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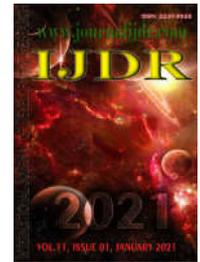
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KANT'S PHILOSOPHY: PREPOSITIONS TO THE STATE AND THE LAW

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ABSTRACT

In order to understand the foundations of the current legal phenomenon, two aspects deserve special attention: the notion of State and the concept of Law. The study of these aspects is based on one of the most relevant philosophers on the subject - Immanuel Kant. This article aims to demonstrate Kant's judgment on Law, as an instrument for the guarantee of freedoms, and this judgment is intertwined with the idea of a rational State, according to which a harmonious existence is sought. For the philosopher under study, morality is divided into imperatives, which are: the hypothetical imperative and the categorical imperative. The first imperative is nothing more than to practice a moral act for the sole purpose of obtaining an advantage or some recognition. The second, the categorical imperative, as a synthesis of morality, is when one practices a moral action, solely and exclusively, for having in his conscience, that is acting in a correct and moral way, always grounded by reason. Elsewhere, Kant differentiates between Natural Law and Civil Law. It establishes that the natural is all that right created by man himself who intends to follow ordinances, that is the individual creates laws he thinks are correct and moral, and is thus a free man. On the other hand, the civil law is the law created by forces outside itself, with the intention of bridging and counteracting the claims between individuals and between the State and society. It also establishes the importance of the search for a coercive civil law, since, when in a natural state, even temporary, man runs the great risk of not being able to preserve his interests. This justifies the coercive force of civil law exercised by the power of the State. The most illustrious works of the philosopher on Law and State have been researched, among which is the *Metaphysics of Customs* and the *'Foundation of Metaphysics of Customs'*, without, however, leaving aside his masterpieces? *'Critique of pure reason'* and the *'Critique of practical reason'*.

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INTRODUÇÃO

This study is the result of a research, which seeks to relate Law, Philosophy and Language as branches of thought that involve each other. In this plan, a theoretical research was carried out, with the aim of deepening the knowledge about exemplary texts of the philosophy

of Law, especially the work "Metaphysics of Customs", by Immanuel Kant. Thus, this article aims to explain - with language accessible to beginners in the study of the foundations of Law - what is the State and what is Law, in the conception of Immanuel Kant. The icon of philosophy was born in Königsberg, Prussia (present-day Kaliningrad), on 22 April 1724, having rarely left his native land, where he died in 1804. As an academic educator he wrote a significant number of works, usually divided into the three major groups: Epistemology,

aesthetics and practical reason. With regard to epistemology, reflecting the dogmas in parallel with the agitation occasioned by the ideas of David Hume, Kant publishes the "Critique of Pure Reason", where it establishes its theory of knowledge by questioning how synthetic a priori judgments are likely. By another starting point, from the object to the subject, the philosopher establishes the structure through which it is possible to know, that is, the ways in which the subject understands the world of phenomena. Metaphorically speaking, it is as if the author identifies the forms existing in the subject, which are completed by experience. In turn, the essence of Kantian aesthetic theory is revealed in "Critique of Judgment". In this work, Kant focuses on understanding how the experience of analyzing the real occurs through a reflective judgment, that is, the link between generic and particular stimulates the subject to understand, in a non-conceptual or logical way, the goal of nature as consensus between subject and world. Finally, the practical reason is addressed in most of Kant's works, however, it has as reference the work "Critique of Practical Reason". It is at this moment that the philosopher studies reason in analogy to human action, including in the collective. Kant shows that it is feasible to establish a universal moral, derived from reason, and not to stop, solely and exclusively, with material or empirical notions.

This work, by focusing on the conception of Law and State in Kant, relates to the last offered field of Kantian thought, that is, practical reason. The author under study installs his reflection on the Law and the State under an endless questioning about human action as a social being, as will be evidenced in the course of the presentation. To begin, it is important to remember that understanding what the State and the Law is with its relations was the subject of long discussions, often without success, of most philosophers. Kant, by the way, was one of those who succeeded in debating this subject, and to this day it provides deep and great discussions. In order to formulate the concept of State and Law, the author establishes a philosophy that has a leap towards the idea of morality, which therefore leads to various divisions, such as: autonomy, freedom, among others. What should be emphasized is that the foundation of the Law and the State is, in such a way, tied in morality, which makes it essential to invest in this foundation of support. Therefore, in order to understand how the author organized his theory of Law and State, it is indispensable to understand morality in order, later, to delve into the essential purpose of this work.

Kant and the moral: In the first lines of his work "Fundação da Metafísica dos Costumes", Kant says that in this world, and even outside it, nothing is possible to think that it can be considered as good without limitation except one thing: a good will" (KANT, 2007, p. 21). However, it states shortly afterwards that good will is not good for what it promotes or accomplishes, for the aptitude to achieve any proposed purpose, but only for the will, that is, in itself. (KANT, 2007, p. 23). Good will as a fruit of reason is not the perfect form of the individual to reach his end, and man's preservation and well-being is understood at last, so it would be better to admit that his intuition guided him. However, if we were to accept being guided peremptorily by instincts, we would therefore be misjudged as rational beings. Therefore, for Kant, moral action must be regulated by reason, being instigated by a good will and not simply by some inclinations. In other words, to act morally is to act in the pursuit of a good will, not by inclination, but by a sense of duty. This is a formal sense of morality, in connection with duty, an idea that removes the inner inclinations and seeks to act according to reason, and therefore possesses, in the philosopher's view, in itself a good will. As previously mentioned, the will is linked to the subjective conditions of inclinations, such as, for example, the pursuit of happiness. However, moral action, most of the time, will not adopt the same direction as the pursuit of happiness, thus being able to induce man to value his possibilities and, in his judgment, choose to act in such a way as to satisfy his inclinations, thus ceasing to act in a moral way. For example, we go to a hypothetical situation, note: if by chance we witness a heinous crime, such as rape, being practiced by a loved one - brother, father or cousin - and this, in turn, comes to be prosecuted and tried for the crime committed. The whole family, if in the name of morality, can be truly

witnessed to, recounting all that has happened and witnessed, can be brought to deep disgrace and sadness. In this hypothetical example presented, one abandons the cunning and strategic action, so that morality prevails, even if such a decision does not result in happiness. Kant asserts that in the totality of acting, the action which is objectively indispensable, but suffers taxation of inclinations, and which is in harmony with material laws, will be called by the author of 'obligation'. And when this action is necessary and characteristic of a will, it is called the commandment. Since the will will not necessarily be parallel to the objective necessity of action, the formula of this commandment is called imperative" (KANT, 2007, p. 48).

The obligation to resemble the good will with the inclinations, and to evaluate the subjective deficiencies of the will of man with the objective laws of the will, in theory, are disclosed in the formula of the imperative. The necessary action, probably good and that contains in itself the intention of its realization is called a categorical imperative. Thus, Kant establishes the concept of the categorical imperative:

Since I have withheld the will from all stimuli that might lead it from the fulfillment of a law, there is nothing left but the universal legality of actions in general, which must be the only principle of the will, that is: I must always act in such a way that I may also want my maxim to become universal law (KANT, 2007, p. 50-51)

Extracting all the subjectivity of acting, by not providing true subsidies to morality, and exclusively making use of reason, is that moral conduct can exist, for it can become universal. Kantian moral action sought to be universal, since, when it narrates the categorical imperative, it proves that action, to be moral, is dependent on the universality of action, that is, the act must enable the practice by all. Therefore, the formula of the categorical imperative is: "Act only according to such a maxim that you may at the same time want it to become universal law" (KANT, 2007, p. 59). However, not only does reason focus on the will, and Kant admits this: "Man feels in himself a strong balance against all the commandments of duty that reason represents as so worthy of respect: it is his needs and inclinations, whose entire satisfaction is understood under the name of happiness" (KANT, 2007, p.37). When action is moral in having in view some intention, a strategic action seeking a certain end is termed a hypothetical imperative. Let's see an example situation, namely: If when finding a certain movable property, with great value to its owner, the same is sought in the expectation of achieving some kind of gratification - of recognition or financial - he will act morally to have some reward for the action, ie a hypothetical imperative. But if the intention is opposite, in seeking the owner by having a conviction of his own that he is acting virtuously, and that this is right and moral, and not by seeking some recognition or gratification, the motive of my action is a categorical imperative, for one seeks to act solely with the intention of being in accordance with morality and obligation.

Thus, it is concluded that, for the philosopher, morality is to act according to a maxim, a universal maxim, and to seek its value exclusively in action. Therefore, if man himself is the creator of the law that will be imposed upon him, and it is not necessary to follow the decisions of another or of some other factor external to his own action, he, according to the author, is totally free, for if he fulfills his own laws, is free to act in the way that it considers to be the best, grounded by reason. This is the formal conception of the autonomy of the will, acting according to its own internal laws, coinciding with the concept of morality. On the contrary, any act that is guided by a norm that does not originate from the will to act on the basis of reason is called heteronomy, that is, to act according to external legislation that coincides with the concept of legality.

Now about Legality: Up to now it has been verified that moral action is an internal imperative which, by being instituted by the one who obeys it, makes him a free individual. However, Kant states that there is a probability that, in the pursuit of adhering to his will, the

individual may undertake acts that will compromise the freedom of others, and from this risk, the obligation of an external legislation to the will of each individual is born. One of the main teachings of Kant is the autonomy of will, which makes man act according to his own design. When Kant refers to the external legislation and the doctrine of Law, he intends to ensure that externally man will not be deprived of exercising his own will. That is external freedom. The doctrine of Kant determines that the Law supports the relations between individuals; the choices that these people will make in their relations; the form of these choices. In this argument, Kant defines Law as being the "[...] sum of the conditions under which one's choice can be united to another's choice according to a universal law of freedom" (KANT, 2003, p. 76). It derives from this that any act that conforms to the freedom of others within the collectivity, and in accordance with a universal law, will be a conduct and a just law for Kant. This is the general principle of Law, from which its universal law proceeds, as the author refers: "Act externally so that the free use of your will may coexist with the freedom of all according to a universal law" (KANT, 2003, p. 77). It should be noted that the meaning of Kant's Law is based on affinity to the external freedom of the other. In this way, there will not be exclusively the inner interest in acting in a correct and moral way, because the noncompliance of the principle will induce you to reach the will of others, which, in turn, may require the readjustment of the behavior. Therefore, he may be obliged to correct his conduct. Consequently, this repression can generate a paradox: how can law be repressive if its main intention is to ensure freedom? Kant dismisses this contradiction by clarifying the possibility of repression as a necessity for the organization of the general principle of law, because if its freedom is a blockade for the freedom of others, coercion is a means to ensure the freedom of the injured party, thus correcting the abuse committed against him. The support made, proposed by Kant, to freedom is elucidated by the fact of affirming that this is the only natural right: "Freedom (the independence of being constrained by the choice of others), insofar as it can coexist with the freedom of all others according to a universal law, is the only original right belonging to all men by virtue of the humanity of these" (KANT, 2003, p. 83). The philosopher organizes the natural right to freedom in several others as coming from this principal: innate equality, to be irreproachable, and something like freedom to act. Thus, the author is concerned, essentially, with the inconsistency of morals, alone, establish certain behaviors. In the face of this, the coercive protection of the only natural right, the right to freedom, is indispensable in order to establish a society full of harmony. The protection ensured by the Law will be linked and intertwined with the idea of State as a civil body, as shown below.

Private and public and the link between state and law: The initial differentiation that must be clarified in order to understand the Doctrine of Law, with regard to Private Law and Public Law, is that the philosopher, when referring to the first, alludes to Natural Law and when alludes to the second, Civil Law' (KANT, 2003, p. 83). The private has in view the state of nature, in which relations are solely individual, free from superior command. On the other hand, the public aims at the civil condition, whereby relations between men and between State and individual are regulated by a civil ordinance, that is, by a higher authority. In addition to this distinction, Private Law and Public Law are also distinguished by their original sources. The natural is born in reason and in relations between individuals; and the civil is born from the will of the legislator - in harmony with Natural Law. Kant, in basing this differentiation, creates a difficulty for the jurisdiction of Private Law, since the state of nature is a social moment lacking state strength, sanction and coercion, measures necessary to safeguard the free will, are not applied, causing the private to run the risk of not being respected. But this problem is solved by Kant, when he says that this is a provisional state. The natural state is a period that precedes the civil state, in which the state's rigging will bring coercive force to the good use of the law, granting definitive guarantees to human rights. Thus, the need to seek the civil condition is due to the commitment to ensure the freedom of each individual, since in the natural state, for lack of a higher power that has as force the coercion, there is a risk of failure to comply with the fundamental principle of law. Therefore, the author states that the

state of nature is cause and the marital status is consequence of that. The statement set forth is evidenced by the examination of possession, named by Kant as mine and yours external. That is, there is no way to guarantee, in a peremptory way, the possession of what is mine or yours in the natural state, being that we have the imminent probability of conflicts, since there is no power of coercion of the State, being, therefore, each individual entrusted with the protection what is rightfully yours. The decisive possession of something can only occur through legal or normative possession, for that is the only way something that is mine remains mine, even if it is not in my possession. For Kant, it is a moral obligation to move from the natural state to the civil state, because the individual cannot remain in a state in which no person is sure of the claims of others. Despite the necessity placed by Kant of the duty to migrate from the state of nature to the civil state, this does not mean that one supersedes the other. On the contrary, Kant says that these rights are integrated, that is, the natural binds itself to the civil, positivizing it. The civil state uses Natural Law to make it public and, in this way, organizes coercion because it is an important element to the rule of law and guarantee of human freedom.

Final Considerations

In view of the above, the value within Kantian practical reason of morality, which must be the foundation for all human action, was evidenced. But solitary morality is unfit to regulate the life of the collective. From this inability, the Law manifests itself as an indispensable tool for the external union of the wills of the most varied individuals of the social order. In other words, the meaning of Law for Kant is summed up as a conglomerate of laws, imposed by the State, with coercive force, with the aim of enabling coexistence in society without the violation of individual freedom - this freedom being, according to the author, a universal law to be safeguarded. The Law, as a means to a harmonious society, is marked and fixed with the passage from the natural state to the civil state - which, as asserted by Kant, is a moral obligation. The Law only achieves a definitive status after the constitution of the State, since in the state of nature the transitoriness of rights is striking, given that it has no consistent criteria for the protection of individual rights. It is therefore necessary to establish the State, in order to prevent the conflict between antagonistic wills and the transience of rights. It is therefore necessary an external power coercive and distinct from the particularized wills to resolve any clashes between the members of a society. Thus, the foundation of the juridical phenomenon was proved according to a classical author, namely: Immanuel Kant. It became explicit how, in the absence of the realization of morality, the Law has a determining role in the social administration, being such creation improved in a state condition. Under another aspect, the State appears as an essential composition for human coexistence as a society, applying the Law as an instrument of action that guarantees the state's purpose. Therefore, the teaching that Kant provides that, while man, as a member of the collective, is not governed by moral conduct, it is essential the Law to establish harmony and social peace. And, this moral is not of the sense of the hypothetical imperative, which aims at a benefit or recognition, but rather the categorical imperative, as the most sublime expression of morality - to do good and correct by the simple fact of being moral with other members of society. It is in this way, with all the teachings of Kant, that we will be able to build a country, a society, a family and a moral human being. Worthy of respect for each other.

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