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Direito como *nomos* versus direito como *tese* em um cenário de descontinuidade discursiva baseado em Friedrich A. Hayek. Da possibilidade de uma tese de descontinuidade discursiva alternativa a Hayek

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** Scheall, 2015. The discontinuity in Hayek that will be dealt with in this work concerns the legal world and not the economic one, where Hayek also carried out a 'theoretical reconstruction', that is, he advocated a discontinuity in the economic thought of his time, including his own, also called "epistemic turn". Because of this, economic doctrine refers to Hayek I and Hayek II. According to Scott Scheall, from the Arizona Department of Science, Technology and Society, "Terence Hutchison (1981) was the first to postulate a fundamental discontinuity in Hayek's thought. According to Hutchison, 'Hayek I' was (something like) a Misesian methodological apriorist, while 'Hayek II' favored a methodology more in line with the Popperian philosophy of science. Still according to Scheall, "the existing secondary canon clearly divides between arguments for an irreconcilable break in Hayek's intellectual development and interpretations of Hayek's writings as essentially consistent over a wide swath of his career." Other authors also agreed with the rupture pointed out by Hutchison, such as Calwell, for example. According to Scheall, "in the early 1990s, Bruce Caldwell began a tendentious debate with Hutchison over the 'Hayek II' thesis (Caldwell, 1988, 1992a, 1992b; for Hutchison's response, see Hutchison, 1992, and for the Caldwell's later reflections on the 'skirmish', see Caldwell, 2009). Caldwell rejected Hutchison's particular taxonomy, but not the notion that there was a significant discontinuity in Hayek's thought. According to Caldwell (1988, 2004), Hayek's transformation consisted of a rejection of the standard notion of equilibrium in favor of the epistemic conception of economic order. Like Caldwell, Nicolai Juul Foss (1995) has argued that Hayek switched from the usual treatment of equilibrium to the epistemic conception but insisted that this transformation was more subtle and less sudden than Caldwell would have observed.*

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ABSTRACT

This investigation seeks to verify the possibility of presenting the counterpoint enhanced by Hayek as a strong version of the so-called discontinuity thesis. In order to answer this question, one of his main works was visited: 'Volume I of Law, Legislation and Liberty', exploring his discursive discontinuity thesis in Law, based from his concept of Nomos and Thesis, where he sustains a theoretical model that suggests a spontaneous social order from the process of evolution of society, in which he places the judge as sufficient to make and apply laws, to the detriment of the principle of separation of the powers, insofar as he defends what he calls the transfer of powers.

KEWORDS:

Constitutional; Hayek; *Nomos*; *Thesis*; Law.

RESUMEN

Esta investigación busca verificar la posibilidad de presentar el contrapunto reforzado por Hayek como una versión sólida de la llamada tesis de la discontinuidad. Para responder esta pregunta, se visitó una de sus obras más importantes: el volumen I de Law, Legislation, and Liberty (Derecho, legislación y libertad), para explorar su tesis de la discontinuidad discursiva en el derecho, con base en su concepto de nomos y tesis, donde defiende un modelo teórico que indica un orden social espontáneo a partir del proceso de evolución de la sociedad. En dicho orden, pone al juez como una figura suficiente para formular y aplicar las leyes, en detrimento del principio de separación de poderes, en la medida en que defiende lo que llama transferencia de poderes.

PALABRAS CLAVE:

Constitucional; Hayek; nomos; tesis; derecho.

RESUMO

Esta investigação busca verificar a possibilidade de apresentar o contraponto reforçado por Hayek como uma versão sólida da chamada tese da descontinuidade. Para responder a essa questão, foi visitada uma de suas principais obras: o volume I de *Law, Legislation, and Liberty* (Direito, Legislação e Liberdade), e explorada sua tese da descontinuidade discursiva no direito, a partir de seu conceito de nomos e tese, em que sustenta um modelo teórico que sugere uma ordem social espontânea a partir do processo de evolução da sociedade. Esta coloca o juiz como suficiente para fazer e aplicar as leis, em detrimento do princípio da separação dos poderes, na medida em que defende o que chama de transferência de poderes.

PALAVRAS-CHAVE:

Constitucional; Hayek; nomos; tese; direito.

1. INTRODUCTION

The present work seeks to respond to a concern expressed in the classroom by Professor Doctor José Manuel Aroso Linhares, in the doctoral course of the Faculty of Law of the University of Coimbra, in November 2020, about *the possibility of presenting the counterpoint systematically explored by Hayek as an exemplary strong version of the so-called discontinuity thesis*. To do so, it focused on books and articles relevant to the topic using the bibliographic method, specifically 'Vol. I of *Law*, *Legislation and Freedom*', by Friedrich A. Hayek, where it was sought to understand the *discursive discontinuity* thesis in Law from three themes developed by the author: a) *Nomos*, the author understands Law as a safeguard of justice ; b) *Thesis*, he understands Law as a product of legislation, which is as an *order resulting from deliberate decisions*; and c) the changeable concept of Law.

Hayek, systematically, from positions laden with political-social ideologism, distances himself from what could be called *the imperative need of observance of the constitutional harmony between the powers*, or, according to Linhares, from a sort of *institutional complementarity* between the constituted powers, the legislative and the judiciary (legislation and jurisdiction), as a ***rationally plausible*** (and methodologically relevant) ***continuum*** for this said harmony. In this sense, speaking of a spontaneous social order that emerged from the process of natural evolution of society, in Hayek's view, is to refer to an *order* where the judge, like Dworkin's Hercules, is stamped as a key and sufficient figure to make and apply laws[1], to the detriment of the principle

1. Hayek's proposal is, initially, a pertinent proposal based on the Common Law System, whereof sources, such as uses and customs,

of separation of powers, insofar as it defends what it calls *the transfer of powers*. After dealing with the semantic issue that involves terms such as: *paradigm, continuity*, and *discontinuity*; and seeking to understand in what extent Hayek bases his propositions, and even after bringing other examples understood as discursive discontinuity thesis in the sciences – such as Wittgenstein, in philosophy, and that of Habermas, in the social order – it was analyzed, even if perfunctorily, the need and the possibility of postulating an alternative thesis to Hayek, as a response to the raised concern-problem.

2. CONCEPTUAL ASPECTS ABOUT PARADIGM[2], DISCONTINUITY[3] AND OTHER RELATED TERMS – AN INITIAL SEMANTIC ISSUE

2.1. Comparative purpose

The relevance of a preliminary approach to the semantic-conceptual aspects of the terms *paradigm* and *discontinuity* is justified as they interact semantically and epistemologically, because while paradigm denotes the "*break*" of a certain way of thinking, the second denotes the "*interruption*" of a certain sense of continuity, which also occurs when there is an interruption of a way of thinking, acting, and culminates in submitting to a new model placed, to a new form.

2.2. What is paradigm?

The paradigm consists of scientific achievements and advances that generate models for long periods, and that clearly guide and foment scientific development in the search for solutions to the problems raised, aiming to give support to the hypotheses raised[4]. According to the doctrine of Kuhn, an American physicist and philosopher, a paradigm "is what the members of a community share and, inversely, a scientific community consists of people who share a paradigm"[5].

2.3. What is discontinuity?

Discontinuity is understood to be an interruption or, simply, a lack of continuity. The term *discontinuity*, as used here, is really close to the thought of GASTON Bachelard on *epistemological discontinuity*. He is known as the most representative defenders of the idea of a *break* in a certain current of thought, and, therefore, contrary to the thesis of epistemological continuity, as defended by authors such as Pierre Duhem. Bachelard maintains that "even in the historical evolution of a given problem, no one can hide *real breaks*, sudden mutations, which destroy the thesis of epistemological continuity"[6]. And it is precisely this idea of *real breaks* (fissures or even systemic ruptures) in a certain current of thought (way of thinking), which makes the phenomenon of discontinuity resemble and interact epistemologically with the idea of paradigm, so necessary for the reconstruction of any branch of science, such as Law. On this topic, Saito claims that "the epistemologies based on the idea of rupture, such as the epistemologies of Gaston Bachelard and Thomas Kuhn have been valued. For many educators, Bachelard's notions of "epistemological obstacle" and Kuhn's "paradigm shift" seem to break with the linear and progressive vision of the development of scientific knowledge"[7].

2.4. Dis(continuity) x (Dis)continuism - Some semantic aspects

reach preponderant relevance in the social order designed by him. Notwithstanding the fact that "Hayek's epistemic argument and his normative argument for Law as nomos rest on a distinct view of common law adjudication", as asserts Postema, 2011, p. 176, what is certain is that all its premises, development and conclusion concern the Law, which the sources are the uses, customs and jurisprudential precedents, that is, the Common Law.

2. The word paradigm comes from the late Latin paradigm, which comes from the Greek παράδειγμα, which in turn originates from the word παραδείκνυμι, which means to show, present or confront. Epistemologically, it is a term that defines a typical example or model of something that should be seen as a pattern for development. On the Greek origin check Isidro Pereira, 1990, p. 958.

3. Used here to mean a condition of what is discontinuous, interrupted. Property of a function that is not continuous. Interruption; reduction or cessation of continuity. Variation; set of frequent changes or modifications.

4. A more in-depth approach on the subject can be seen in Tozzini, 2000, where the author treats the paradigm as a model.

5. Kuhn, 2011, pp. 219/220. This author defines "the study of paradigms as what basically prepares the student to be a member of the scientific community in which he will later work". According to Kuhn, these "communities can and should be isolated without previous recourse to paradigms; then these can be discovered through (scrutiny) the behavior of the members of a given community".

6. Bachelard, 1969, p. 259.

7. Saito; Bromberg, 2010. According to Saito, 2013, "... this view would characterize an epistemology with a positivist bias. However, it is necessary to take into account that these two notions, in fact, mask the positivist conceptions that still permeate these two epistemologies.

The discontinuity thesis as presented in the scientific community, denoting the idea of rupture in a certain way of thinking and based on scientific advances, meets another plea that, not infrequently, appears as an object of criticism in the academic in the academic community, which is *continuism*, which use often appears as a criticism of the prevailing *conservatism* in the academies, pointed out as a blocking agent of development, such as scientific, political, social, cultural, etc. In this way, continuism presents itself as a *malefic agent* even to continuity, as it denotes an aspect that is more harmful than itself. It is, therefore, a pejorative form of continuity. In this context, according to Saito, it can be "said that Bachelard was considered by educators as the theorist of discontinuity"[8], because, "seeking to supplant the theses that defended continuism, he sought to justify discontinuity in science through the notion of 'paradigm'"[9].

2.5. Regarding continuity and discontinuity - doctrinal application

Treating these two phenomena, but only within the framework of Constitutional Law, Canotilho applies them with the same semantic sense that now we use, which is the idea of rupture or not something. According to him:

> "The idea of continuity/discontinuity of constitutional law is associated with processes of constitutional change, basically meaning the following: there is continuity when a legal-constitutional order that succeeds another is legally and politically brought back to the preceding constitutional order; we speak of discontinuity when a new constitutional order implies a break (revolutionary or not) with the previous constitutional order. The relationship of discontinuity exists between a constitution that became effective and valid in a given legal-political space and another constitution that was not obeyed with regard to the precepts of alteration and revision and, which, at the same time, ceased to be valid and effectively in force in the same juridical space"[10].

Now, having established these semantic-conceptual preliminaries, it is necessary to point out what really matters to Law, when two antagonistic theses on scientific development are brought to light, namely on the possibility of an alternative thesis of discursive discontinuity to Friedrich August von Hayek[11], from his double discursive understanding, namely: Law as *nomos* and Law as *thesis* brought in his doctrine and presented in the first volume of his work: *Law, Legislation and Liberty*[12]. The term double discursive understanding can lead us to imagine, as in fact we do, that Hayek takes the *nomos* and *thesis* as *antagonistic phenomena*, and this is the perception we have, especially because the author makes no effort to make us understand differently. However, there are those who refute such opposition and find a point of convergence, as Postema does; when he declines that "although Hayek portrayed *nomos* and *thesis* as opposite poles, his conception of law actually combines them"[13]. By crediting the ordering of society to a socially organized system that is the result of a bipartite process in 'growth' and 'evolution', and not to the idea that the ordering of society was not only due to institutions and practices invented or created for this purpose[14], as well as, by opposing the Cartesian duality (mind/body), namely Cartesian rationality[15], Hayek opens a

8. Saito, 2013. p. 186.

9. Saito, 2013, p. 188. For this author, the idea that scientific knowledge has a movement is abstracted from BACHELARD's doctrine, as long as it is looked at in its historical perspective.

10. Canotilho, 1993, p. 144.

11. Austrian economist and philosopher (1899 – 1992), defender of classical liberalism and systematizer of classical liberal thought for the 20th century. He made contributions to the philosophy of law, economics, epistemology, history of ideas, economic history, psychology, among other areas. Nobel laureate in economics in 1974.

12. Hayek, 1985.

13. Postema, 2011, p. 170. This author justifies his perception by arguing that Hayek, in sustaining that the modern social order is fundamentally a spontaneous order, and that it emerges from the behavior of many individuals who make decisions in concrete circumstances in pursuit of their individual goals protected by implicit social rules, and that, in this context, the law is implicit, that is, the nomos.

14. Hayek, 1985, p. 63.

15. Hayek, 1985, p. 67. We refer here to what Hayek calls constructivist rationalism as being, according to him, the "most complete expression" of Descartes' thought, consisting primarily of "radical doubt", which prevented him from envisioning in his conclusions the possibility of dealing with of questions related to social and moral aspects, which would come to be done by his contemporary Thomas Hobbes. The rejection as 'mere opinion' of everything that could not be logically deduced from explicit premises and beyond any reasonable doubt, which would invalidate all norms of conduct that could not be justified within their model of thought, left no alternative to Descartes but the attribution of such phenomena to the designs of an omniscient deity. See Hayek, 1985, p. 65. See also in DESCARTES, 1989, p. 44. For Hayek, "the basic assumption of the idea that man managed to dominate his environment mainly through the capacity of logical deduction, from explicit premises, is factually false".

fruitful discussion about the recurring need for the phenomenon of discontinuity as a means for scientific development and improvement of the society in which we live.

In maintaining that "our irremediable ignorance of most of the particular facts which determine the processes of society is nevertheless the reason why most social institutions have taken the form they really are," our author makes it clear that the need we have, as society, to benefit from the knowledge provided (from the knowledge of others) to improve ourselves as a society. According to him:

> "In civilized society, indeed, it is not so much the greatest knowledge that the individual can acquire, but the greatest benefit that can be obtained from the knowledge of others, which determines this individual's ability to pursue a multiplicity of ends infinitely wider than mere satisfaction of most urgent physical needs"[16].

It can be inferred from the present excerpt that what our author is actually doing is dealing with the need for discontinuity as a means of progress to which we refer in the previous paragraph, and at the same time opposing the phenomenon of continuity, where what is observes is a *continuum* rationally "justified" by a scenario of apparent complementarity between the *legislative* and the *judiciary*, either within the scope of a formalist or pragmatic-instrumental system. That is why he reinforces his critique of *constructivist rationalism*, which comes from Cartesianism, by saying that:

> "The characteristic error of constructivist rationalists in this respect is that they tend to base their argument on what has been called the synoptic illusion, the fiction that all the relevant facts are known to some mind and that it is possible to build, from this knowledge of particular facts, a desirable social order"[17].

Also, Hayek chooses the unrestricted trust in the powers of science by the modern mankind as a limiting factor that prevents them from recognizing limits imposed "on their knowledge by their mental constitution", which would form "a permanent barrier to the possibility of the rational construction of the totality of society"[18]. According to the author, "civilization is founded on the fact that we all benefit from knowledge that we do not possess", and that "... one of the ways in which civilization helps us to overcome this limit to the extent of individual knowledge is the subjugation of ignorance, not through the acquisition of more knowledge, but through the use of knowledge that is and remains widely dispersed among individuals"[19]. Another foundation given by Hayek that fits with the idea of need/possibility of reconstruction of science, and in our case, of Law, as one of its branches, meets the core that is intended to be addressed in this work, which is the critique to the mistaken idea, according to him, that "science is exclusively concerned with what it is, and not with what it could be", because, for the author, "the value of science consists above all in saying what would happen if some facts were to be different than they are"[20]. In good measure, for Hayek,

> "The fruitful social science must be, to a very large extent, a study of what does not exist: a construction of hypothetical models of possible worlds, which could exist if some of the alterable conditions were modified. We need a scientific theory primarily to tell us what the effects would be if some conditions were different than they were before. All scientific knowledge is knowledge not of particular facts, but of hypotheses which, so far, have resisted systematic attempts to refute them"[21].

In a frontal critique of Cartesian dualism, our author will say that

> "The errors of constructivist rationalism are closely related to Cartesian dualism, that is, with the conception of a mind of independent existence, which hovers outside the order of nature and which allowed humans, endowed with such a mind from the beginning, to plan

16. *Hayek, 1985, p. 73.*

17. *Hayek, 1985, p. 73.*

18. *Hayek, 1985, p. 74. For this author, "we hear so much about the rapid progress of scientific knowledge, that we come to suppose that all the simple limitations of knowledge are soon destined to disappear".*

19. *Hayek, 1985, p. 75. For Hayek, "science does not consist in the knowledge of particular facts".*

20. *Hayek, 1985, p. 77.*

21. *Hayek, 1985, p. 78.*

institutions of the society and culture in which they live"[22].

This criticism is used by Hayek to argue that the ideal model of the evolution of society requires a concomitance of society with the mind. According to him, the mind would be both a product of the environment in which it acted and evolved. It would, therefore, be the result of the development of people in society, which would have enabled them to acquire "habits and practices that increased the chances of survival of their group"[23], and in this sense, there is the relevance of norms. The result of this process, according to our author, is a knowledge that, despite being expressed in the form of a *norm*, is still not assimilated as such by individuals, who only take it as a model to be followed, precisely because they are norms of action, and not mandatory formal compliance. It is, therefore, a complex of norms that, despite not having been created by the mind of the individual, started to govern their actions, which in turn, performed in accordance with them, achieving better results than those of individuals or competing groups[24]. For Hayek, still in an evident critique of Cartesianism,

> "These rules of conduct did not develop, therefore, as conditions deemed necessary for the achievement of a known purpose; on the contrary, they evolved because the groups that practiced them achieved better results and surpassed the others. They were norms that, given the environment in which people lived, ensured the survival of a greater number of groups or individuals who practiced them. The problem of how man managed successfully in a world he only partially knew was thus resolved by his adherence to norms which had been useful to him, but which he did not and could not know were true in the Cartesian sense".

Having made these considerations, it is clear that the thesis of discontinuity present in Hayek's doctrine on the need to seek social evolution from the experience and practices of new media based on it, prevails over the thesis of continuity, namely the one that implies continuism (its pejorative aspect), insofar as they recognize in practices that are well-directed towards social good, as norms are followed after being observed. In practice, the well-known *paradigm shift* is a condition for the evolution of society.

In this sense, taking as a starting point the idea that the hypotheses that arise in the sciences as an exercise of a prognosis of how society could be in case *of this or that* were not the way they are, we will start to make brief considerations of how Hayek offered an important contribution to Law, while considering it as *nomos*, when he punctuates it as a *safeguard of justice*, and as *thesis*, when he punctuates it as *originating from legislation* (which, according to him, cannot be confused with law[25]).

3. LAW AS *NOMOS*[26] AND *THESIS*[27] IN THE DOCTRINE OF FRIEDRICH A. Hayek – A PROPOSAL OF DISCONTINUITY

3.1. Law as *nomos* taken as a *safeguard* of *justice* – legal certainty as a condition and purpose of law

22. Hayek, 1985, p. 79.

23. Hayek, 1985, p. 79. According to this author, the idea of a mind already evolved and able to "plan the institutions that made life in society possible is contrary to everything we know about the evolution of man". For Hayek, learning from experience goes beyond an exercise in reasoning, it consists of "observing, disseminating, transmitting and improving practices that were imposed because they gave good results", not for an individual per se, but for the collectivity, since which provided an increase in the chances of survival of the species.

24. Hayek, 1985, p. 79.

25. Hayek, 1985, p. 30. According to the author: "If the constitution of the open society is by definition a set of organizational norms, it cannot be confused with a law, in the strict sense of the rule of law, as it is not a norm of individual conduct, but a rule of organization of a system of government".

26. Hayek, 1985, p. 269. In the doctrine of Hayek, from Greek mythology, the word nomos is used as a reference to rules of conduct of individuals in society, applied to n future situations and distinct from each other, concerning individual rights, to which everyone, indistinctly, must subordinate up. Because it is a law that guarantees freedom, it has uses and customs as its source. In this work we use it as the Law, as it was used by ancient and mythological civilizations, and also by the doctrine in general.

27. Hayek, 1985, pp. 218/219. Used here in contrast to nomos, which meant "use", as put by Hayek, for whom thesis can "mean both the granting of the law and the adoption of laws thus granted". If nomos refers to rules of moral conduct, arising from uses and customs, thesis refers to positive rules, it is, therefore, legislation made "on order" and applied unevenly, as they are derived from the demands of society, therefore, they serve specific purposes of certain social groups, having, because of that, character and sanctioning nature, which shows their authoritarian spirit of social control, which is why they are not always fair.

When dealing with the *nomos* as a safeguard of justice, Hayek actually puts the judge at the center of a system, without which there would be no talk of Law at all. Thus, in the system defended by the author, by subverting the established order, considering the legislator as a mere *imitator of the models* of rules of fair conduct carried out by the judges, he attributes to them a role that does not seem to find support in the social reality of our time. Considering, e.g., that "laws emanating from judicial decisions will necessarily have certain attributes that the legislator's determinations may not have and will only have if the legislator takes as a model the law made by judges"[28], is to promote an inversion of values related to the *duty* of each one. Treating the *nomos* as a *safeguard of justice* and taking the judge as the center of this system subverts and opposes what the author himself preaches, when he maintains that "it is necessary to completely free ourselves from the erroneous conception that there can be a society that is constituted and, in a second moment, it grants its own laws"[29]. The opposition arises when he argues that customs guarantee the expectations of the people involved[30], and that, as a result, "the satisfaction of expectations that these customs guarantee will not be and will not appear to be the result of any human will, nor will it depend on someone's desires or particular identities of the people involved"[31]. In fact, it cannot depend on the aforementioned identities of the parties, however, it depends on the Law put in place, through the normative set to which the judge is (and should be) bound, under penalty of not having the application of the Law, but of the will of the applicator. As the author also adds,

> "If the need to appeal to an impartial judge arises, it will be because he is expected to decide the case as one among other analogues, which could take place anywhere and at any time, and therefore in a manner which meets the expectations of anyone who finds himself in a similar position among others he does not know personally"[32].

Substantially, the will of the law enforcer cannot override *society's expectation* that the law that guarantees the legal certainty that allows it to live in society is in fact what will be applied by the judge who, from the first to the last moment of its function, is under the aegis of the norms, even when it says the right in the exercise of equity. And as Hayek himself points out, "the reasons why the norms emerged should not be confused, therefore, with the reasons that made it necessary to enforce them[33], even because the expectations of the parties involved and, mainly, of society, is the application of law as a means to achieve justice, that is, the hope is justice will be done. The normative abstraction seen in this proposal by Hayek makes it doubtful also at this point, since the fact it is ideologically appealing is, per se, sufficient for its refutability from a rational point of view, as in fact Postema does, which refers to this characteristic in Hayek as being an "ideological fervor"[34].

The Law (through the normative set) is responsible for providing the means for the reasoning of decisions, so there is satiety (feeling of effective jurisdictional provision) for those who seek the regency of a magistrate to judge their disputes. It is worth noting that this process of formation of a system of norms developed from the jurisdiction, as supported by Hayek, finds limits even in the author's own doctrine, when it comes to the enunciation of these norms. According to him, "... in none of the cases the judge will be free to pronounce the norm he sees fit. The norms that he pronounces must fill a gap in the already recognized body of norms, in a way that serves to maintain and improve the order of actions made possible by the already existing norms"[35]. Despite being a form of manifestation of the Law, in the sense of demanding knowledge

28. Hayek, 1985, p. 218.

29. Hayek, 1985, p. 220. This author maintains that "not every law can, therefore, be the product of legislation; the power to legislate presupposes, however, the recognition of some common norms; and such norms underlying the power to legislate may also limit that power. No group will agree to expressed norms unless its members already have somewhat coincident opinions". This author's opinion seems to oppose the principle of separation of powers, insofar as he defends that the judge is also a legislator.

30. Ao que Postema vai chamar de "utilitarismo de expectativas". Segundo este autor: "Hayek parece endossar uma espécie de "utilitarismo de expectativas" como o princípio fundamental da tomada de decisão no Common Law". Cf. Postema, 2011, p. 178.

31. Hayek, 1985, p. 223.

32. Hayek, 1985, p. 223.

33. Hayek, 1985, p. 221/222.

34. Postema, 2011, p. 163. When comparing Fuller's and Hayek's ideas, Postema will add that "due to the ideological fervor of Hayek's writings, his work had little force in Anglo-American legal philosophy, but his conception of law has much in common with Fuller's interactional conception of law and his arguments are different and, in some ways, more sophisticated than Fuller's.

35. Hayek, 1985, p. 228.

of the jurisdiction and having legitimacy, since its application derives from the exercise of a constitutional duty – in this case, the judge's – it is not reasonable, as Castanheira Neves asserts, that jurisdiction should be thought of according to the paradigm of its application, having the judge as an impersonal, anonymous and fungible operator of said application[36].

It is important to say that the true safeguard of justice lies in the respect and protection of the expectations that society has on the established Law and the norms that ensure its equitable application from the democratic exercise of jurisdiction, and that if the real objective of this, as Hayek claims is, in fact, "to maintain the current order of actions"[37]; because the purpose of the Law goes beyond serving a spontaneous order of actions, as the author wants to make us believe, it is, to a large extent, destined to safeguard justice, however, not charging the price of disregarding principles that guarantee the established order, such as the independence of powers. In any case, maintaining and enforcing rules as a means of saying the Law to society, finds in the principles something that cannot be taken as a blank paper of morality, but as a moral parameter, to a large extent, which must be insurmountable by those who exercise the public function, having as a beacon the correct application of the Law as a safeguard of justice to be delivered. In this context, norms and principles must play a complementary role in the execution of specific cases. Not least, when dealing with the function of principles in relation to rules (considering these as norms[38]) and their application to concrete cases, Streck will opt for the discursive discontinuity thesis, as he considers it the most adequate for understanding the prevalence of principles over rules[39]. According to this author, by this thesis, "it is understood that the constitutional principles institute a practical world in Law". Still according to Streck, "This institutionalization represents a qualitative gain for the Law, insofar as, from this paradigmatic revolution, the judge has the duty to decide correctly. It is the duty of correct answer, correlated with the fundamental right of correct answer"[40].

For this reason, Hayek's defense that "it will be up to the judge to decide in a way that corresponds in general to what people consider fair[41]" is in line with what has been defended in this section, however, it contrasts with the author's thought, when defending the judge as a *character* who must be at the center of a system as the creator and enforcer of norms, and also that these are the ones that really matter, even if they are not the product of legislation. This idea, as pointed out by Kansu Karadağ, actually contrasts with his central thought on the independence of powers, as it is known that he "attributed the existence of a strong rule of law to the existence of an impartial judiciary, separated from other powers. The separation of powers is an integral part of the rule of law"[42] by placing the judiciary "in a particularly separate position in terms of the separation of powers"[43], maybe it makes possible to understand its structural preference within the framework of a modern, but perhaps excessively liberal, constitutionalism that it defended. He himself stresses that "the independence of judges must be guaranteed. Arguing that judges should make decisions based on the law, with no secret intention"[44]. This "transfer of powers", seen in Hayek's defense of the judge's *duty* and its prevalence over the legislative, can perhaps be explained by the fact that he does not consider the *transfer of legislative power* to be contrary to the separation of powers, something that offends

36. Neves, 1998, p. 20. For this author: "If the law is constituted and manifests itself in a system of norms – if it is this system of norms and is exclusively objectified in it –, then certainly one cannot think that the projection of law in the historical reality-implies any legally constitutive possibility, it will rather be necessary – and this is the first note – that the right presupposed in the system and its norms, and as it is objectified and manifested there, is only repeated in the concrete solution".

37. Hayek, 1985, p. 226.

38. In this sense see Canotilho, 2003, p. 1159. Cited by LINHARES, 2012, p. 396. According to Linhares, it is a "binomial or binary distribution".

39. Linhares, 2012, p. 405. Understanding that both principles and rules are norms, the discussion about which prevails over which does not remove the taint of being norms. On the prevalence of one over the other, there is the lesson of Linhares, for whom the recognition that "principles are norms of a higher degree", with an immaculate deontological sense, starts to correspond directly to a requirement of validity, which corresponds to an understanding of validity that authorizes the discovery of rationally self-subsistent communicative-procedurally justified criteria in legal norms, as such capable of being followed by their rationality...

40. Streck, 2014, p. 67.

41. Hayek, 1985, p. 255.

42. Kansu Karadağ, 2020, p. 416. Also in Hayek, The Constitution of Liberty, s. 186.

43. Kansu Karadağ, 2020. p. 416. Also in Hayek, The Constitution of Liberty, s. 210.

44. Kansu Karadağ, 2020, p. 416. Also in Hayek, The Constitution of Liberty, s. 210.

the principle of separation of powers. As Kansu Karadağ asserts, "Hayek defines the rule of law as a meta-legal rule, although he seems to have taken a libertarian and liberal direction. Hayek agrees that the rule of law regulates all other laws and is the ultimate norm. However, he does not define the rule of law as natural law like some other liberal constitutionalists[45]".

The perception of the imperative need for legal certainty as a condition and purpose of law, before a thesis of ingrained discontinuity of liberalism, based on the defense of a "modern" constitutionalism, considering, in the scope of law as *nomos*, as presented by the author, does not seem to conform to the needs of a State which order requires to be democratic and ruled by law. This is because, at first, the primary purpose of Law has always been to offer legal security, and according to Hayek's perception, it is not possible to see where such security can be rooted in the defense of a possible "transfer of powers", without seeing also, in a way, an affront to the principle that guarantees the separation and mainly the independence of powers.

In a second moment, Hayek's conclusions seem to highlight the need for a self-refutation of his proposal of discontinuity of Law from his idea of *nomos*, implicit in the defense of a liberal and modern constitutional State, where he presents the judge as Hercules (present in Dworkin), or even the judge of *jurisprudentialism*, as defended by Castanheira Neves[46]. Therefore, concluding that all authority derives from Law, and that "not all law can be the product of legislation; the power to legislate presupposes the recognition of some common norms; and that such norms underlying the power to legislate can also limit that power"[47], as Hayek asserts, making it clear that considering the Law, as *nomos*, as a safeguard of justice, based on the premises set out and now visited, does not seem to meet the aspirations of the organized society, evidencing, therefore, the need for an alternative to the discontinuity thesis proposed by him, and perhaps the formulation of a trend that distances itself from the current model (where the courts increasingly gain prominence over the legislative) aiming, thus, at an effective *reconstruction* of Law from its concept and application, without forgetting, however, the important role and legislative responsibility, as we will see in the next section.

3.2. Law as *thesis* (law from legislation) – Legislative participation and responsibility.

As we discussed in the previous item (about Law as *nomos*), where a discursive and conclusive prevalence was observed for the problem of separation of powers, and where it was seen that Hayek's liberal position, in terms of being favorable to the figure of a strong judge, with powers to create and apply the law, would violate this principle and, therefore, would not have the much-needed legal certainty, the main purpose of the law, as it is the safest way for a fair and democratic judicial provision for society, Thesis also shows the same discursive prevalence, because, in fact, as Hayek himself states, this is what it is about, the *separation of powers*, a problem that, according to him, is based on an ambiguity in the word 'law'[48]. In this way, despite intending, at the beginning of his exposition, to differentiate what he understands as antagonism between the execution of a rule of fair conduct and the execution of an instruction emanating from the legislature, which would be rules of governmental organization, Hayek actually raises which could be considered another imbroglio with regard to *nomos* and *thesis*, consisting in pointing out which one would best conform to public and private law. The problem in raising this discussion is that the author himself is aware of the difficulty of distinguishing such phenomena, and because of this he declines that "there is, however, no consensus on where exactly the demarcation line between public law and private law should be drawn.[49]"

For Hayek, "the law derived from legislation consists predominantly of public law"[50], however,

45. Kansu Karadağ, 2020, p. 416. Also in Hayek, The Constitution of Liberty, s. 212.

46. Neves, 1998, p. 43. According to the author, "the confusion resulting from this ambiguity of the word 'law' is manifested from the first discussions about the principle of separation of powers".

47. Hayek, 1985, p. 220.

48. Hayek, 1985, p. 277. According to the author, "the confusion resulting from this ambiguity of the word 'law' is manifested from the first discussions about the principle of separation of powers".

49. Hayek, 1985, p. 285.

50. Hayek, 1985, p. 286. For the author, "the modern trend has been to increasingly erase this distinction, on the one hand exempting governmental bodies from obedience to general norms

he points out that "the distinction between public law and private law is equivalent to the distinction between norms of fair conduct and organizational norms", which does not solve the problem of the distinction that he intended to highlight, because if we consider that both norms fall within the list of laws, granted or enacted, and that both will be or may, at some point, be the object of application, that is, they can be adopted, one would be speaking, therefore, of *thesis*, as the author also defined when he added that he would use this Greek word (*thesis*) to designate the 'established law'[51]. Professor AEON, in a direct approach to Hayek's doctrine, is firm in saying that what Hayek "calls public law is far better suited to *thesis*, while what he calls private law better conforms to *nomos*, subject to the mechanism for correcting occasional legislation."[52].

According to Hayek,

> "...these norms that govern the governmental apparatus will necessarily have a character different from that of the universal norms of fair conduct, which constitute the basis of the spontaneous order of society as a whole, will be organizational norms, created to achieve specific ends, supplement positive determinations of specific things to be done or certain results to be obtained, and to establish to that end the various bodies through which the government operates"[53].

Having made these considerations, if we take as a universal premise that a law is an imposed obligation, as is understood literally from the Latin term '*lex*', and that legislation is a 'set of laws', in perfunctory conclusion, we have if *the law comes from the legislation*, and in this context, one would not be alien to the scope of what the author takes for thesis[54]. Well, when he brings up the possibility of transforming private law into public law, through what he calls 'social' legislation, it is clear that Hayek, also in the case of thesis, adopts the discourse of substantiating what has already been defended in the previous topic, through the transfer of the power to legislate to other bodies, in case, the Judiciary, consisting, in this case, in the mitigation of the role of the Legislative Power. This can be seen when he deals with the possibility of transforming public law into private, as well as when he points out what would be a partiality of the legislative that, according to him, would have the pretension of taking control of the *governmental apparatus*, and the doubt that arises is whether the Judiciary, even in the Haykian doctrine, would have the balance and security necessary for such a claim (and here we still don't talk about legitimacy or not). As Miranda teaches "the function of control requires, in a way, a notion of balance, either within the governmental machine, between people and rulers, or between the means of control themselves"[55].

In order to understand this possibility raised by Hayek, it is necessary to point out this author's understanding of which norm fits in the public sphere and which one fits in the private sphere. According to him, norms of fair conduct belong to the list of norms of private law, and *organizational norms* dependent on purposes would belong to the role of norms of public law. Hayek inserts this position when he deals with what he calls social legislation which, according to him, would serve to "orient private activity towards specific ends and for the benefit of specific groups"[56], which would be, to a large extent, what he calls the search for '*socialization of Law*', whose cradle and greatest apex would have occurred in Germany. It is well known that the search for safeguarding vital interests for the people, as Hayek highlights, made the United States of America an example of this

of fair conduct and, on the other hand, subjecting the conduct of individuals and particular entities to special rules aimed at achieving specific purposes, or even to specific determinations or authorizations issued by administrative bodies".

51. Hayek, 1985, p. 273.

52. AEON J., 2007, p. 180. In fact, this conclusion by AEON does not differ from the understanding that we have adopted in this work; because taking as a basis that Law as a thesis in our author's doctrine has as its center the role of legislation, either through programmatic interventions or due to the authoritarian action of such norms with the other powers. There is no room for not understanding a character of correctness in their performance, and furthermore, there is no way to ignore the fact that, even within the restricted scope of the separation of powers, the legislative activity occupies a prominent place, given that among its various constitutional prerogatives is the supervisory and controlling power and, mainly, the power to delimit the performance of the other powers

53. Hayek, 1985, p. 271.

54. As Postema, 2011, 168 points out, in the context of what Hayek understands by thesis, "the social order is seen exclusively as the product of the law, separating or replacing the informal social rules, which are customs. The coordinated activity of individuals in society is the product of rules conceived by political authorities, imposed on the subjects of law, directing them towards ends or objectives conceived and articulated by these authorities".

55. Miranda, 1997, p. 16.

56. Hayek, 1985, p. 302.

concern for social rights that began in Germany, when in the first half of the 20th century, the USA was involved in the stock market crisis, in 1929, "forcing" the Supreme Court to grant almost unlimited powers to the Legislative, in order to fulfill this social purpose[57].

And it is in this context of the search for 'social justice' that in Germany the idea that individual activities, previously governed by norms within the scope of private law, were gradually replaced by the scope of public law, which would imply transforming private law only into a provision of the private initiative and of a provisional nature, which should also be provisionally protected within the scope of public law[58], which to a large extent, shows 'confusion' between *nomos* and *thesis*, as the author intended to point out from the premises set out in his work. In a second moment, when dealing with what he calls the partiality of the legislative power, when he returns to the pretension of managing the governmental apparatus, Hayek will say that the result could be a transformation in the spontaneous order of society into an organization, and this would occur because of there is confusion in the legislative activity when *elaborating norms of fair conduct* and the direction of the governmental apparatus. For the author, this confusion would have the power to produce in parliamentarians, "a completely different attitude from that which would prevail in an assembly that was mainly concerned with legislation in the classical sense of the term"[59].

Finally, it is certain the natural requirements of procedural changes both within the Legislative Power and in the Judiciary, arise due to the process of social evolution, which increasingly demand Rights, especially social ones[60]. However, participation and legislative responsibility of the legislative power in the elaboration of laws, either they are corollaries of rules of fair conduct, to use the author's expression, or rules that aim at the organization of the State, provided in the Constitutional scope of the Constitution. It prevents a glimpse of a Right as thesis accustomed to usurping powers from another entity, such as the Executive and the Judiciary, and, in this sense, it is possible to add that Hayek did not intend to do more than base his criticism of the constitutional prerogatives of the Legislative Power, when he defended the transfer of Power, when dealing with the Law as *nomos*, which is the Law itself. All this raises the question of whether or not it is pertinent, based on these considerations to Hayek's doctrine, to postulate an alternative discontinuity thesis, based, initially, on the volatility of social aspirations and, consequently, on the concept of Law, as will be discussed in the next topic.

4. FROM THE POSSIBILITY OF AN ALTERNATIVE DISCURSIVE DISCONTINUITY THESIS TO Hayek

4.1. The changeable concept of Law - Back to Friedrich A. Hayek

To deal with the conceptual mutability of Law, Hayek uses legislation as a parameter to compare it to Law, claiming that it is a powerful and necessary instrument for achieving good things[61] in society. The conceptual idea of Law goes back to the history of society, taking it as a set of rules of conduct, without which humanity would not have evolved. The author credits these norms of coexistence to our own peaceful existence in society[62], however, he does not mention them as static, but as products of evolution itself, at least those that were effectively observed, because, according to his reading of what would be a norm or set of norms, it is "simply a tendency or

57. Hayek, 1985, pp. 303/304. On this, our author will say that such measures implied "in fact that a legislature could pass any law with a view to any end it deemed beneficial". According to Hayek, "it was in Germany itself, however, that this process advanced the most and had consequences that were more fully accepted and explicitly accepted. In that country it had become a current opinion that the pursuit of social objectives involved the progressive replacement of private law by public law". Ditto, p. 304.

58. Hayek, 1985, pp. 303.

59. Hayek, 1985, pp. 305.

60. Miranda, George. The term "mainly" used here is justified because we are dealing with a kind of fundamental right, as Miranda teaches well, when he says that: "Fundamental social rights are also, as they could not fail to be, susceptible to protection through the courts, although in a more circumscribed manner (it is already known) than the rights of liberty". According to this author, "the norms that enshrine them almost all fall into the category of programmatic norms, whose most characteristic violation is the unconstitutionality by omission". Novais, 2012, p. 18/19. Manual of Constitutional Law. Volume IV – Fundamental Rights. Coimbra: Almedina, 2017, pp. 400/401. As Novais also says, quoting Dworkin, "having a fundamental right, under the rule of law, is holding a strong legal guarantee equivalent to having a trump card in a card game".

61. Hayek, 1985, p. 177.

62. Hayek, 1985, p. 178.

disposition to act or not to act in a certain way, which will manifest itself in what we call a practice or custom"[63]. The idea of immutability of law dates back to antiquity, where there is a concern to maintain the rules and their applicability with the same aspect of originality, not having, therefore, a concern to recreate it, but to keep it on its original bases, the which shows a certain awareness of legal certainty. According to Hayek,

> "A 'legislator' could endeavor to purify the law of supposed corruptions, or to restore its original purity, but there was no thought that he could make a new law. Historians of Law agree that, in this sense, all the famous ancient legislators, from Ur-Nammu and Hammurabi to Solon, Lycurgus, and the authors of the Twelve Roman Tables, did not intend to create a new law, but simply to state what was and always had been the law"[64].

In this context, the author credits the evolution of norms of conduct capable of producing a spontaneous order, at a given moment, to a clash between legislators and rulers, aiming to prevent them from transforming their domain into a kind of organization, thus promoting social imbalance[65]. Here what can be called a rearrangement of a natural social imposition, can be taken as an example of the conceptual mobility of the Law that, as a result of the social environment in which it is applied, does not allow such type of "bargain", since its sediment is the customs and the expectation that one has of its fair application, making it almost unanimously tacit.[66]

From Hayek's concept of Law, it is possible to infer that he understands Law as a set of norms, and that such norms serve to govern the conduct of individuals in society, and thus, are intended for future and distinct situations in which, from an environment of legal certainty, enable the formation of an order of actions[67]. From this idea, it is possible to glimpse the tacit defense of the conceptual mutability of Law, not only in relation to *norms of conduct*, but also the *procedural* ones, however, not at a level of discontinuity that can be considered relevant to the real needs of the Law and society, and in the same line of thought it is possible to say that there is a fundamental problem in the current concept of Law concerning its moral[68] and ethical composition – at least from the perspective of those who need it most, whether it is an individual or a group, consisting in the frustration of expectations in relation to their demands, and all this is inserted in a context where the final protagonism will fall to the justice rendered, which begins in the very concept of Law, which imposes the need for its reconstruction.

Thus, even recognizing the importance of customs and precedents, not only within the scope of *Common Law*, for example, but of any and all legal system in Law, there is no way to move away from a certain imperative need for correction (*adequacy to the society that applies it?*) of its course, that is, of its reconstruction itself, as a condition of the evolution that Hayek deals with, and this can only be carried out through legislation, which in turn is the result of the function of the legislator who exercises it on behalf of its representatives. This idea finds support in the fact that there is also no denying that mutability is generalized in all segments of knowledge, since facts and circumstances are different from one to another, from time to time, and thus, mutable, as well as so are the understanding and conclusion about them, which,

63. Hayek, 1985, pp. 185.

64. Hayek, 1985, p. 194. For Hayek, "...if no one had the power or the intention to change the law, and only the old law was considered good, this does not mean that the law did not continue to develop. It simply means that the changes that actually took place were not the result of a legislator's intention or plan." Ditto, 195.

65. Hayek, 1985, p. 195.

66. Hayek, 1985, pp. 199. Hayek, 1985, pp. 199. Hayek, still defending the aforementioned transfer of power, where he places the judge as a kind of "lord of the laws", within the scope of Common Law, speaks of the existence of a certain tacit acceptance of the application of the Law, but without the concern with re-creation, on the contrary, with the perception of its maintenance, that is, with the conviction in the application of the Law that has always been immutable. According to him, "when a case arises and no valid law can be adduced, the lawmen, or judges, will make a new law, convinced that they are making the good old law, which in fact was not expressly transmitted to them, but it exists tacitly".

67. Hayek, 1985, p. 203.

68. LINHARES, 2010, p. 519. Regarding the presence of the moral 'element' in the concept of law, LINHARES points out that "a <legal definition of the concept of Law> (legal in the sense of being constructed from the participant's internal perspective) necessarily incorporates <moral elements> (questions of justice (...) are moral questions)".

to a large extent, shapes knowledge itself and people, giving rise to the need to change their concepts about the environment, people and things that are part of it[69], understanding this as the phenomenon of discontinuity as a condition for evolution itself, similar to what happens in other segments of science, such as philosophy and Law itself, as we will see below.

4.2. Examples of discontinuity discourses in Law from analytical philosophy

a. The Wittgensteinian discontinuity

Paradoxically, by including the *continuity thesis*, which he called the *law of continuity of nature* (law of minimum effort, of minimum energy expenditure) in the list of intuitions about the possible ways of achieving science[70], Ludwig Wittgenstein already knew that what was proposing in the *Tractatus was* just the opposite, that is, it was a discourse of discontinuity of everything that was known in philosophy, especially the way they thought about it since the time of the classics. According to Wittgenstein, the true method of philosophy would be to say only what could be said. In other words, as he states in aphorism 7 of the *Tractatus*: "What one cannot speak of, it is better to be silent". In fact, the Viennese philosopher even recognizes the absurdity of his proposed method, recommending that after his understanding and after this, the individual should, so to speak, "throw away the ladder"[71]. In short, with sediment in an analytic philosophy, at the heart of the positivism of his time, is that Wittgenstein defends his method as the ideal for the world to be seen correctly.

Notwithstanding the paradigm brought with the *Tractatus*, it was only with the publication (*post mortem*) of *Philosophical Investigations*[72] that the world of philosophy saw a second and more important point of philosophical rupture (discontinuity) promoted by the Austrian philosopher, which would promote a process of successive discontinuity not only in philosophy, but in other areas of knowledge, such as education and law. Particularly in the case of Law, having as a tool the idea of *meaning as use*[73], in the midst of a tripartite philosophy in the perception of *following rules, forms of life* and *language games*, Wittgenstein expires authenticity and inspires discontinuity in the discourses of great names in philosophy and the theory of Law[74] that would become fundamental for an eventual process of re-creation of law, as in the works of Habermas, who would come to inspire Vives Antón in the area of criminal law, when dealing with human action.

b. Habermas' discursive theory of law, as a discontinuity proposal?

In Habermas, it is possible to glimpse more than one proposal of rupture of thought, as in his discursive theory of Law and democracy, and in the theory of communicative action, where he maintains that "the concept of action regulated by norms refers, not to the behavior of an actor in principle solitary who encounters other actors in his surroundings, but to the members of a social group that guides his action by common values"[75]. Yet, for the German philosopher, "the particular actor follows a norm (or violates it) as fast as in a given situation in which the conditions to which the norm applies are given. Norms express an agreement existing in a social group"[76]. In short, "all the members of a group for whom a certain rule applies can expect from one another and

69. Hayek, 1985, p. 245. Speaking further of the expectation of the law to be applied, Hayek will say that "The maximum certainty of expectations attainable in a society in which individuals are free to use their knowledge of constantly changing circumstances with a view to their equally changing goals is secured by norms that inform each of these circumstances which others must not alter and which the individuals themselves must not alter".

70. Wittgenstein, 2008. in. 6.34.

71. Wittgenstein, 2008, in 6.54. In the words of Wittgenstein, "My propositions are elucidated in the following way: whoever understands me will finally recognize them as absurd, when thanks to them – through them – he has climbed beyond them. (One must, so to speak, throw away the ladder after having climbed it.) One must overcome these propositions in order to see the world correctly."

72. Wittgenstein, 2009.

73. Wittgenstein, Investigations..., 43. For Wittgenstein: "The meaning of a word is its use in language". In this not simple proposition, there is, possibly, the gateway to an alternative proposal for the reconstruction of Law, as already observed in some design, both in the doctrine of Habermas and of his contemporaries, such as Vives Antón, who brought it to the question of norms of conduct (human action), within the scope of criminal law.

74. Rudá, 2020. Sobre a influência de Wittgenstein em grandes teóricos do Direito (About Wittgenstein's influence on great legal theorists).

75. Habermas, 2010, p. 117.

76. Habermas, 2010, p. 117.

have the right to expect from one another that, in certain situations, mandatory or prohibited actions are carried out or omitted, respectively"[77]. As is well known, these ideas by Habermas were shaped by various segments of scientific knowledge, such as Education and Law, in a clairvoyant process of discursive discontinuity. In the scope of his work facticity and validity, he preaches the (re)construction of a Law that Santos calls a legitimate positive, seeing it as a category of social mediation. According to Santos,

> "To the extent that the positivity of law - even if in a minimal character - cannot be renounced, it is interesting the discursive idea of building positive law based on the agreement of social actors who will be affected by such normativity (principle of self-legislation), even if it is extremely problematic to ensure the ideal conditions for the construction of this discursive practice (observance in the real world of the democratic principle and the principle of discourse). However, this attempt to build a legitimate positive law, in addition to being politically interesting for rescuing the idea of political participation as an action in the polis, would also constitute the law as a reflection of community desires"[78].

In another perspective, Linhares will refer to an argumentative reconstruction (which implies discontinuity) concerning a positive normativity, in a critical-dialectical essay on ALEXY and Habermas, dealing with the *dual nature of law* in an analytical/normative plane invoked by ALEXY, where he understands it to be a contrast between a real or factual dimension and an *ideal* or critical dimension. Linhares asserts that:

> "more than reconstructing-composing two decisive arguments - the argument in favor of positivity or the real dimension of law, the argument in favor of the ideal dimension -, it certainly means already defending-assuming the sequence that integrates such arguments - a sequence determined by a demand for reconciliation, which must also be for the correction (*as a second-order correctness*) of positive normativity"[79].

When raising his alternatives and proposals for a new way of thinking about society, such as, for example, conceptualizing and applying Law, Habermas actually speaks of community living (in society), and in this sense, by proposing to correct or recreate his concept, as condition for (through its application) to recreate the Law itself in order to approach an ideal of justice, which implies seeking good social life, is proposing the application of the phenomenon of discontinuity. It is known that in the Law there is not the solution to all the problems of community living, however, there is no talk of community living without the Law. As Linhares adds, "more than celebrating the integrative vocation (of a community sense) that the right answer assumes..., it is, effectively, to recognize the specificity of the commune that it builds... the way or form of life which it urges us to proceed"[80]. It seems to us that the discursive theory of law and democracy, whereof influence has its origins in Dworkin[81], as proposed by Habermas, "breaks with the traditional explanatory models by founding the legitimacy of modern law on a discursive understanding of democracy"[82], which once again it evidences the defense of a new understanding, a new paradigm.

In the end, despite the arguments above, it still seems not possible to say that, in Habermas' theory, there is the appearance of a direct proposal of discursive discontinuity on the Law itself, being possible only one inference. And if it were reasonable to make such a statement, perhaps the scope of his theory, given the contemporaneity of the conception, would still not be possible to

77. Habermas, 2010, p. 117. This idea by Habermas is, in a way, in line with what Hayek maintains, for whom "law is a means not only to enforce legal norms, but also, and above all, to promote individual freedom, and in its evolution, individuals learned to observe, comply with and enforce rules of conduct, even before they were verbalized. Thus, evolution provided the formation of an order of group activities, and that the preponderance of these is the fact that these norms are observed (fulfilled) by the members of the group". As in Hayek, 1985, p. 203.

78. Santos, 2014, no. 1.

79. Linhares, 2010, p. 519.

80. Linhares, 2010, p. 559.

81. Thus, as Habermas himself declines, recognizing the influence he had on Dworkin, "there is a declared influence of Ronald Dworkin's theory of law on the legal perspective adopted by the discursive theory of law". Habermas, 2009. The same observation is observed in PUCSP's Legal Encyclopedia, Volume I (electronic resource): general theory and philosophy of law / coordinators: Celso Fernandes Campilongo, Álvaro Gonzaga, André Luiz Freire - São Paulo: Pontifical Catholic University of São Paulo, 2017, pg. 5, which reads that "the differentiation between a legal discourse on norms – understood, with Ronald Dworkin, as referring primarily to an order of principles – and ethical discourses on preferable values is central to the discursive theory of law".

82. PUCSP Legal Encyclopedia, cit. P. 8.

be measured, however, there is no obstacle to its being considered as such, having the philosophy of language as mainstay (which Habermas used a lot) as a possible philosophical basis for an eventual alternative to Hayek, as will be seen below.

4.3. Possibility of an alternative to Hayek's discursive discontinuity thesis, as a means of conceptual reconstruction of Law – Approximation

The theme of this section was the starting point of this research, which after going through Hayek's doctrine on his idea of *nomos*, *thesis* and the mutability of the concept of Law, it is possible to say that the time for a conceptual reconstruction is past. of Law, proportional to the changes in the society that applies it, and that the discontinuity thesis presented by Hayek, from the *Common Law*, although it does not serve this system (as observed in the collated criticisms), nor the *Civil Law*, as the shortcomings envisaged above. Well, starting from this premise, and considering the strong ideological appeal of Hayk's propositions as a preponderant factor for them not to reach the protagonism expected by the author and his aficionados[83], the time has come to answer the question proposed by this investigation, because, as Linhares points out well, "it is inevitable to conclude that the defense of discontinuity proposed by Hayek is not satisfactory... and that our present circumstances need an alternative version"[84].

Well, if the intention to present an alternative proposal to the discontinuity thesis of Law sustained by Hayek is submitted to the binomial necessity/possibility, we would be facing a question that, by itself, requires the clarification of two other questions: a) what makes the conceptual reconstruction of Law (and Law itself) necessary? To answer this question, it is necessary to measure the level of society's satisfaction with the justice that has been provided by the Judiciary. In this way, it is necessary to look at the current legal reality[85], consistent in the normative set and expressed, mainly by the jurisprudential set emanating from the courts, as a source of balance between the demands submitted to the judge's judgement and the expectations of the parties involved. Thus, to speak of the need to reconstruct the Law is to make reference to the social purpose of judicial provision and of the Law itself. Focusing on such sources may be the path that the current doctrine should follow, as had already been done, for example, by Holmes, Langdell and others, who worked on the legal system of their time, in a systematic and rational way, respecting fundamental principles and concepts, precepts from which divergent legal positions and the legal norms expressed[86] can be analyzed; b) Where is the Law going and where should it be going? Apparently, the Law of our time seems to walk along a path with different directions, however without taking any of them, specifically, becoming, permanently, a source of juridical insecurity. As Linhares rightly points out, the legislative and jurisdictional discourses, *as rationally distinct modes of «creation-constitution of Law»* do not understand each other and, I say, they fight daily, making Hayek's work modern and aligned with the gaps left by an opposition/ambivalent dispute (since interests, which are diffuse, are shown to be dubious) in which society loses. For this reason, the first part of the question can be considered answered. For the second part, it is necessary that we return to talk about the current legal reality, which shows itself indebted to a society that neither sees nor enjoys a Law (legal system) capable of meeting its needs, which, however, are not those of when most of the norms were enforced (were created). What we currently

83. Postema, 2011, p. 180. In this regard, it is worth noting the opinion of Postema, for whom "Hayek alerted legal theorists to an important condition of the law's effectiveness that has been largely ignored. However, in addition to placing an important issue on the legal theory agenda, its epistemic concerns have not advanced much in our understanding of law. In general, his writings did not greatly influence the development of jurisprudence in the second half of the century".

84. Linhares, José Manoel Aroso. Law as jus and/or nomos and law as thesis or strategic programming. What meaning could this tension have in the contemporary context? Doctoral course class, given on November, 11, 2020, at 2:00 pm, at the Faculty of Law of the University of Coimbra.

85. Postema, 2011, p. 104. Hohfeld, according to Postema's doctrine, maintained that "the legal reality is a complex of fundamentally abstract normative facts about the relationships between individual natural persons. Furthermore, he maintained that viewing the law in this way provides the key to analyzing, organizing and explaining all that is law.

86. Thus in Postema, ob. cit. P. 104, where this author further adds that Holmes called his project jurisprudence (philosophical or analytic). Postema further asserts that while Holmes imagined that the concept of duty might suffice, and others thought that the concept of rights would suffice, Hohfeld argued that his more complex but also logically refined analytical framework would provide the necessary basis for a comprehensive rational reconstruction of any legal system.

have is the presence of new realities[87] and, consequently, new social and legal demands.

In view of the above, taking the questions as satisfying, and taking into consideration that Hayek's discontinuity thesis for Law, considering either *nomos* or *thesis*, do not correspond to the precepts and principles on which modern law is based. It is possible to imagine that the binomial need/possibility of conceptual recreation of Law remains satisfied, especially if we take it as a reflection of community desires, which, to a large extent, means considering it as the *meaning of its use in the social environment*, as we have seen in other works[88], instead of considering it only in the normative plane, used to legal positivism, or just a facticity. However, given the formal limitations imposed on the present academic work, it will not be possible for us, here, to make further considerations about a possible alternative proposal in the terms in which it has just been mentioned, but only to recognize the possibility and facticity of its postulation, as proposed. at the beginning of the investigation.

5. CONCLUSION

This investigative work intended to answer the question about the possibility of postulating an alternative to the thesis of discursive discontinuity proposed by Friedrich A. Hayek, in the midst of his conception of Law as *nomos* and Law as *thesis*. In the first chapter of the work, it focused on the semantic question that involves the terms continuity, paradigm, discontinuity, continuism, in which was possible to verify that such words are common to the various fields of science, such as Economics, where it was found that the very Hayek played a leading role in sustaining the phenomenon of discontinuity in the economic sciences, and with great success, which even earned him a Nobel Prize in 1974 for his theory of *currency and economic fluctuations*.

In the second chapter, when analyzing Hayek's conceptions regarding Law as *nomos* and Law as *thesis*, it was found that one cannot ignore the fact that his ideas, despite being planned from the *Common Law* (and for this), its reach can be immensely greater than can be imagined, and in this fact lies the concern that must be present in the judicial imagination that is intended to be equitable and democratic; because, as noted, they impact the e*stablishment*, understood as the entire judicial, social and political system, since it points to a break in the harmony between the constituted powers, insofar as it seeks to give greater prominence to one of them (the judiciary) to the detriment of the others (executive and legislative).

In the fourth chapter, we sought to respond to the concern-problem of this investigation, which dealt with the possibility of postulating a discursive discontinuity thesis as an alternative to Hayek, which, after some considerations about the conceptual mutability of Law, also addressed by Hayek, and other considerations were made about examples of what would be the use of discontinuity in the philosophical doctrine of Ludwig Wittgenstein and Jürgen Habermas. It was verified that the postulation of an alternative thesis to the one proposed by Hayek is necessary and possible.

Finally, this investigation did not intend to be definitive regarding the issues raised here, but only intended to contribute to the science of Law, seeking to be a source of inspiration and instigation for other researchers to continue to pursue a Law that meets more and more society's aspirations.

87. Herkenhoff, 2001, p. 38. On this subject, Herkenhoff points out that: "The timid hermeneutic posture of most judges and jurists does not allow, in my view, to apply the Law in the light of new realities, so that, through the work of jurisprudence, , the advancement of Law towards the interest of the great majority, seeking to use the contradictions of the law, in favor of the dispossessed".

88. Rudá, 2020.

BIBLIOGRAPHIC REFERENCE

- Bachelard, Gaston (2021, January 1st). *Essai sur la connaissance approchée*. Bibliothèque Paul-Émile-Boulet de l'Université du Québec à Chicoutimi, 1969. http://bibliotheque.uqac.ca/
- Campilongo, Celso Fernandes, Gonzaga, Alvaro & Freire, André Luiz - Enciclopédia jurídica da PUCSP, Tome I: *Teoria Geral e Filosofia do Direito*. São Paulo. Pontifícia Universidade Católica de São Paulo, 2017.
- Canotilho, José Gomes. Direito Constitucional e Teoria da Constituição. 7th ed. Coimbra: Almedina, 2003.
- _____. Direito Constitucional – 6ª th. Coimbra: Almedina, 1993.
- Descartes, René. Discurso do Método. São Paulo: Ática, 1989. Second Part.
- Habermas, Jürgen. Teoría de La Acción Comunicativa. Translated by: Manuel Jimenez Redondo. Madrid, Trotta, 2010.
- _____. *Ronald Dworkin - a maverick among legal scholars. Europe: the faltering project.* Cambridge: Polity Press, 2009.
- Hayek, Friedrich A. Direito, Legislação e Liberdade, Vol. I. São Paulo: Visão, 1985.
- Herkenhoff, João Batista. *Para onde vai o Direito? Reflexões sobre o papel do Direito e do jurista.* Porto Alegre: Livraria do Advogado, 2001.
- Isidro Pereira, S. J. Dicionário Grego-Português e Português-Grego, 7th ed. São Paulo. Lisboa: Livraria Apostolado da Imprensa, 1990.
- Kansu Karadağ, Akasya. *Carl Schmitt'in Modern Anayasacilik Eleştirisinin Friedrich August Von Hayek Üzerinden Düşünülmesi.* İnönü Üniversitesi Hukuk Fakültesi Dergisi – İnÜHFD 11(2):411-421 (2020), p. 416. Cf. Also in Hayek, The Constitution Of Liberty, s. 186.
- Kuhn, Thomas Samuel. *Estrutura das revoluções científicas.* São Paulo: Perspectiva, 1978, 2011.
- Linhares, José Manoel Aroso. *Na "coroa do fumo" da teoria dos princípios. Poderá um tratamento dos princípios como normas servir-nos de guia?* Em Estudos em homenagem ao prof. Doutor José Gomes Canotilho. Vol. III. Coimbra: Coimbra Editora, 2012.
- _____, *O Homo HVMANVS do Direito e o projecto inacabado da modernidade*. 86 Bol. Fac. Direito U. Coimbra Publishing, 515 2010.
- Miranda, Jorge. Manual de Direito Constitucional. Tomo V - *Actividade Constitucional do Estado*. Coimbra. Coimbra Publishing, 1997.
- Neves, Castanheira. *Entre o legislador a sociedade e o juiz ou entre sistema função e problema*. Boletim da Faculdade Direito da Universidade de Coimbra, Vol. LXXIV. Coimbra, 1998.
- Novais, Jorge Reis. *Direitos Fundamentais e Justiça Constitucional em Estado de Direito Democrático*. Coimbra: Editor Coimbra, 2012.
- Postema, Gerard J. *Legal Philosophy in the Twentieth Century: The Common Law World.* In A Treatise of Legal Philosophy and General Jurisprudence, Vol. 11. London: Springer, 2011.
- Rudá, Antonio Sólon (2021, January 1st). *Reflejos de la influencia de la filosofía del lenguaje de Ludwig Wittgenstein en las teorías del Derecho en Kelsen, Ross, Hart y Dworkin.* Revista Misión Jurídica / Vol. 13 - Número 19 / Julio - Diciembre de 2020 / pp. 62 – 87. https://revistas.unicolmayor.edu.co/index.php/mjuridica/article/view/1786/2717
- Saito, Fumikazu (2021, May 1st).

"Continuidade" e "descontinuidade": o processo da construção do conhecimento científico na história da ciência. Revista da FAEEBA – Educação e Contemporaneidade, Salvador, vol. 22, no. 39, pp. 183-194, January/June 2013. http://www.revistas.uneb.br/index.php/faeeba/article/view/338

- Santos, Luiz Elias Miranda dos, Neves, Castanheira & Jürgen Habermas: *Os valores e o discurso como propostas para a recuperação do sentido do direito.* RIDB, 2014.
- Scheall, Scott (2021, January 15th) *A Hayekian Explanation of Hayek's 'Epistemic Turn'*. Department of Science, Technology, and Society, Arizona State University, USA. Economic Thought 4.2: 32-47, 2015. http://et.worldeconomicsassociation.org/files/WEA-ET-4-2-Scheall.pdf
- Skoble, Aeon J. (2007). *Cambridge Companion to Frederich August von Hayek.* Cambridge University Press: Cambridge Collections. Online.
- Streck, Lenio Luiz. *Verdade e Consenso: Constituição, hermenêutica e teorias discursivas*. 5th ed. São Paulo, Brazil. Saraiva Publishing, 2014.
- Tozzini. Daniel Laskowski. *Filosofia da ciência de Thomas Kuhn: conceitos de racionalidade científica*. São Paulo, Atlas Publishing, 2000.
- Tuma, Eduardo (2021, July 1st). *Nomos e Thesis no pensamento de Hayek*. Available: https://jus.com.br/artigos/30333.
- Wittgenstein, *Investigações Filosóficas*, translated by Marcos G. Montagnoli, Petrópolis, Vozes, 2009.
- _____. *Tractatus Logico-Philosophicus*, translated by Luis Henrique Lopes dos Santos, São Paulo, Universidade de São Paulo Publishing, 2008.