



Research Paper

Some Considerations on Values in the Wake of National Socialism. The Proposal of Arnold Brecht

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ABSTRACT: *Arnold Brecht was one of the thinkers who, after the military and political defeat of National Socialism, contributed most to the ideological defeat of the proposals that had made the Nazi regime possible. From his exile in the United States, he presented the study of politics—unlike its practice—as an eminently scientific discipline. This paper examines his famous Political Theory, in which he addresses the issues of justice and values from the perspective of scientific value relativism. Brecht declared that justice was an empirical issue and understood that science could determine its universality, despite the fact that it could not establish a logical link between “is” and “ought”. Although the theoretical contributions of Brecht have not received the recognition that they deserve, he can currently be considered as one of the leading opponents of relativist defeatism, inasmuch as he was of the mind that a set of culturally shared values could provide a universal postulate.*

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I. BIOGRAPHY OF ARNOLD BRECHT

Arnold Brecht was born in Lübeck (Schleswig-Holstein) in 1884—the year in which the Fabian Society was founded in England, which sponsored the gradual and peaceful introduction of socialism and whose manifesto was drafted by George Bernard Shaw (1856-1950)—into a traditional family whose members pursued liberal professions or worked in the civil service.

His curriculum evinces that Brecht knew how to reconcile different, albeit compatible professional activities: (a) as a civil servant working in the Reich Chancellery, in the Ministry of Economy, in the judiciary, and in the Constitution Commission for reforming the Länder (as the Prussian delegate), a career during which he reached the position of director of the constitutional section of the Ministry of Interior of the Reich and that rapporteur-general of the Council of the Reich for budgetary matters; and (b) as a scholar and researcher in the fields of philosophy, politics, and political science.

After being forced to abandon Germany in 1933, he stood out for his creative spirit in the field of political science in the United States. In his dual status of thinker and civil servant, Brecht would publish around 150 books, monographs, and papers. In 1959, a quarter of a century after abandoning Germany, he published his masterful *Political Theory: the Foundation of Twentieth-Century Thought* in English, a work over 600 pages long which received the Woodrow Wilson Award of the American Political Science Association. Although his personal vicissitudes will not be covered in detail here, it is worth mentioning that he managed to maintain his composure in the face of the onslaughts of an extremely eventful and perilous existence (Alvarez Turienzo, 1993). To Luis Legaz y Lacambra's (1943) regrets, expressed in his *Introducción a la Ciencia del Derecho*, that the destiny of his generation had not offered him the chance of a *vita quieta* and the *otium* necessary for elaborating on his ideas with tranquility, could be added Brecht's even greater misgivings (Alvarez Turienzo, 1993, p. 55).

From 1902 to 1905 Brecht studied law at the Universities of Bonn, Berlin, Göttingen and Leipzig, obtaining a Bachelor's degree from this last institution in 1906. His publications on legal theory, initially focusing on topics pertaining to private law, contained the first formulation of the theory of impossibility, which he would employ with such efficiency in his subsequent research on the concept of justice.

Until entering the civil service, Brecht had hardly read any literature that did not have to do with law, economy, or management and administration. But once he had come into contact with different centers of administrative and political decision-making, as a consequence of the function that he was expected to perform,

with a clearly theoretical profile, he also turned his attention to politics. His experience in this field allowed him to lay the foundations of his thought and to develop many of his analytical tools in order to discover and analyze the wherewithal of politics and power, which Benedetto Croce (1886-1952) accurately described as “politics in nuce” (Eckardt, 1932, p. 19).

He very soon became an enemy of the Nazis, to the point that he was arrested in April 1933—a moment when the home of Gustav Radbruch was searched, his writings and documents were seized, and he was divested of his chair at the Faculty of Law of the University of Heidelberg. Brecht was released thanks to the mediation of members of the Government and the administration without direct links to the National Socialist German Workers’ Party (hereinafter, NSDAP) in power. It is important to recall the statements made by Hannah Arendt (1906-1975) to Günter Gaus, the reporter and future senior official of the administration of the German chancellor Willy Brandt. In an interview broadcast on the public television of the German Federal Republic on 28 October 1964, which received the Adolf Grimme Award and was published under the title, *Was bleibt? Es bleibt die Muttersprache (What remains? Language remains)*, in the book, *Zur Person*, by G. Gaus (1965), Arendt described the decisive events that marked the shift towards the politics of this exceptional twentieth-century figure of political science and theory, as a result of the Reichstag Fire (on 27 February 1933) and the legal arrests that were made thenceforth. In the autumn of the same year, Brecht, now in his fifties, abandoned Germany and was forced to start a new life and academic career in the United States, where he obtained US citizenship in 1946. If memory is life, as Pierre Nora (1984, p. XIX) holds, in the case of Brecht his unhappy memories and the oblivion into which he was plunged determined the path that he would take on the New Continent.

At the invitation of the economist and educator Alvin Saunders Johnson, Brecht joined the faculty of the New School for Social Research in New York—an academic institution for adult education that Johnson had helped to create in 1919 and which he would run as of 1922. In 1933, Johnson converted it into a sort of university in exile (Dillard, 1954-55) which gave refuge to intellectuals who had been forced to abandon the Old Continent as a result of the rise to power of totalitarian regimes. Radbruch (1951) himself was invited to join what was by all means a pilot center, an offer that he rejected. Brecht would form part of the faculty of this academic institution until his retirement in 1954. With time he would teach and research at the Universities of Harvard, Columbia and Yale.

For Brecht, the study of politics, unlike its practice, was an eminently scientific discipline. He said as much in his famous *Political Theory*—which Luis Legaz did not hesitate to classify as fundamental—in which not only his outstanding scholarship, but above all his far-sightedness, are for all to see. He addressed the issue of justice and values from the perspective of scientific value relativism. He thus established that justice was an empirical problem and understood that politics should be treated with the opportune application of the scientific method, without renouncing, as he himself acknowledged in the “Prologue to the first part”, the analysis of non-scientific political theories, while recognizing that science could establish their universality, but, in contrast, could not give them an absolute value. Brecht thus became one of the leading opponents of relativist defeatism, persuaded as he was that a set of culturally shared values could provide a universal postulate.

There is not a shadow of doubt that even today man continues to wonder about the possible existence of absolute values. The members of our society, especially the young generations, express a desire for if not absolute, at least objective, answers to moral questions; as well as those that are relevant in the field of law. Science, philosophy, and law have yet to provide answers to issues such as abortion, euthanasia, capital punishment, genetic manipulation, homosexuality, and other similar ones. But how should we answer the question about the morality of these issues and the legal treatment that they should be given?

The National Socialist disaster, however much of a “shock of reality” (Birulés, 2000, p. 9) it was for Brecht and everyone else, brought with it, after its fall, a revival of the belief in certain criteria of objective justice (Radbruch, 1961 [1957]) and a return to the premises of a natural law grounded in the ethics of values (Rodríguez Molinero, 1975, pp. 379-400). In certain radical intellectual circles, the scientific and technological advances since the beginning of the twentieth century resulted in an attempt “to disparage such nonscientific impulses to scientific activities, keeping science limited to a strictly positivistic, physicalistic, behavioristic approach even in the preparatory stage [...]” (Brecht, 1959, p. 481). However, nor should the feeling of repulsion that this scientific relativism may produce in us lead us to reject the application of the scientific method in research on human values, both the strictly moral ones and those plentiful and principal ones that have a special legal relevance. In *Behemoth: The Structure and Practice of National Socialism, 1933-1944*, Franz Neumann (1942), concerned with painting a faithful picture of the enemy joined in battle, openly rejected identifying National Socialism with relativism, convinced that “National Socialism is [...] incompatible with any rational political philosophy, that is, with any doctrine that derives political power from the will or the needs of man” (p. 463).

In this context, modern scientific value relativism had, and still has, much to say. If based on a strict conception of science, like intersubjectively transmissible knowledge, unlike a real or alleged knowledge that is

not intersubjectively transmissible or mere speculations that are considered to be knowledge, it is possible to arrive at certain conclusions.

In his careful analysis of the relationship between historical and political science, Hans Mommsen (1962) stressed time and again the new course of German historical science plotted by Wilhelm Hennis, Brecht, and Hans Buchheim.

II. SCIENTIFIC VALUE RELATIVISM

From this perspective, there is first and foremost the impossibility of determining the absolute character and specific material content of any ultimate human value. At any rate, values should not be understood as having a sole relative and subjective character.

The apparent inability of science to establish ultimate principles of the value of justice, for example, is mitigated by important factors. “First, science has an almost unlimited possibility of exploring the *consequences* of the different ideas of justice, after clarifying their meaning – their historical, individual, actual, or potential meaning. Second, *jurisprudence*, as distinct from science (although aided by scientific methods in exploring historical facts), may be able to declare maxims or other basic principles *legally* binding at a definite place and time, even in conflict with dictatorial decrees, although pure science is unable to establish the universal and invariant validity of the same principles” (Brecht, 1959, p. 485; original emphasis).

In this connection, mention should go to Radbruch (1878-1949), perhaps the last great theoretician of legal certainty (Legaz y Lacambra, 1960, p. 161) as an expression of the legal guarantee of such values. As already noted, this author was divested of his chair at the Faculty of Law of the University of Heidelberg on 12 July 1933 (by virtue of the Law for the Restoration of the Professional Civil Service of 7 April 1933) in the interwar period, several months after the NSDAP had come to power. Radbruch (1919) searched for the possible scientific limits to totalitarian assessments, declaring that jurists should not only feel like servants of law, but also servants of justice ... “The legal profession should feel like a great league in defense of human rights above and beyond ideology” (p. 13; own translation).

Abandoning his initial views on a universal abstract science that substantiates the validity of legal rules, Brecht introduced the science of law as a science of a specific historical phenomenon (Bonsmann, 1970; Kaufmann, 1987; Wolf, 1973). In the last number of the journal *Die Gesellschaft, Autoritäres oder soziales Strafrecht*, whose title anticipated the most controversial text “Strafrechtsreform und Nationalsozialismus”, published in the journal *Wiener Neuen Freien Presse* in Vienna, on 15 and 22 January 1933, he concluded that the National Socialist political regime was sponsoring a criminal law that deserved to be called “terrorist”. All in all, neither did he review nor renounce his ideological position, which continued to be rationalist and relativist. Rationalist because he was confident that, by employing reason, it was possible to gain a better understanding of the world; and relativist for understanding that it was impossible to demonstrate rationally the superiority of a political ideological over others. “Science can, in this context, play only a subsidiary role of the handmaiden of jurisprudence, supplying the lawyers with the relevant historical material to bolster their theories about the limits set to the juridical validity of legislation” (Brecht, 1959, p. 359).

The third important factor against the inability of establishing absolute criteria of justice is that the scientific method, when applied to value relativism, cannot deny—as already observed—that there are perhaps absolute criteria of justice; Brecht (1959, p. 485) only contended that they could not be scientifically verified. In this respect, he rejected the basis that philosophers had traditionally applied to support a system of absolute values: the logical link between “is” and “ought”. Nevertheless, the recognition that science cannot establish or verify ultimate criteria of moral judgements, since the union between the moral and the empirical fields is logically impossible, does not mean to say that there is not a certain relationship between both. Thus, scientifically speaking, it is possible to claim that there is a factual link between “is” and “ought”.

Brecht (1959) enunciated it as follows: “The correctness of reports that an external voice was heard, and that this source was a good and almighty God, cannot be verified scientifically in an intersubjectively conclusive manner [...]. The contention, however, that some kind of inner voice making pronouncements about right and just, or wrong and unjust, operates in some or all human beings is verifiable by empirical research at least to some extent. If such a voice were found operative in all human beings, this would be relevant as proof of a factual link connecting Is and Ought in man [...].” (p. 385).

Immanuel Kant (1784) expressed himself in precisely the same terms when formulating his “necessary regulative principles” and his categorical imperative. His intention was to establish the fact that particular ideas are necessary forms of human thought, or that they are conceived by human reason as orders or demands. In his own words, “Hence, the objective reality of the moral law cannot be proved by any deduction by any efforts of theoretical reason, whether speculative or empirically supported, and therefore, even if we renounced apodictic certainty, it could not be proved *a posteriori* by experience, and yet it is firmly established of itself” (pp. 136-137; original emphasis).

The fourth important factor is that empirical research apparently discovers in human thought and feelings as regards justice a series of elements that are universal and invariant characteristics of the *nature of man* and which can be relied on as constant factors. This may be the fundamental departure point for building neither on a morality with an absolute material content as that established by the rationalist jusnaturalists, nor on a morality with a merely formal content, like that established by Kant with his categorical imperative, but on a relative moral system, albeit with universally human elements. This then begs the question of what these universal and invariable elements are. In the case of justice analyzed by Brecht (1959, p. 396), he established the following:

1. Although, as the “Oxford friend” of Professor Andrei Marmor(2005, p. 747)declared, there is nothing more difficult in philosophy than to say something that is really true, the first universally human element of justice should be the truth. Justice, in the objective sense of the word, presupposes the conformity with objective truth, namely, all those relevant assertions about facts and relations between facts should be objectively true. In the subjective sense of the word, justice demands conformity with that which the person in question who acts or judges considers to be true (Kalinowski, 1967; Ambrosetti, 1972; Brenner, 1968; Leinweber, 1970).
2. Generality of the system of valuesapplied. It is unfair to choose arbitrarily a different system of values for each case.
3. Equal treatment for what is equal under the accepted system of values.
4. That there is no restrictionof freedom beyond the demands of the accepted system of values.
5. With respect to the necessities of nature in the strictest sense of the word. It is unjust to punish or reproach morally the violation of a law or command when compliance is impossible (Brecht, 1959, p. 396).

There is a chance that some of these postulates, conceived as scientific working hypotheses and based on the fact that they are considered to be essential and ineradicable the world over, without any opposition to them having been ascertained in the ancient or modern literature, can be excluded, modified, or supplemented by others. However, given the relevance of all of them, the hypothesis that they are universal to the rank of a scientific law could be elevated (Brecht, 1959, p. 402).

With this, it seems that Brecht had achieved a very rigorous application of the scientific method to values proving, together with value relativism from a scientific perspective, the universal validity of certain elements that should be present when judging values (truth, generality, etc.). Having said that, it should be recalled that this scientific value relativism does not at any time deny the possibility that there are indeed absolute values, which confirms that the proof of their certainty cannot derive from science, but from intuition or metaphysics. In this sense, it would be impossible to talk about intersubjectively transmissible knowledge.

III. ARNOLD BRECHT VERSUS THE RELATIVIST PHILOSOPHY OF JUSTICE OF HANS Kelsen AND VERSUS ST THOMAS AQUINAS

In his famous farewell address at the University of Berkeley (California), “What is Justice?”, delivered in 1953, Hans Kelsen (1971 [1957]) also expressed himself in these terms, in line with emotivism, when claiming: “The problem of values is in the first place the problem of conflicts of values, and this problem cannot be solved by means of rational cognition. The answer to these questions is a judgment of value, determined by emotional factors, and, therefore, subjective in character – valid only for the judging subject, and therefore relative only” (p. 4).

The relativism of Kelsen reinforces his “refined” conception of law (positivist, normativist, and formalist), purged of all extra-legal impurities, namely, all those elements that are not normative. He expressed himself in a much more radical fashion than Brecht when asserting that the value par excellence that has to do with law, the value of justice, the only facet in which it has an ultimate or final value is something that is by no means susceptible to any form of empirical or rational control. So, Kelsen not only rejected any possibility that science might someday establish universal objective elements constituting values, but also went a step further when contending that a science of law should abstain from expressing value judgements. He expressed himself in these terms when claiming,“Juristic value judgments are judgments that can be tested objectively by facts. Therefore they are admissible within a science of law. But it should be noted that the question as to whether in a concrete case a definite behaviour is legal or illegal, is to be decided by the competent legal authority, not by the science of law. Judgments of justice can not [sic] be tested objectively. Therefore a science of law has no room for them. Judgments of justice are moral or political value judgments, in contradistinction to juristic value judgments. They intend to express an objective value” (1971, p. 229).The issue of fair justice, of the law that ought to be, is not susceptible to scientific knowledge, insofar as it something that belongs to the subjective sphere (Laporta, 2010, pp. 674-685).

In another part of his address, the scientist of the Vienna School (Celano, 1990) believes the absolute relativity of justice to be a reality: “And, indeed, I do not, and I cannot say what justice is, the absolute justice for which mankind is longing. I must acquiesce in a relative justice and I can only say what justice is to me. Since science is my profession, and hence the most important thing in my life, justice, to me, is that social order

under whose protection the search for truth can prosper. ‘My’ justice, then, is the justice of freedom, the justice of peace, the justice of democracy – the justice of tolerance” (Kelsen, 1971, p. 24). In his *General Theory of Law and State*, Kelsen (1945) assumes the postulates of legal neo-positivism in which any value judgement is a valid subjective judgement only for the subject who judges and, for that reason, relative. And all in the framework of a conception that understands the pretensions of the theory of natural law to be regarded as a scientific theory as a mere ideology. Whereby the pure theory of law, insofar as it is scientific and, therefore, ideology-free, refuses to broach the subject of justice.

It would seem that Kelsen, whose pure theory of law is an *opus perpetuum* in the sense of *monumentum acre perennius* and *perpetuum mobile* (Losano, 1985, p. xvii), alike, identifies law with the established legality, formally valid law, perhaps forgetting human nature as the basis of law (Vela Sánchez, 1965, pp. 293-319), and of the very object of law, man in his social role, who constantly and irremediably endows his legal relationships with moral elements. At any rate, the logic of explicitly formalist research on legal reflection, both philosophical and doctrinal, seems to have been the key Western contribution to the legal field in the twentieth century (Iturmendi Morales, 1983, p. 599).

Brecht apparently discovered which of these elements can be scientifically proven; even though his contribution, albeit expressed in modern terms, could already be glimpsed in St Thomas Aquinas’ conception of natural law as objective law, universally valid and knowable to man through his reason, and grounded in the rational good whose maximum expression is the honest good: the truth. This is how he expressed it in his *Summa Theologica* (written between 1265 and 1273) when enunciating the basic inclinations of man as a basis of universal natural law: “Wherefore according to the order of natural inclinations, is the order of the precepts of the natural law. Because in man there is first of all an inclination to good in accordance with the nature which he has in common with all substances: inasmuch as every substance seeks the preservation of its own being, according to its nature: and by reason of this inclination, whatever is a means of preserving human life, and of warding off its obstacles, belongs to the natural law. Secondly, there is in man an inclination to things that pertain to him more specially, according to that nature which he has in common with other animals: and in virtue of this inclination, those things are said to belong to the natural law, ‘which nature has taught to all animals’ [Pandect. Just. I, tit. i], such as sexual intercourse, education of offspring and so forth. Thirdly, there is in man an inclination to good, according to the nature of his reason, which nature is proper to him: thus man has a natural inclination to know the truth about God, and to live in society: and in this respect, whatever pertains to this inclination belongs to the natural law; for instance, to shun ignorance, to avoid offending those among whom one has to live, and other such things regarding the above inclination. All these precepts of the law of nature have the character of one natural law, inasmuch as they flow from one first precept” (St Thomas Aquinas, 2018 [1485], p. 391).

In light of the foregoing, St Thomas could have been endorsing the future words of Brecht (1959, p. 492): “Inescapable, universal elements in human feeling and thinking, such as the interrelation between justice and truth or veracity, are important accretions to the area of intersubjectively transmissible knowledge.”

By drawing this parallel between St Thomas and Brecht, the intention is not to belittle the enormous boost that the scientific method has given to the discovery of certain universal elements present in values, but to confirm that the only thing that cannot be proven scientifically is the origin that has been attributed to them—God, human nature, the nature of things, etc.—but not so their rational and empirical character.

In his *Corrigenda* to the work of Erik Wolf, Brecht (1958, p. 192) clarifies his conception in the context of scientific verifiability: “I distinguish between knowledge that is intersubjectively ‘transmissible qua knowledge’ and knowledge, real or putative, that is not so transmissible. The term ‘transmissible’ has been editorially changed to ‘communicable’. This is in conflict with my well-considered use of terms. There is no doubt that metaphysical knowledge is ‘communicable’ in the sense of ‘relatable’, but it is doubtful and controversial whether such knowledge, real or putative, is scientifically ‘transmissible’ qua knowledge” (p. 193.1).

IV. CONCLUSIONS

It is necessary to recognize the contribution and clarifications that scientific value relativism has made, especially to the following four aspects. Firstly, the need to distinguish clearly between at least three types of alleged knowledge: intersubjectively transmissible knowledge, intersubjectively non-transmissible knowledge, and speculative knowledge. Secondly, to recognize the considerable objective contributions that science can make to estimating the proposed axiological values and criteria. Thirdly, the legitimacy of the speculative—and recognized as such—discussion on metaphysical problems by scientists, contributing their technical knowledge of a scientific nature to that discussion. And, fourthly, the legitimacy of a scientific attitude that allows for religious inspiration and directs its attention towards facts and causal regularities, provided that the ensuing scientific research remains free of religious opinions and convictions (Brecht, 1959, p. 488).

Once the “relative” relativism of values has been substantiated from a scientific perspective, and given the presence of certain universal elements in the nature of man, we should return to the question posed at the beginning of this paper: If it is possible to make an objective value judgement on specific issues such as abortion, euthanasia, capital punishment, genetic manipulation, homosexuality, and other similar ones, what should that judgement be, and what type of legal treatment should these issues receive?

In any case, it is essential to take a self-effacing stance and to state, as did the theoretician and philosopher of science Karl Raimund Popper (1902-1994), from the perspective of “critical rationalism”, that the quest for truth is an eternal, limitless quest, inasmuch as it renounces the idea of a knowledge endowed with the guarantee of truth and, as a consequence, extends, as a matter of principle, uncertainty to all forms of human knowledge (Popper, 1976; Russ, 2005, pp. 1733-1740). In the same vein, in a private conversation that I had the opportunity to hold with the exceptional Jesuit pedagogue, jurist, and philosopher Luis Vela—the only European guest at a conference on anthropology held in the Philippines in 1972, which was attended by both atheist and religious philosophers—he revealed to me the conclusions at which he had arrived during the discussions there. As man’s knowledge increases arithmetically, he discovers that his lack of knowledge multiplies and grows geometrically. In sum, man’s knowledge knows no bounds and, consequently, it is a mystery per se.

Nor do we cease to be self-effacing if we accept, as Brecht did, that this same quest, that eternal path of truth and, accordingly, justice, is in itself an encounter with both in man’s subjectivity: notwithstanding possible errors in the conclusions, the real honesty of our reasoning is subjectively a fair and true act. However, this alone is not sufficient, since the field of law is, above all, objective. Thus, versus the questions posed here, it could be said that, from a moral perspective, the answer should be sought in this honest quest for the fairest, employing to this end the postulates that the scientific method offers us as universal. The answer may possibly be relative. Nevertheless, if our moral analysis of these issues is indeed honest and rigorous, I dare say that such relativism would cease to exist in the vast majority of cases and we would encounter universally accepted conclusions. What the analysis of these questions perhaps lacks is rigor in the empirical method employed (Bambrough, 1969, pp. 37-53).

As to the legal treatment that these questions should receive, this is an aspect closely linked to the foregoing. However, it should be considered that, despite the assertion already made by St Thomas (2018 [1485], Q. XC) that law should not prohibit all unjust actions, but only the worst or those with the greatest social repercussions, nor should we forget the pedagogical character that legal rules possess and the consequences that their specific formulation has for social morality.

Perhaps we should endorse Rafael Hernández Marín’s (1986, p. 130, n. 7, p. 210; own translation) insights into ethical relativism: “Ethical relativism is a dark doctrine. This is chiefly due to the fact that the proponents of that doctrine do not clarify what it involves. Furthermore, it seems to be a jealously guarded secret” (Maciá Manso, 2008).

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