

ARTICLES & ESSAYS

THE FUNCTION OF MORAL NORMS IN THE LEGAL
SYSTEM: THE KRAUSISTS'S RESTORATION OF THE
FUNDAMENTAL CONCEPTS OF LAW

DELIA MANZANERO & JOSÉ MANUEL VÁZQUEZ ROMERO

Abstract: There are multiple and diverse voices of jurists who have expressed their fear of the unrestricted power of law enforcement and have announced the crisis of the formalist sense of Law. The widespread reaction against the abstract and formalist character of the positivist theory of law manifested itself as the Krausist philosophy of law and was backed by the philosophy of Krause, Schelling, Hegel and the most recent Natural Law theories that seek to establish substantial criteria for moral action. This distrust was caused by the heteronomy of modest and obedient civil servants of the judicial order that rely on political balance of power in which nothing depends on the human bottom of institutions. Let us consider briefly the impressive analyses performed by different thinkers on this issue, which they considered characteristic of their era, but that continues to constitute a difficulty that challenges contemporary society.

Keywords: Krausism, philosophy of law, politics, iusnaturalism, autonomy.

Introduction

Karl Christian Friedrich Krause (Eisenberg, 1871 München, 1832) was a German philosopher whose philosophical system has been labeled in the ontotheologic formula of pantheism as overcoming the unilateral positions of pantheism and deism (*vide*. a masterly biography: Ureña, 1991). His theory of society is rooted in humanitarian and Masonic ideas. The ideal of humanity is the most prominent result of his practical philosophy with a cosmopolitan state in which society is conceived as a harmonious body, governed by the idea of Alliance Humanity (*Menschheitbund*).

Krause's ideas have had considerable influence on European intellectuals, especially on *Heinrich Ahrens* (1808-1874), a philosopher and jurist who was one of the most brilliant disciples and propagandists of the doctrines of Krause. His famous courses in Paris resulted in the publication in 1838 of the lessons of *Natural Law* (Ahrens 1864), a work of which

there have been countless translations and that has been used as a classic textbook in every European and American law school. Ahrens's work has also been a key factor in the education of the most important Spanish jurists and statesmen.

The foundation of the movement known as Spanish Krausism had its origin in the exportation of Krause's works to Spain made by Julian Sanz del Río (1814-1869). The Krausist doctrine had a powerful influence on Spanish history, politics, education and literature in the late nineteenth century and beyond. Among the followers of this school of thought were Gumersindo de Azcárate (1840-1917), Adolfo Posada (1860-1944) and particularly Francisco Giner de los Ríos (1839-1915), founder and director of the *Institución Libre de Enseñanza* (the Free Institution of Education).

The ILE was founded in 1876 by personalities involved in education, cultural and social reforms who defended academic freedom and refused to adjust their teaching to the official dogma in religion, political or moral issues. This forced them to continue their educational work outside the state universities, through the creation of a private educational institution. The Spanish civil war of 1936 and the subsequent outlawing of the Free Institution of Education represented a long break in its activities in Spain, but the project continued to encourage the work undertaken in various countries by exiled institutionalists. An example is the design of the new initiative proposed by the ILE teaching, which sees students not as passive entities receiving knowledge, but as active students participating in their own learning process, which has been a precedent of the *New School* (Adolphe Ferrière, Maria Montessori) and the American "progressive education" of John Dewey.

Having summarised the main lines and the origin of the Krausist doctrine, we shall discuss in this article the importance of their liberal interpretation of the classical natural law theories for the advancement of legal theory and moral philosophy in Spain and their role in the restoration of the fundamental concepts of Law.

Summary

The period from the second quarter of the nineteenth century to the middle of the twentieth century was one in which, at least as far as Spanish and Anglo-American jurisprudence was concerned, an often uncritical positivist consensus predominated in jurisprudential thought. This positivism was chiefly concerned with the formal nature of laws and law-making—by what processes rules and standards may be enunciated in such a way that they will be recognised by courts and other formal or applicatory institutions.

Krausists fully agree with this theory on the point that the products of law making can only be treated as valid if made in accordance with certain forms or manners—that is, that law must have a public form that allows everybody to know the most important parts if not all of the law. Therefore, form and formalities come as a part of the very idea of having law and are the heart of the idea of rule of rules (as rule of law) because it prevents and limits abuse from political rulers and their officials by law.

However, this formalist theory lacks soundness insofar as it seeks a legal system that sets aside the only reality of laws and legal institutions, that is, the reasons for action, the intrinsic values at stake in human action and their unfolding in moral standards, as well as their ideal reality and the purposes of particular communities.

Legality and Morality in the Practical Philosophy of Kant

We consider it interesting to emphasise the practical philosophy of Kant not only because it is the version of the question about the relation between law and morality that has had the most influence from the standpoint of the history of the problem, but also because this theory presupposes a counterpoint of reference that helps us explain the Krausist position.

Kant distinguishes between Legality (*Legalität*) and Morality (*Moralität*). Their essential difference is that rules of law address external behaviour, whereas rules of morality address internal behaviour. According to Kant, in order to fulfil the legal duties the “legality” of the act is sufficient, in other words, the action *according to* duty, whereas fulfilling the duties of virtue requires the “morality” of the conviction, that is, action *by* the duty, which is just respect of the law:

The mere agreement or disagreement of an action with the law, without regard to the incentive of the action, is called *legality*, but, when the Idea of duty arising from the law is at the same time the incentive of the action, then the agreement is called the morality of the action (Kant 1983, 19).

The thesis of the distinction of law and morality that gives predominance to the immanent obtained a foundation on legal theory that nowadays conserves validity and power of conviction, particularly, the thesis that public power is not only subject to natural law, but to their own positive rules (a clear antecedent of the rule of law in democracy), and the thesis that positive law should not include all moral action, but only those that immediately affect the common good. This preceded certain modern approaches of the distinction between morality and law, particularly the Enlightenment view that positive law should guarantee individual freedom from the State, and should not interfere in the freedom of consciousness, which makes a significant contribution to the development of democratic ideas and the assertion of the principle of popular sovereignty.

Thanks to this achievement, the development of the theory of institutions of democratic rule of law in XVIII became viable and was ultimately included in the constitutional democratic state. The main characteristics of this kind of state are, first, securing the rights of man and citizen, and secondly, organising the will of the State through its institutions and procedures (democratic elections, principle of the majority, division of powers, legality of the administration, legal protection through independent courts, etc.), which afford the best possible protection against the abuse of power by the State.

In the words of Dorado Montero, contemporary of Giner and disciple of Krausist philosophy in his early works, this

liberal individualist state legally abolished the classes, the arrogance of the previous law, and their prerogatives and privileges, including legal ones. What it enthrones and proclaims in its place is the individual democratic principle, or what is the same, the equal value of all individuals, their having value simply by virtue of being men (hence the declaration of human rights, 1789), and equally of all men before the law, which is the equal submission to a genuine representative of the impersonal social justice (Dorado 1916, 374-375).

This doctrine also means an abandonment of ontological objectivism for a modern subjectivism that aims to enhance the dimension of law as a set of powers and faculties of

the person. It operates as a transition from transcendent *a priori* of an objective reality that imposes the indifference sovereignty of the divine omnipotence, to an *a priori* of a practical will based on the autonomy of human order governed by natural rationality, with respect to others' transcendent orders¹. The predominance of the *immanent* in this position implies the advocacy of concepts darkened in the previous era, such as freedom, individualism and progress, so that it was possible in principle to let everybody construct his or her own life plan within the limits of mutual non-interference.

The purpose of the doctrinal construction of Kant and Fichte was to delimit the scope of political power and remove the competition of the issues of conscience, putting a limit to absolutism and assuring individuals' freedom of conscience. According to this doctrine, internal conduct (questions of conscience) would be exclusively subject to morality, whereas external behaviour would be regulated by law. We cannot ignore that Kant was one of the most significant theoreticians of the rule of law and against this background we must understand his position on the relation between law and morality. In the words of the distinguished Krausist jurist Adolfo Posada:

The State, according to Kant, is the right institution for law. "A city (*civitas*) is the reunion of a greater or smaller number of persons under legal laws"; the State is based on the rational nature of human being, who demands in the State a respected and individual *power* to determine itself freely, without any limitation outside but the law that delimits equally the other men. The State exists and is organised in order to guarantee the coexistence of individual liberties (the Law), by means of a possible coercion. The State's idea and its aim depend on each other. State, conceived as a norm of outer social life, which is made effective by the directed force to the coexistence and harmony of the individual liberties, is reduced to being a body of law whose mission is to render the necessary guarantees to make possible and maintain the harmonious coexistence of those liberties (Posada 1915, 140).

This conception, based on assigning to the State only a strict and legal aim, was a hallmark of the modern era². The distinction between law and morality is a great merit of

¹ An important *caveat* is that this rationalist *a priori* built in the pattern of rational necessity that follows the natural right of human nature is not the final escape from the pitfall of ideology, because, as Muralt rightly points out, the shift from natural law to the ethics of personal autonomy might equally be portrayed as a shift from obedience of God to obedience of laws chosen by human beings for themselves: "speaking as B.-H. Levy or A. Glucksmann, [this rationalist *a priori* (is)] unable to exorcise the figure of the master, rather it disguises an *a priori* notion of human nature or the original state of nature of men, and from this notion they attempt to deduct, without any empirical or historical contingency, all the rights and obligations that ensure the humane policy action, its morality and its effective sociality" (Muralt 2000,116). In the context of the Spanish Krausist legal doctrine, has been suggested that the vindication of the legal autonomy and the idea of auto-coercion may be due to the conception that "... the first person or inherent sovereign, the Self (mankind, Humanity), was the result of the internalization of paternal power, *paterfamilias* in Roman Law, who has an absolute power within the family and has the paternal authority over children's rights" (Vázquez, 2009).

² "The conception developed based primarily by Grotius, under the influence: 1.º, the abstract idea, formalist and material of the law; 2.º, the exaltation of the individual against the political powers; 3.º, the hypothesis of the state of nature, and 4.º, the doctrine of the social pact. A study of the process of this conception will find capital antecedents in Rousseau, and capital developments in Kant" (Posada 1915, 139-140). However, Posada advocates for a paradigm shift in the concept of sovereignty, from the

Kant who was able to remove from the field of law the questions that affect the privacy of individuals, and his achievement has gone down in history as *an important civilising conquest* (Atienza 2003, 91-92).

Hence it may be said that the rationalists of the seventeenth and eighteenth centuries contributed to the study of legal theory with valuable new methods and insights, in some respects foreshadowing the innovations of the nineteenth century.

Nevertheless, it is easy to see that from this point, a mere couple of steps were enough to reach the legal positivism and thence the positivist thesis of the separation between law and morality. Along with the practical purpose of delimiting the scopes of law and morality to ensure freedom of conscience and political freedom, it was later developed the claim of positivism (Bentham, Austin) to insist on the completely separation between both normative orders. Here the ground was not primarily practical but essentially theoretical: it responded to the necessity to distinguish, for methodological and scientific reasons, the law that *is* and the law that *should be*.

How the Krausist Philosophy of Law Completes and Improves the Liberal Tradition

Krausist philosophers and their supporters agree in that liberal democratisation—articulated chiefly in the Kantian anti-utilitarian principle that one must always treat humanity, in oneself as in others, as an end and never as a mere means—was an important civilising conquest. However, since Kant cannot account for the obligations and institutions that he tries to justify, let alone others that he overlooks, such as the obligation in justice to employ much of one's wealth for the relief of the needs of others, Krausists believe that there is still the outstanding task to integrate and give it a positive content of social justice, solidarity and humanity, where the two previous formulae—transcendental and immanent, authority and freedom—are integrated into a novel definition. Krausist philosophy is therefore not the abstentionists' State successor, but its criticisms are directed to continue and complete this work by means of a new concept of care and education.

According to the Krausists's aspiration to achieve the *recrystallisation* of modern society—although on a different basis than previous ones in history—they raise several positive reforms to complete the negative reforms conquered, for example, providing a correctional character for penal law, etc.; aspects that presuppose a crucial social reorganisation.

The concept of law that was broken³ in the late 19th and early 20th centuries and against which Krausists fought⁴ was the one that defended the thesis of being able to describe a

idea of "imperium" to "autonomy": "The *ethical fluid* destroys the notion of power as a *subjective* right of sovereignty or whoever has the highest power (Duguit), but it has to support the notion of subjective law founded on ethics, namely, of a law as an expression of an ethics approach" (Posada 1983, 35).

³ "In modern times, serious philosophical aberrations and the abstract and formalist character of the Philosophy of Law have generated distrust in these sciences" (Ahrens 1880, 12-13). "These extreme doctrines are a true decay in the law's concept" (Clarín 1878, 401-402).

⁴ As stated by Krausist articles published in 1885 and 1908, where they claimed their restlessness on this problem and sets out quite a worrisome diagnosis for their era: (Azcárate 1885, 55-57) and (Posada 1908, 315-320).

reality as legal, without the need to resort to justice criteria. This positivist theory does not consider the moral claim of the positive law to be obeyed irrespective of the formal definition of processes, because its objective is the identification of the formally valid law, which properly describes obligation in the sense of a formally imposed duty.

One of the problems in Kant's philosophy is that, strictly speaking, it cannot properly speak of a morality of actions, but rather of the legality (or otherwise) of the actions. Compliance with law does not necessarily infer morality; indeed, one may *conform to* the law for fear of punishment that may occur if there are violations of the law, or through hope of reward if he obeys the law. According to this theory, there can be legality without morality and, conversely, morality without legality, which leads to the conclusion that legality and morality are independent of each other. At times, Kant emphasises this independence to the maximum extent, with the purpose of highlighting the purity of the morality norm of any coercion or external sources; however, such a claim raises practical problems: this independence can produce a moral subject whose intentions are pure, but who breaches the rules of law, and another subject who complies with the law, but only for fear of punishment or to obtain a reward.

Thus, Heinrich Ahrens, eminent Krausist whose *Natural Law* had numerous editions and translations, recognised the merit of the pure and unconditional moral principle of Kant's theory—"Morality is the kind of acting that the good man fulfils *purely and absolutely* by the good itself"⁵—although he stressed that this conception was insufficient because it assumed that the true foundation of morality was a "mere precept of consciousness («categorical imperative»), without further explanation" (Ahrens 1878, 35). This precept is merely an arbitrary replica, for each individual, of that individual self-interested, thus is redundant and futile for the individual addressed and his community. The Kantian reduction of moral rationality to logic that relies on the technical necessity of means to ends is unsound because, despite its attempt to assess the principles informing positive law in terms of a universal conceptual framework, it lacks the concept of a substantive reason for action and it does not explain what motivates us towards one purpose rather than another. As John Finnis claims,

his own official definition of "humanity" would rob this categorical imperative of its significance. For if our humanity is, as he [Kant] says, our rationality, and that rationality has no directive content save that one be consistent, we are left with neither rational motivation nor intelligent direction that could count in deliberation (Finnis 2002, 7-8).

See some excerpts of Francisco Giner and Leopoldo Alas in similar terms:

The last moment of legalistic superstition, Modern liberalism, had led to excessive faith in the virtue of external mechanical guarantees. It wanted to prevent it all, regulate everything, not leaving anything to chance as arbitrary government, officials or judges, of whom everybody had been suffered so much before; and after the policy code, civil, criminal, procedural, and many others had ordered everything from a rational and compelled firmly linking to everybody, has rested on the belief that its legal system had secured forever the rule of law. For example,—

⁵ "If legislation makes an action a duty and at the same time makes this duty the incentive, it is ethical. If it does not include the latter condition in the law and therefore admits an incentive other than the Idea of duty itself, it is juridical" (Kant 1983, 19).

Giner asked—, had Kant not banished the motive from law, and thus, had he not dreamed possible a legal life for a people morally evil? And in this point, do not have been unable to open the doctrinarian eyes who were boasting of never having infringed a single precept of the Charter while they were out of power! (Giner 1932, 38).

The authors who followed this doctrine, that sought to separate more and more the legal sphere from the moral one, to such an extent took the exaggeration, that there was someone who said that immorality of the agents nothing mattered to Law in a state artistically constituted; even more, that where law was organised as a perfect machine, it would be noticeable that this advantage coincided with the immorality of its individuals; in short, they came to say that the function of law is exerting its real influence, all the mission assigned to it, where there is no other principle to serve as a brake on the passions. After all this, a reaction against the formal sense of law, was a logical conclusion (Clarín 1878, 401-402).

This attempt to incorporate moral factors into the definition of law is the hallmark of the other broad school of legal theory, “Naturalism”, which is an older and more diverse body of theory than the relatively more recent body of positivist theory, and has some of its more outstanding embodiments in the Spanish Krausist theory. Francisco Giner de los Ríos, Leopoldo Alas, Adolfo Posada, Heinrich Ahrens and a considerable list of other Krausist authors fought against the formalist concept of the Law claimed by Kant, whose deficiency was being purely outer law, without actual content of substantive ends. According to Giner, “this concept of law due to Kant, had to degenerate into subjective formalism with Fichte and others; since Kant had tried to find the impossibility to get at the beginning of the reality (*noumenon*), in his language, had sapped by its base and foundation the rational freedom, that is not subjective” (Clarín 1878, 401).

Diverted it [to the subject] of all objective fund, physical or moral, as “unknowable essence of the things”, [Kant] distinguishes in the Ethics the Science of Law and the one of Virtue. He leans for support that claim in purely subjective and formal reasons, and elevates, especially in the first of these doctrines, on the base of the subjectivism and for the aim of an *outer freedom*, empty of all bottom, formalism to its highest degree (Ahrens 1878, 99).

Why is Rational Freedom Theory Important for Contemporary Legal Studies?

Nowadays we truly believe in our Western liberal democratic societies that there is nothing more important than freedom, and freedom ultimately means choice. We are all very aware that autonomy and freedom of choice are essential for our wellbeing. Without choice, we cannot be fully human. People need to manage their lives as they see fit. Hence if they are deprived of this opportunity (freedom understood as choice), they lack free will and dignity.

The mistake, the reasonable mistake that we have made, is that, since we know that freedom is good, and choice is good, then it must be true that having more choices is even better. What we have done in the last decades is to explore the amount of choices that people have without any sort of guidance or criterion of value. Azcarate quotes the following words of Mackenzie to describe the situation for his context:

Society has ceased to be quite fluid and fragmented, and simply begins to form some organic filaments, to use a phrase of Carlyle. The powers on high have been weakened, and those that we have inside of us have not grown enough. There is nothing able to govern us, and we have not learned to govern ourselves. This is now the general appearance of this problem and all human problems (Azcarate 1893, 283).

As long as we live in liberal societies where issues such as “what is worthwhile in life” must be answered by each individual, this kind of moral dimension in education is absent. In universities nowadays students are taught to be good technicians but they are not taught how to be good citizens. This is the great innovation that lies ahead. It is a funny kind of innovation, because it amounts to reverting to an earlier time. It is not setting a new course, but remembering people who were valuable in the past. It is through teaching and learning that civilisation is sustained, but tradition alone cannot guarantee its existence or claim its renovation unless each generation understands that tradition and appropriates it as its own. I believe that in the civilised societies, there is a kind of nervousness and defensiveness in regard to recognising that some ways of life are better than others, that some values are better than others. If we look back, we could find better understandings of what *freedom of choice* means, waiting for critical and contemporary readings, and with regard to the very idea of autonomy understood as an internal point of view that considers the acting person who deliberates, identifies intelligent options and is able to choose and carry out the intentions adopted.

We find a good example of this in the Krausist theory, for which moral education must be inculcated and which defines rational freedom as the power to determine yourself as a subject according to your own essence. As Krausists stated, a concept of freedom in the sense of free will, of indifferent and neutral power without essential content is unworkable, contrary to what the dominant theories claimed, namely, that freedom and law are complete opposites.

Ever since the modern era, which spurned the classical juristic tradition, freedom has been understood as *freedom from*, that is, emancipation from any religious, familiar and social bond, so men are free because they reject the traditional ties and reconstruct them from their individual instinct. This Hobbesian concept, which later inspired a lot the Benthamite and Austinian positivism, defines “right” as liberty in the sense of sheer absence of duty. Therefore, having rights meant having no duties. This claims self-government and negative restrictions on state power, which are the necessary preconditions to human rights. However, we must realise that it is possible that this merely formal conception of law neither observes nor takes into account the substantive human rights. Furthermore, its atomistic approach focused on individual negative freedom does not propose policies to eliminate social problems such as poverty or to support a role for the state as a guarantor of a minimum level of welfare.

In addition, from the moment at which Kant considers law as outer freedom, coercion is framed as the only system capable of conserving the harmony of the outer liberties of different individuals; this coercion is nothing but the limitation of the freedom of everyone, to prevent it from harming the general harmony of the outer freedom, and of everyone’s rights. Nevertheless, this purely coercive model of law becomes problematic. One of the most fundamental and controversial issues in the theory of law is why people obey “laws”, and why they should. In answering this question, there will have to be an inquiry into the

relation of morality to validity in the assessment of law. The positivist legal theorist would say that obligation is simply based on laws coercively imposed by the state through the application of threat or force. However, natural law theorists such as the Krausists point out that, irrespective of the potential application of coercive measures, laws have a moral dimension that imposes some form of obligation on its subjects. Thus Krausism holds that the positive value of the authority has the managerial character of a rule as an indicative and guiding factor, and, as such, is based on the pure idea of rationality and on the law characteristic of a community of rational beings, whereas the coercive element, which induces compliance with the rules by means of penalties, is based on demands of empirical human nature. Therefore the concept of authority cannot readily be explained in terms of the mere application of power.

In order to explain authority, we find a more interesting approach in the Krausist philosophy of law, for which free will, far from being a privilege, is considered the shadow of freedom; to illustrate this idea, Krausist thinkers paraphrase Goethe:

As Goethe so rightly said: “Anything that gives us freedom of spirit, but does not rule over ourselves, is corrupting”; this judgment applies to all abstract liberal theories, which are isolated from the moral principle (Ahrens 1880, 308-309).

This concept of rational freedom is also expressed by the Spanish Krausist Adolfo Posada: “the State complies with the law when their collective personality lives inside out, from the act of consciousness to action—autonomy” (Posada 1915, 142). Here lies the Krausist position on the legitimacy of democracy, which, whether or not a positivist legal theorist wishes to accept it, is again far from making wrong-headedly a trivial verbal point. The issue has a dimension connecting enactment with the law-establishing process and with secure establishment. Regimes that are not regarded as legitimate by the people subject to them have a lot going against them; in particular, they dare not put their laws to the test of fully informed consent by the people whose conduct the laws are regulating. For Francisco Giner the legal system is indeed to be recognised by the public opinion:

That «legal country» of Luis Felipe, was not the nation. Even suffrage can pretend to be called “universal”, it’s just a body, as many officials as you like, on whom rests the whole system of formal powers in the modern State. Moreover, they are officials by law, that is, designated indeed by their own elected officials. Out of them and their votes, is the will of all, the diffuse opinion, making them feel more or less pressure, sometimes not finding them too obedient. This is the last judge, good or bad, but without appeal. If it is not on your side, the wisest law (...) is never more than a project (...); it will always need the truly positive character, the one that does of the conduct that *has a real* address, a practical principle, but not of which the governor would wish that *it was had*⁶ (Giner 1932, 38).

⁶ See an excerpt of Ronald Dworkin in similar terms: “Because it [society] does not remain united by physical cohesion, but maintains its unit by the invisible bows of the common opinion. If such bows were too relaxed, the members would separate without order nor concert. The subject of such subjection is a common moral; the submission to this one is one of the burdens of society; and humanity, which needs society, must pay that price” (Dworkin 1980, 142-143).

Otherwise, the acceptance and enforcement of the laws must then rest on force, on coercive measures, on fraud by the rulers, or on misconceptions that the rulers and the ruled share about the content of morality and the extent to which legislation has conformed to morality.

This is one of the reasons that explain the revival of natural law by a considerable part of Spanish intellectuals in the late nineteenth and early twentieth centuries. It is certainly related to the devastations wrought by formal positivism in political and intellectual life. See some examples of these critics:

It was the old State, called gendarme and police State, a regulation and codification of egoisms and struggles for domination and parasitism among its members, and for that reason it was rightly said that it was nothing but a hell. Likewise, it was said that their rules in which was based and that served to it as norm were almost absolutely negative rules, and merely prevented to cause others more damage than they could tolerate, but they did not establish the positive aid consisting of imposing beneficial acts: to feed the hungry, clothe the naked, etc. [...]

And that is why the emancipator State of the XVIII is the State of *laissez-faire* [...]. It is a state where fairness is conceived merely as a negative relation, leaving the positive aid given to the field of morality, piety, charity, and mercy. And thus, the formulation that represents the law of life and action within that State, the rule of its fairness is this: “do not harm others” (*alterum non laedere*), whereas the moral formulation is this other one: “to do all the good you can to the entire world” (*omnes quantum potes juva*). Versions of this conception can be found not only in liberal legislation that was borne of the French Revolution, rectifying and reactionary against the ‘old regime’, but also the philosophical works and doctrinal lawyers and other writers of the time (school of natural law, liberal political economy, etc.)... (Dorado 1916, 374-375).

In the field of politics, this mechanistic system, as a result of the formalist theory of Law, was even more manifest. The authors of the time devoted their works to report the shameful phenomenon of corruption in political life engendered by the neglect in which the study of the fundamental legal questions has been left. Note the following statements of Ortega y Gasset, Giner, Azcárate, paying attention to the historical context in which they were made, which was none other than the one characterised by the frustration with the canovist Restoration:

Between us has become an undue separation of practical politics and ideal politics, as if one in its own would make sense without the other. Contemporary history of our country has made patent how much misery can be a practical politics exempt from ideal politics (Ortega 1916, 260).

We intend to examine briefly a [disease], which in greater or lesser degree affects modern societies: indifference in political matters (Azcárate 1894, 79-86).

The sacrifice of law to politics, ends to means, the whole to the part, has only contributed to the disrepute of politics and those who are devoted to it, to the superficiality in the treatment of problems and to a global situation of scepticism that degrades social, political and economic processes.

The disaffection for the forms of political representation has led to talk that we are in a post-heroic politics, where politics has lost all its force for social change. This time of distrust in politics coincides with great optimism regarding the individual. Society today is

seen as a set of individual consumers (Dewey 1930, 295). Let us recall that in classical Greek terminology, those who live in negative privacy—worried only about their individual interests, unrelated to anybody (*idioteía*) and unconcerned about public affairs—were called “*idiotés*”.

The solution to this state of collective disaffection does not rely on recovering the belief that law, as it is, already represents justice, because this would involve the loss of all Utopian reality. Instead, the solution would be to keep believing in the political dimension of human beings, in the path that we still have to travel, and in the future of justice. Otherwise, we will no longer speak of the end of politics but also of the end of the human being.

The usual and well known reason for which the vast majority of countries consecrate their activity to politics—which is the means—and neglects the cultivation of legal issues—which are the end—is their ambition to exert power, which is considered as an aim in itself by many political parties, instead of a means to obtain fairness. So remarkable has been the opposition and struggles of these spheres, whose aim is supposed to be to serve a common assignment, that politicians not only do not serve the aim of Law, but are also disloyal to their principles, engaging in all manner of illegality and malfeasance:

A conservative person of a certain country, whom a coreligionist tried to convince that a pretension for which he requested his support was fair, said to him: “that nothing matters; what matters is to achieve it”. In this assertion we can find the crude expression of the sacrifice of law to politics [...] and citizens end up replacing the question: “do you have *right*?” with “do you have *favour*?” The *legal sense* in a town is atrophied when things like this happen (Azcarate 1885, 56).

Politics was among us, still remains, all Literature: politics of orators, writers, poets, journalists, lawyers... sometimes also, financiers, who only serve in general to stupefy and deprave it more. The notables of our politics are not men of State, but of Parliament; they are not governors and statesmen, but speakers; they do not obtain their reputation and positions for what they do, but for what they say. Let’s consider now how much an empty education in the same pattern has served this excessive desire of eloquence. From Law’s lessons to the “societies of speaking”; from them to the Chambers; and from there to the Government: these are the gradual stages that a youth crosses, free of scruples, ready to play for and against with all problems (Giner 1888, 23).

Undoubtedly, the outer observation of the political forces game immediately discovers its execution of power inspired by the idea of domination and the deficit of solidarity in its regulation. But this soon raised protests and it had to face social reactions from, among others, intellectual and social cores, especially the Spanish Krausist legal philosophy. The assertive statements that we have reproduced of the Krausist conviction about Ethics as the leitmotiv that stimulates the legal and social life, lead us to the next question posed by Adolfo Posada: “Can we find a moral explanation of political power, under which the rule of law is not only the result of social reactions, but also produced by the human consciousness, through a synthesis of ethical reactions?” (Posada 1908, 317-318). The answer to this question and the need to introduce really effective legal reforms lead them in their approach to resort to spheres of law other than politics:

There can be no doubt that human consciousness experiences a deep crisis in relation to the idea of Law in our time (...). Thus, not long ago, I had a conversation with eminent professor

Vierkant, who was from the University of Berlin, about the transformation of the order of Law that was happening at the present time, and he told me: "From my point of view, more than a transformation or change of the order of Law is taking place in our time; I think that the age of law has already passed, as happened at a time, the age of the primitive custom; generally, the legal order, as a system of regulation of human conduct, has been already surpassed, and nowadays the social consciousness seeks its light and its norm in other ways that are not those of the Law" (Rivera 1932, 245-251).

Adolfo Posada⁷ and Francisco Giner are the authors who best represent this amplification from the strictly legal to the study of Sociology, capable of showing the variety and richness of the internal organism of society. According to their approach, only if we accept this ethical relation in legal and social life and in politics, will the fundamental concepts of political Law, in a crisis induced by the individualistic formalism, be restored again.

However, the more sceptical citizens are of the power of regulation and outer guarantees, the more confident they become of the value of ethical and internal forces. What once was hoped for Kantian's "rule of law"—that so brief enthusiasm felt for the author of *The names of Christ* [Fray Luis de León]—nowadays inhibits the sincere and intensive action of men. Sanz del Río [the importer of Krause's doctrine in Spain and mentor of the Spanish Krausists] was more efficient, creating in the barren ground of our intellectual life, not a doctrine—thank God!—but something worth infinitely more than the best doctrine: a current of spiritual emancipation, scientific education, ethical austerity, which has removed and softened, and still follows and will continue removing for many years yet, what little remains of plastic in the bottom of this harsh region (Giner 1917, 34).

The translation of this ideological position characteristic of the Krausist approach within this subject generates further responses and leads us to certain solutions. The first thing that the Krausist claim shows is that, while the articulation between Law, Morality and Politics concerns our intellectual work, we must guard against falling into the trap of considering this task a purely theoretical benign purpose, for it is also incumbent on our civic life. Let us recall here what was said about the original ethical sense of morality and law, as eminently social, and their integration and expression in the mores of a people.

Likewise, the Krausist philosophy of law played the role of making a markedly different contribution to the development of modern naturalist thought, dealing with substantive rather than procedural issues.

For this purpose, Krausists formulate the novel concept of rational freedom and a new founding of the guarantees of contract that are collaborating in the positive content that Krausist theory believes had to accompany the legal work of the State. Their proposal is that, in addition to the negative concept of freedom claimed by formalist theories, which is based on the liberal principle of *laissez faire*, and whose aim is confined to indicate the legal margins with regard to individual liberties for the formal and mechanical defence of the balance of forces, Krausist philosophy adds a positive concept of freedom that is not based on a restriction of freedom, but on the creation of real opportunity so that men can make use of their rights.

⁷ Vide his *ethical fluid* theory, which generates the legal life taking care of aims, making law work as an expression of ethical estimation, in his article (Posada 1928, 117-121).

These two paradigms historically have entailed two forms of government⁸. While the negative *freedom from* is incompatible with an unlimited government, it can be noticed that it is not so clear that the relation of positive *freedom to* will differ from an unlimited or interventionist government. In this regard, we should be aware that a legal system should not serve as a tool by which one social sector seeks to impose a particular moral code on the rest⁹. However, a law whose principle of coexistence—that is, keeping order and legal safety—is not accompanied by a principle of assistance to ensure a certain minimum standard of ethics would be equally unjustifiable. Said in Krausist terms: the accomplishment of the human condition is the foundation and ultimate goal of law.

In fact, the logical and historical development of this issue is shifting from the merely negative claims of *freedom from* state interference to the Krausist concept of *freedom to* as an affirmative and substantive social claim to state resources. For instance, we find that the contemporary natural law theories—among which Krausism stands out—develop the classical tradition of the Hellenistic thought, which was based on rational inquiry into the nature of man and his social life instead of the modern tradition. They also revise and complete the main tenets of the modern tradition based on individualism and the formal sense of law as long as they set aside some of the very elements of the classical tradition that today's new classical theorists hold in highest esteem, such as the intrinsic human good, understood as substantive ends and reasons for action.

Thus, Krausist legal philosophers reject the modern tradition insofar as they find the mere guarding of the safety and respect for individual freedoms unsatisfactory, and they update the classical cognitivist theorists' insight into the human objects, namely, the good they intend to accomplish. According to this approach, it is essential to understand the acts that actualise human capacities, and this understanding of our human potential implies the understanding of the fulfillment of human nature. This neo-classical approach establishes the normativity that helps to educate men in the law and the conditions of possibility so that the individuals act as just citizens insofar as those human goods are the reasons that we have for action and the guide for all thought about what is to be done.

Conclusions

To summarise, the Krausist philosophy of law can be considered an improvement on formalists, whose conception of the rule of law as merely formal procedures is unable

⁸ “the “negative” sense [of liberty], is involved in the answer to the question “What is the area within the subject—a person or group of persons—is or should be left to do or be what he is able to do or be, without interference by other persons?” The second, which I shall call the positive sense, is involved in the answer to the question What, or who, is the source of control or interference that can determine someone to do, or be, this rather than that? The two questions are clearly different, even though the answers to them may overlap” (Berlin 1969, 121-122).

⁹ “We realise how the theory of natural law may be influenced by the aspirations of a society at a certain moment of its evolution, and how great is the *danger* of that theory of becoming nothing more than an expression of these aspirations. As we go over the history of ideas of natural law, it is always relevant to ask whether and how far they are genuinely philosophical, or whether and how far they are merely ideological” (Simon 1992, 27).

to explain the emergence and guarantees of substantive human rights in society. The achievements of Krausism consist of correcting several of its major shortcomings with a much broader, moral and positive interpretation of law. These proposals can be summarised in two main questions:

A) Krausist legal philosophy opposes the formalist theories that view the law as a conclusion of a contract between individuals with the following argument: showing that the compulsory nature of the contract and its character of law to the contracting parties is not purely at the discretion of the subject, but in the conditional nature of men, that is, acknowledging that human beings are always constrained to some extent by physical and social necessities and consequently they must live in society, otherwise they cannot survive or develop their capacities in isolation. Thus, according to Krausist iusnaturalism, government is not only necessary and unavoidable but also desirable for human survival and welfare, and fundamental human rights should exist because people have inherent value. Consequently, unlike social contractarianism it is not merely a method of enquiry into particular questions but a test in its own right of the rationality of law-making that must play a vital role in any “naturalist” discussion of the proper purposes of law-making and the property of the content of given laws.

B) In order to implement the above principle, the aim of which is that law should leave its limited role as guarantor of the formal coexistence of individuals and engage in the task of care to ensure the development of the different aspects of humanity, it is necessary to understand the point, the objective and the value of the social actions and practices as conceived by the people who perform it, and propose an end to the law for the accomplishment of a particular essence and content, not merely a formal balance. The lack of normative content and teleological perspective in a purely positivist theory is seen by Krausists as a burden because their normative vacuity would be heuristically sterile in explaining and supporting human rights, which are found and have their origin in the idea of natural justice (*jus naturalis*). The foundation of Krausist law is, consequently, a material foundation, which means that law has specific contents to implement that must always be consistent with the human condition. This humanistic argument represents a naturalism of substance that seeks to establish substantial criteria for moral action, and does so through the perception of principles derived from the understanding of human nature and aspirations. Thus, these principles constitute the foundation and the legitimacy of law and this main political function is to legitimate the state. Therefore, the margins of legality or illegality would not be conferred only by the sphere of private freedoms of others, but also by the content or the aim that all law must realise.

As illustrated in these questions, compared to restrictive and negative formalist theories of securing a mere formal balance between individuals in society, Krausism assumes the task of establishing the basis for human accomplishment. In this proclamation, its disciples wanted to see the beginning of a new philosophy of law that could offer solutions to the needs and expectations of their historical context. And there is, certainly, in the bottom of this line of reasoning some of the most genuine and precursory principles of the philosophical and legal thought of Francisco Giner; one of them, perhaps now becoming more common, is the conviction that the best way to safeguard the freedom and law is claiming a minimum ethical standard integrated by moral and legal norms to provide the essential structure to society,

equipping it with stability and cohesion and guaranteeing the normal operation of human life, that is always organised social life. This is a great contribution to the Western theory of human rights and, despite the criticisms, it is still a challenge for advanced democracies that want stability and prosperity.

References

- Ahrens, H.** *Curso completo de Derecho Natural o de Filosofía del Derecho con arreglo al estado actual de esta ciencia en Alemania*, Quinta Edición, corregida y notablemente aumentada por D. Manuel María Flamant, Segunda Edición Española, 520, 1864.
- Ahrens, H.** *Enciclopedia Jurídica o Exposición orgánica de la ciencia del derecho y del estado*, Madrid, versión directa del Alemán, con notas críticas y un estudio sobre la vida y obras del autor por Francisco Giner, Gumersindo de Azcárate y Augusto G. Linares, tomo I., 1878.
- Ahrens, H.** *Enciclopedia Jurídica o Exposición orgánica de la ciencia del derecho y del estado*, Versión directa del Alemán, aumentada con notas críticas y un estudio sobre la vida y obras del autor por Francisco Giner, Gumersindo de Azcárate y Augusto G. Linares, Profesores en la Institución Libre de Enseñanza, Madrid, Victoriano Suárez, t. III, 1880.
- Atienza, M.** *El sentido del Derecho*. Barcelona: Editorial Ariel, 2003.
- Azcárate, G. de.** El Derecho y la política. *Boletín de la Institución Libre de Enseñanza* [BILE], IX, tomo I, 55-57, 1885.
- Azcárate, G. de.** *El problema social*. BILE, XVII, tomo II, 283, 1893.
- Azcárate, G. de.** La indiferencia en política. BILE, XVIII, tomo I, 79-86, 1894.
- Berlin, I.** *Four Essays on Liberty*. London: Oxford University Press, 1969.
- Clarín** (Leopoldo García Alas y Ureña). El derecho y la moralidad'. *Revista Europea*, t. XII, 240, 401-402, 1878.
- Dewey, J.** Individualism, Old and New. II: The Lost Individual. In *New Republic*, nº 61, 1930.
- Dorado Montero, P.** Socialismo y justicia social. *Boletín de la Institución Libre de Enseñanza*, XL, tomo II, 374-375, 1916.
- Dworkin, R. M.** *Filosofía del Derecho*, Traducción de Javier Sáinz de los Terreros México: Fondo de Cultura Económica, 1980.
- Finnis, J.** *Natural Law and Natural Rights*. Oxford, Clarendon Law Series. H. L. A. Hart (Ed.). Oxford: Oxford University Press, 1980.
- Finnis, J.** Natural Law: The Classical Tradition. In *The Oxford Handbook of Jurisprudence & Philosophy of Law*. J. Coleman, S. Shapiro (Eds.). Oxford: Oxford University Press, 2002.
- Giner de los Ríos, F.**, Calderón, Alfredo. *Resumen de Filosofía del Derecho*, Madrid, Obras Completas, t. XIII y t. XIV, tomos I y II., 1926.
- Giner de los Ríos, F.** Acerca de la función de la ley. BILE, LVI, tomo I, 38, 1932.
- Giner de los Ríos, F.** Notas Pedagógicas. Sobre el estado de los estudios jurídicos en nuestras universidades', BILE, XII, tomo I, 23, 1888.
- Giner de los Ríos, F.** Cuándo nos enteraremos? BILE, XLI, tomo I, 34, 1917.
- Kant, I.** *The Metaphysical Elements of Justice. Part I of the Metaphysics of Moral*. Transl. by John Ladd. Indianapolis: Bobbs-Merrill Educational Publishing, Library of Liberal Arts, 1983.
- Morillas, J. L.** *The Krausist Movement and Ideological Change in Spain, 1854-1874*. Transl. by Frances M. López-Morillas, Paperback, Series: Cambridge Iberian and Latin American Studies, 2010.
- Muralt, A. de.** *La estructura de la filosofía política moderna. Sus orígenes medievales en Escoto, Ockham y Suárez*, Estudio introductorio de León Florido y Valentín Polanco: Colección Fundamentos nº 203, 2000.

- Ortega y Gasset, J.** La pedagogía social como programa político. *BILE*, XL, tomo II, 260, 1916.
- Posada, A.** *Tratado de Derecho político. Derecho constitucional comparado de los principales Estados de Europa y América*, 5ª ed., Madrid, Librería General de Victoriano Suárez, 1893-94.
- Posada, A.** El fin del Estado, *BILE*, XXXIX, tomo I, 140, 1915.
- Posada, A.** Notas sobre la crisis del Derecho Político, *BILE*, XXXII, tomo II, 317-318, 1908.
- Posada, A.** El «Cuerpo místico» del P. Suárez y el «Organismo social» del Maestro Giner. *BILE*, LII, tomo I, 117-121, 1928.
- Rivera Pastor, F.** La actitud íntima del hombre actual frente al Derecho', *BILE*, LVI, tomo I, 245-251, 1932.
- Simon, Y. R.** *The Tradition of Natural Law: A Philosopher's Reflections*. Introduction by Russell Hittinger, U.S.A., Vukan Kuic (Ed.). New York: Fordham University Press, 1992.
- Ureña, E. M.** *Krause, educador de la humanidad. Una biografía*. Madrid: Universidad Comillas, Unión Editorial, K. C. F. Krause: *Philosoph, Freimaurer, Weltbürger. Eine Biographie*, Stuttgart-Bad Cannstatt, 1991.
- Vázquez Romero, J. M.** Dos en uno: el concepto de estado individual krausista y su relevancia biopolítica', in *Francisco Giner de los Ríos: actualidad de un pensador krausista*. Pedro F. Álvarez Lázaro, José M. Vázquez Romero (Eds.). Madrid: Marcial Pons, 27-82, 2009.

Universidad Pontificia Comillas de Madrid
 28250 Madrid
 Spain
 Tel.: 00 34 917343950
 E-mail: vazquez@upcomillas.es