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Freedom of choice and Rational Freedom
A critical reading of these emancipatory concepts

DELIA MANZANERO

Universidad Autónoma de Madrid / Universidad Pontificia Comillas de Madrid

Nowadays we truly believe in our Western liberal democratic societies that there is nothing more important than freedom, and freedom ultimately means choice. 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.

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 orders. The predominance of the *immanent* 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.

Currently, 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".

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 man is free because he rejects the traditional ties and reconstructs them from his 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 positivism 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 thorough 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". 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". 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 common opinion.

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 society 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.)...".

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".
José Ortega y Gasset

"We intend to examine briefly a [disease], which in greater or lesser degree affects modern societies: indifference in political matters". Gumersindo de Azcárate

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 skepticism 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. In classical Greek terminology, those who live in negative privacy – worried only about their individual interests, unrelated to anybody (*idiotēia*) 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". Gumersindo de Azcárate

"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". Francisco Giner de los Ríos

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?". 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.

Adolfo Posada 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.

For this purpose, Krausists formulate a 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.

These two paradigms historically have entailed two forms of government. 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 rest. 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.

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