

# LAW, DISCOURSE AND POWER: A CRITICAL REALIST APPROACH

## *DIREITO, DISCURSO E PODER: UMA ABORDAGEM REALISTA CRÍTICA*

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**Abstract:** This essay aims to propose a theoretical model for legal discourse capable of simultaneously explaining the processes of the emergence of Law and its dialectical relationship with the deep strata of reality. The central hypothesis is that Critical Discourse Analysis (CDA), particularly the dialectical-relational approach proposed by Norman Fairclough, when articulated with Roy Bhaskar's critical realist ontology, offers the necessary theoretical-methodological resources to overcome the limitations of traditional approaches, enabling a conception of Law as a socio-historical practice marked by structural contradictions (antinomies) and as an intermediate entity mediating the relationship between social structure and human

**Resumo:** Este ensaio tem como objetivo propor um modelo teórico para o discurso jurídico capaz de explicar, simultaneamente, os processos de emergência do Direito e sua relação dialética com os estratos profundos da realidade. A hipótese central é que a Análise Crítica do Discurso (ACD), particularmente a abordagem dialético-relacional proposta por Norman Fairclough, quando articulada à ontologia do realismo crítico de Roy Bhaskar, oferece os recursos teórico-metodológicos necessários para superar as limitações das abordagens tradicionais, possibilitando uma concepção do Direito como uma prática sócio-histórica marcada por contradições estruturais (antinomias) e como uma entidade intermediária que medeia a relação entre a estrutura social e a agência humana.

**Palavras-chave:** Realismo crítico; Análise Crítica do Discurso; Discurso jurídico; Poder; Antinomismo; Estratificação.

## 1. Introduction

The linguistic turn promoted by philosophy at the beginning of the twentieth century shifted the axis of philosophical reflection from consciousness to language, evidencing that the latter is not limited to describing the world, but actively constitutes it. In the legal field, this inflection generated profound transformations in theories of interpretation and normative application. Authors such as Karl Olivecrona, H. L. A. Hart and Ronald Dworkin incorporated the postulates of the *philosophy of language* to reconstruct the concept of Law. However, as argued in this essay, such incorporations remained insufficient to produce a critical theory that satisfactorily describes the relations between legal language, power and society.

The problem that guides this investigation is: *how to articulate a theory of legal discourse capable of simultaneously explaining the processes of emergence of Law and its dialectical relationship with deep strata of reality?* The central hypothesis is that Critical Discourse Analysis (CDA), especially in its dialectical-relational strand proposed by Norman Fairclough, when articulated with the ontology of critical realism of Roy Bhaskar (and collaborators), offers the theoretical-methodological resources necessary to overcome the limitations of traditional approaches; enabling a conception of Law as a socio-historical practice marked by structural contradictions (antinomies) and as an intermediate entity that mediates the relationship between social structure and human agency.

To develop the argument, the essay is organised in three movements. First,

a critique is made of the main legal theories that incorporated the linguistic turn. Then, CDA is presented in its articulation with critical realism, reconstructing Law as an antinomial socio-historical practice and as an intermediate entity. Finally, legal discourse is defined as the semiotic component of this practice, analysing its relationship with power and social transformation.

## **2. The linguistic turn in legal theory: appropriations and limitations**

The linguistic turn, whose fundamental pillars are the works of Gottlob Frege, Ludwig Wittgenstein and John Langshaw Austin (Marmo, 2012), brought two central consequences for the understanding of legal language: the transition from the representational to the pragmatic conception of language (language as action) and the emphasis on contextualised use as determinant of meaning, to the detriment of theorisations that privilege the static correspondence between words and things. Wittgenstein, especially in his *Philosophical Investigations* (2005), demonstrated that the meaning of a word is its use in language, dissolving the idea that words refer to fixed entities in the world. Austin (1990), in turn, by distinguishing constative from performative utterances, evidenced that certain uses of language are not limited to describing reality, but alter it. In saying "I promise", "I baptise" or "I sentence", the speaker does not report a promise, a baptism or a sentence; he performs them. This discovery had decisive consequences for the understanding of normative language, for it showed that the speech of the judge, in pronouncing a conviction, does not describe an event that would occur independently of his speech, but constitutes the conviction itself as an institutional fact.

John Searle (1969; 1995) advanced on these bases, systematising the theory of speech acts and applying it to the understanding of social institutions. For Searle (1995, p. 26), institutions, including Law, are constituted by rules of the type "X counts as Y in context C". Money, property, marriage, the judicial sentence, all these institutional phenomena exist because there is a collective assignment of function to certain elements, an assignment that is carried out and maintained through speech acts. The consequence for Law is unequivocal: legal reality is, to a large extent, a linguistic reality, not in the sense that bodies, prisons or properties do not exist, but in the sense that these material elements only acquire legal status through speech acts that qualify them as such.

The first and most radical appropriations of the linguistic turn by legal theory

are found in Scandinavian Legal Realism. Karl Olivecrona (1971) argued that the language of Law predominantly performs directive and emotive functions, and not descriptive functions. For Olivecrona, jurists commit a fundamental error when they treat concepts such as "subjective right" or "legal duty" as if they referred to real entities in the world. In truth, such expressions are empty words, devoid of empirical referents, but which fulfil essential communicative and practical roles: to say that someone has a "right" is not to describe a property of that person, but to perform a speech act that directs the conduct of others, especially judges and authorities, towards protecting certain interests. Alf Ross (1994), disciple and critic of Olivecrona, deepened the approach in a behaviourist perspective: for Ross, Law is not a set of valid norms in a metaphysical sense, but a set of predictions about the behaviour of judges. To affirm that a norm is "valid" means to say that it will probably be applied by the courts and, at the same time, to express an attitude of acceptance of that application as justified. Although Scandinavian Realism has been criticised for its psychologistic reductionism and for its difficulty in explaining the normativity of Law, its contribution was lasting: for the first time, a theoretical movement in Law fully incorporated the linguistic turn, recognising that the meaning of legal terms does not reside in extra-linguistic referents, but in their institutional uses.

It was Herbert L. A. Hart, however, who operated the most systematic and notorious incorporation of the philosophy of language into legal theory. In the preface to *The Concept of Law*, Hart (2001) expressly declares his debt to ordinary language philosophy, particularly the work of Wittgenstein and Austin. Unlike Scandinavian Realism, Hart did not seek to reduce Law to psychological facts or predictions of behaviour, but to understand it from the effective use of its language by participants in the legal system. Hart (2001) applies the Wittgensteinian idea that meaning lies in use to undo the old controversy between commands and habits. Against the jurist John Austin, who defined Law as commands of the sovereign backed by threats, Hart argues that this conception is insufficient to explain the difference between being obliged and having an obligation. Legal obligation, according to Hart (2001, p. 82-95), arises from accepted social rules, which the participants of the legal system recognise as justificatory standards of conduct, not merely as predictive standards of coercion. To explain this normative character, Hart resorts to the notion of rule of recognition: a secondary rule that specifies the criteria of validity of the other rules of the system. The rule of recognition is neither valid nor invalid; it is simply accepted as the ultimate criterion by the officials of the system, existing as social practice and, fundamentally, as linguistic practice. Furthermore, Hart incorporates the concept of open texture, developed by Waismann, to explain the indeterminacy

of legal language: rules have a core of clear meaning and a periphery of uncertainty, where judges exercise discretion (Hart, 2001, p. 124-136).

Ronald Dworkin, from a critical position in relation to the analytical tradition, pointed out the insufficiencies of the Hartian approach, proposing a shift from semantics to philosophical hermeneutics. Dworkin (2002) criticises the open texture model, arguing that Hart would have exaggerated the role of judicial discretion in hard cases, ignoring that judges, even when there is no clear rule applicable, decide based on principles: normative statements of greater generality and abstraction, which have a dimension of weight and orient decision in situations of conflict. Dworkin (1986) then proposes a reconstruction of Law as integrity: Law is not a disconnected set of rules with open texture, but an interpretive system in which past decisions must be reinterpreted coherently, as if they were the product of a single author seeking the best justification for Law as a whole. In this perspective, legal language is a means through which an interpretive community continuously constructs and reconstructs its Law.

Despite their undeniable contributions, the three theoretical movements examined share a fundamental limitation: all used the linguistic turn to reconstruct the concept of Law in its ontological, interpretive and logical aspects, but none developed a critical theory that connected legal language to power, ideology and social transformation. They failed to ask: how do linguistic uses in Law reproduce inequalities of class, race and gender? How does legal language naturalise perspectives that benefit certain groups to the detriment of others? How can the very "acceptance" of rules, so dear to Hart, be a product of ideological processes of internalisation that deserve to be unveiled? To answer these questions, it is necessary to resort to a distinct theoretical tradition: Critical Discourse Analysis.

### **3. Critical discourse analysis and stratification of legal discourse**

#### **3.1 Critical discourse analysis as a research programme**

If the linguistic turn shifted the axis of philosophical reflection from consciousness to language, Critical Discourse Analysis (CDA) represents the most radical unfolding of this movement within the scope of social and linguistic studies. More than a simple application of analytical tools derived from the philosophy of language, CDA constitutes a research programme that fully assumes the central postulate of the

turn – language as constitutive of social reality –, while at the same time imprinting on it an explicit political orientation: the denunciation of asymmetries of power reproduced and legitimised by discursive uses. Van Dijk (1998, p. 5) defines the approach as "dissident research" and describes it as a social movement of politically committed discourse analysts oriented towards social transformation. This normative dimension derives from the heritage of the Critical Theory of the Frankfurt School, notably from Jürgen Habermas, for whom language is also a medium of domination and social force (Chouliaraki; Fairclough, 1999, p. 15).

The connection between CDA and the linguistic turn can be approached through two levels of articulation. The first, of an epistemological order, concerns the shared rejection of naive objectivism: just as Wittgenstein demonstrated that meaning does not reside in a correspondence between words and things, but in the contextualised use of language, CDA refuses the notion that discourses are mere reflexes of a pre-discursive reality. Fairclough (2010) and Wodak (1996) maintain that discourse not only represents, but constitutes society and culture, maintaining with them a dialectical relationship. The second level, of a pragmatic order, goes back to the contributions of Austin and his theory of speech acts: by demonstrating that saying is, in certain circumstances, a mode of action, a form of producing effects in the world, Austin provided CDA with the basis to affirm that discourses are not mere descriptions, but active interventions in social reality.

Three great traditions emerged in the field of CDA: Teun van Dijk's sociocognitive model, which emphasises the mediation of mental representations between discourse and society; Ruth Wodak's historical-discursive model, which privileges the *longue durée* and the historical-institutional framing of discourses; and Norman Fairclough's dialectical-relational approach, which will be adopted in this work. Fairclough (1998, p. 72-78) proposes a three-dimensional analytical architecture (*text*, *discursive practice* and *social practice*) which will be examined in detail below. Unlike van Dijk (whose focus is cognitive mediation) and Wodak (whose focus is historical memory), Fairclough privileges textual materiality and its dialectical connection with social practices of power and ideology. This emphasis makes him particularly suitable for the analysis of legal discourse, in which the materiality of the sentence, the petition or the precedent (its lexical choice, its argumentative structure, its intertextuality) can be directly correlated with mechanisms of domination and resistance.

The central points of Fairclough's theory of discourse (1998; 2003; 2010) are based on the conception that language is a form of social practice, which implies recognising a dialectical and internal relationship between discourse and

other elements of social life. This relationship is dialectical because discourse not only reflects or represents the social world, but also actively constitutes it, being simultaneously shaped by it. In this movement, social practices are seen as unstable articulations between discursive and non-discursive elements, so that changes in discourse can imply changes in the practices and social structures themselves, and vice versa (Chouliaraki; Fairclough, 1999).

### **3.2 The articulation between Norman Fairclough and critical realism**

The articulation between Fairclough's approach and Roy Bhaskar's critical realist ontology is the central point of this proposal. Critical realism (Bhaskar, 1998, p. 206-215) distinguishes three domains: the *real* (structures and causal mechanisms), the *actual* (events that occur when mechanisms are activated) and the *empirical* (experiences of agents). Fairclough, Jessop and Sayer (2002, p. 2-3) demarcate their adherence to critical realism, postulating that the stratified ontology of reality is fundamental to avoid two errors: reducing discourse to the empirically observable (empiricism) or treating it as an autonomous domain (discursive idealism).

In Fairclough's three-dimensional model, each level of analysis corresponds to a domain of reality. The *text* corresponds to the observable linguistic surface, that is, the domain of the *empirical*, the discursive experience of agents. In turn, the notion of *discursive practice* deals with the processes of production, distribution and consumption of texts, corresponding to the domain of the *actual*. Social practice, finally, concerns the broader context of institutions, relations of power and ideological structures; corresponding to the domain of the *real*, as it involves the deep causal mechanisms and generative powers from which observable phenomena emerge. As Fairclough, Jessop and Sayer (2002, p. 3) affirm, "semiotic structures exist independently of their actualisation in specific texts, and have causal powers which may or may not be activated".

One of the main obstacles in the development of the Faircloughian model is the development of the argument of semiosis as endowed with transfactual efficacy, that is, with its own causal powers. Fairclough, Jessop and Sayer (2002, p. 2-4) face the issue, arguing that semiosis produces real effects. To do so, they resort to the realist critique of the Humean notion of causality. In critical realism, *causality* is about generative mechanisms (Bhaskar, 1979; Collier, 1994). Understanding the way semiosis produces effects concerns a search for its causal mechanisms.

Fairclough, Jessop and Sayer (2002, p. 4) identify that semiosis involves mech-

anisms such as *reference* (capacity to point to objects or relations in the world), *validity* (mobilisation of claims of truth, sincerity and normative adequacy), *intertextuality* (articulation of different discourses, genres and styles) and *texturing* (work of articulation of semiotic elements in the process of textual production). These mechanisms do not operate in isolation; they are overdetermined (and dialectically connected) by extra-semiotic structures (relations of power, institutions, materiality).

Bhaskar's *transformational model of social activity* (TMSA) (1998, p. 206) postulates that society is simultaneously condition and product of intentional human action. Structure constrains and enables action; action reproduces or transforms structure. In adherence to this postulate, Fairclough, Jessop and Sayer (2002, p. 5-7) demonstrate that semiosis is a mechanism of mediation between structure and agency, by proposing that semiosis operates through three interrelated dimensions: variation (new discourses, genres or styles emerge from the creativity of agents), selection (certain semiotic forms are privileged over others, due to relations of power and hegemony) and retention (selected semiotic forms are institutionalised, incorporated into the *habitus* of agents and materialised in practices and artefacts).

This evolutionary semiotic model allows us to understand how *legal discourse* reproduces structures of domination (by selecting and retaining discourses that legitimise private property, judicial hierarchy, the neutrality of the State) and, simultaneously, how it can transform them (when subaltern agents introduce new discourses, reinterpret principles or strain established genres).

According to Fairclough, Jessop and Sayer (2002, p. 5-6), semiosis is dialectically related to other moments of social practice: material activity, social relations, mental phenomena and the natural world. This connection is ontological, not merely epistemological. Semiosis, therefore, presupposes bodies and minds (embodied agents, with intentionality, needs and desires), non-linguistic practical knowledge (skills, dispositions, *habitus* that precede and accompany language), materiality (institutions, technologies, spaces, objects) and temporality/spatiality.

This articulation allows CDA to escape both discursive idealism (which reduces the social to the linguistic) and reductive materialism (which treats discourse as a mere epiphenomenon of the economic infrastructure). Discourse is a constitutive moment of social practice, but not the only one; maintaining with the other moments a relationship of dialectical internalisation, that is, mutual interpenetration without reduction.

Transposing these theoretical presuppositions to Law, we understand *legal discourse* as irreducible to a purely linguistic or logical-formal dimension. It is constituted as a materially situated practice, involving asymmetrically positioned

bodies in the ritualised space of the courtroom: the citizen who demands or is demanded, the judge, the prosecutor, the lawyer, institutions that materialise and stabilise specific modes of interaction (the courthouse building, the prison, the judicial archives), technologies of registration and circulation of meaning (the court records, the systems of precedents, the jurisprudential repositories) and, above all, relations of *power* that precede, cross and organise each of these elements. Critical analysis of legal discourse, in this perspective, cannot be content with the naive description of textual structures or with the insulated hermeneutic reconstruction of meanings; it must necessarily connect the discursive surface (the *legal norm* materialised in its multiple forms, whether a decision, a law, a normative act, etc.) to the extra-discursive strata that are underlying and conditioning it and which are, simultaneously, reproduced or strained by it.

## 4. Law as an antinomial socio-historical practice and as an intermediate entity

### 4.1 First dimension: Law as antinomial socio-historical practice

From a critical realist perspective (Norrie, 2005, 2010; Bhaskar, 1979, 1989, 1998, 2008), the *concept of Law* must be apprehended from two complementary dimensions. The first admits it as an *antinomial socio-historical practice*, that is, as a contradictory phenomenon, situated and shaped by structural tensions. The second dimension conceives it as an *intermediate entity*, operating within practice, concerning the processes of acquisition of the skills and repertoires necessary for social actors engaged in legal practice to be capable of reproducing or transforming it.

The first dimension is of an ontological nature. It is a matter of answering the question "what is Law?" not through technical-dogmatic definitions, but through a characterisation of its contradictory and historically situated nature. To this end, recourse is made to the work of Alan Norrie (2005; 2010) and its anchoring in the critical realist tradition. Norrie (2005, p. 3) starts from the observation that Western liberal Law is essentially contradictory (that is, antinomial). The antinomies, in this perspective, are not defects between analytical categories within legal rationality, failures that could be eliminated with better systematisation or more refined hermeneutics. On the contrary, they are deep expressions of the historical

tensions of modernity itself (Norrie, 2005, p. 8). In other words, Western Law since modernity is not contradictory despite being a historical product; it is contradictory specifically because it is historical, because it carries within itself the marks of the conflicts, class struggles and asymmetries of power that constituted it and continue to constitute it continuously as a historically situated phenomenon.

Norrie (2005, p. 12) identifies a chain of antinomies that runs through the entire modern legal phenomenon, from its most abstract categories to its most concrete applications. These antinomies can be synthesised in three fundamental axes. The first axis is the *irresolvable tension* between *abstract universality* and *concrete particularity*: modern Law operates with universal categories, the subject of law is, in theory, any person, but this universality collides with the concrete particularity of real subjects, who are profoundly unequal in terms of economic power, cultural capital and social recognition. Law intends to treat as equals those who are unequal, producing as an effect the reproduction of inequality. The second axis is the *irresolvable tension* between *formal justice* and *substantive justice*: formal justice requires that equal cases be treated equally, while substantive justice requires that treatment take into account the concrete differences between subjects. Liberal law oscillates between these two poles, never resolving them definitively. The third axis is the *irresolvable tension* between *abstract individual* and *concrete sociality*: modern Law is, from its self-image, a Law of individuals,<sup>1</sup> but collective relations do not have sufficient legal existence unless translated into individualising categories, losing, in this translation, part of their transformative power (Norrie, 2005, p. 45-50).

These three antinomies are not independent of each other; they articulate and reinforce each other mutually. Abstract universality is the logical correlate of formal justice, and both presuppose the abstract individual. Concrete particularity is the correlate of substantive justice, and both refer to concrete sociality. Modern Law oscillates permanently between the *tension* of these poles, without ever resolving it. This oscillation is not accidental, but a structural necessity: liberal Law needs universality to affirm its legitimacy, particularity to apply the law to concrete

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<sup>1</sup>Although the notion of "collective rights" is already theoretically developed and there are procedural resources such as class actions for their protection, this instrumental framework is relatively recent (dating mainly from the mid-twentieth century) and has not yet been fully incorporated in all Western countries. Switzerland is the most emblematic case of resistance, having formally rejected in 2025 the introduction of collective redress mechanisms for fear of an "Americanisation" of the system (Conrad Hari et al., 2025), while countries such as the United States, although they have consolidated instruments such as class actions, maintain a strong individualist legal tradition that frequently strains the application of these rights. This panorama reveals that, in the West, the predominantly individual-centred approach still persists in several nations, and the full incorporation of "collective rights" as effective procedural instruments remains an ongoing and theoretically and geographically unequal process.

cases, formal equality to maintain the appearance of neutrality, substantive justice to respond to demands of vulnerable groups, the abstract individual to ground subjective rights and concrete sociality to not become entirely unreal. The antinomies are, thus, constitutive of modern Law.

## 4.2 Second dimension: Law as intermediate entity

The second dimension of the proposed concept of Law is that of *intermediate entity*. To understand it, it is necessary to resort to the ontology of critical realism and the social theory of Margaret Archer. Bhaskar (1998, p. 206-215) distinguishes three domains of reality: *real*, *actual* and *empirical*, and proposes the transformational model of social activity (TMSA), according to which *society* is simultaneously condition and product of intentional human action. Between the two poles (*structure* and *agency*) opens the analytical necessity of the existence of an *ontological hiatus*, that is, a space of mediation that cannot be reduced either to agency or to structures. This *hiatus* is precisely the *locus* of production of the conditions of existence of social practices.

The *intermediate entities* connect, in a dialectical way, the domain of the *real* (with its structures, causal powers and generative mechanisms) and the domain of the *actual* (with its concrete events and intentional actions). According to Bhaskar (1998, p. 215), *social structure* is a necessary condition and a means for *intentional action*, but *intentional action* is also a necessary condition for the reproduction or transformation of *social structures*.

At this point, a central analytical distinction imposes itself: the notions of Law as *antinomial socio-historical practice* and *intermediate entity* do not concern the same phenomena; they name different moments of social stratification and respond to distinct processes. At the substantive ontological level, one asks what Law is, and the answer is that Law is a *socio-historical practice* marked by its *antinomialism*. At the functional ontological level, one asks "how" Law emerges, "how" the conditions of its reproduction occur, and the answer is that Law operates as an *intermediate entity*, situated analytically between *structure* and *intentional agency*. These are not two distinct things that relate externally, but two aspects of the same phenomenon. The importance of this distinction is that it allows avoiding two fallacies (reductionisms): (i) reifying Law as if it were a static instance, entirely determined by social structures and, therefore, disconnected from human agency, or (ii) dissolving it in agency, as if it were a mere effect of individual decisions, ignoring its causal powers, that is, its transfactual efficacy.

### 4.3 The processes of legal socialisation

Thus, the notion of *intermediate entity* does not designate a thing, but a relational process: the process through which Law operates *discursive mediation* between structure and agency. Law as a mechanism of mediation operates through a dimension of socialisation. For Bhaskar and Archer, socialisation is the process by which social agents, engaged in socially defined positions, access repertoires, internalise modes of interaction and representation of reality, and shape their identities according to the normative expectations of the practice in which they are inserted. Archer (1995; 2000) developed, from the Bhaskarian TMSA, the morphogenetic approach, which distinguishes three analytical moments: (1) structural conditioning (preexisting structures that constrain and enable action); (2) socio-cultural interaction (process in which agents, in their interactions, reproduce or transform these structures); and (3) structural elaboration (result, whose change or reproduction feeds back the cycle). Socialisation occurs in the second moment: the process by which agents, when interacting, when discursively engaging in practices, internalise structures as repertoires for action and, in doing so, either reinforce them or strain them to the point of their reproduction (or transformation).

Transposing this model to Law, legal practice is a field of specific socialisation (differentiated and irreducible). Legal socialisation involves the internalisation of repertoires for action: subject positions, procedures, rites, deadlines, forms of petition, technical language, hierarchies of precedents, hermeneutic principles. The judge who pronounces a sentence does not need to think about each step of the procedure; he performs it as a second nature, because legal practice was internalised as *habitus*.<sup>2</sup> Internalisation also includes modes of representing reality: certain categories, such as "guilty/innocent", "lawful/unlawful", "property/occupation", become the lenses through which the legal world is apprehended. It involves, finally, the shaping of identities: the "judge", the "defendant", the "witness" and the "lawyer" are not mere functional roles, but subject positions that carry with them normative expectations, forms of treatment, emotional repertoires and ways of speaking and of silencing.

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<sup>2</sup>Archer (2010), in "Routine, Reflexivity, and Realism", argues that the concept of *habitus* is adequate to describe action in periods of morphostasis (structural reproduction), where social circumstances are stable. However, she argues that in modern contexts of morphogenesis (structural transformation), characterised by rapid changes and greater variety of opportunities, *habitus* loses its capacity to provide habitual guidelines for action. It is in this scenario that reflexivity becomes imperative and inescapable for agents to be able to navigate new and uncertain situations. Therefore, while Bourdieu emphasises social reproduction through *habitus*, Archer emphasises social change driven by reflexivity. Despite the fundamental opposition between these two authors, theorists such as Dave Elder-Vass (2007) argue that the two theories can be reconciled. They propose that social action is shaped both by non-conscious dispositions (*habitus*) and by conscious reflexive decisions, operating at different levels or in a continuous interaction.

Learning Law is also learning a way of being.

Crucially, this *socialisation* occurs within *practice*, as an operative mechanism for Law to carry out this mediation between *structure* and *agency* and, thus, be capable of reproducing society. Law, therefore, does not exist *outside* nor *before* socialisation; it is, diachronically, this process of socialisation and social practice.

This conception has radical implications for understanding agency in Law: the agency of social actors engaged in legal practice is never entirely free, for the agent is always constrained by the repertoires he has internalised, by the positions he occupies and by the structures that condition him. But agency is also not strict determinism, for socialisation involves active dynamics of appropriation. The agent can, albeit within narrow limits, produce displacements in the internalised repertoires. This possibility of transformation occurs at the edges of *antinomialism*, in the cracks of open texture, in the moments when the structural contradictions of Law are strained to the breaking point. This is because, as Norrie (2005, p. 49) affirms, legal practice involves a set of restrictions inscribed in the repertoire of legal rules, but this limitation is not absolute: the interpretive movement itself, the tension between dogmatic construction and the concrete case, can produce fissures and transformations.

## 5. Legal discourse in stratified perspective

### 5.1 Defining legal discourse

Having established the notion of Law as *antinomial socio-historical practice* (and as *intermediate entity*), it is now necessary to delimit a concept for *legal discourse* from the relations between the concepts developed so far. The proposed definition is as follows: *legal discourse corresponds to the semiotic component both of the antinomial socio-historical practice and of its dimension as an intermediate entity, especially as regards the latter, we will say that the processes of legal socialisation that produce subject positions and ensure their internalisation by social actors and, with this, enable the reproduction or transformation of society, are discursively mediated.*<sup>3</sup>

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<sup>3</sup>As regards the processes of socialisation, we articulate with the Bhaskarian transformational model of social activity (TMSA), as an investigative resource, Rom Harré's positioning theory and the modes of reflexivity, within the scope of Margaret Archer's Theory of Morphogenesis. The process of positioning, as conceived by Davies and Harré (1990), occurs discursively and immanently in the concrete flow of interaction, where subjects, when engaging in discursive practices, are constantly situated in subject positions that emerge from the narrative lines and speech acts in progress, without there being a prior transcendental structure that rigidly determines these places, but rather a dynamic and often contradictory negotiation that constitutes subjectivity

Such a definition integrates two fundamental theoretical layers: on the one hand, the *structurally contradictory nature of Law*, which manifests itself at the semiotic level through the marks of structural contradictions observable in legal discourse (between universal and particular, between formal and substantive, between individual and sociality); and on the other, the *mediating* function of Law between structure and agency, which is carried out through discursive processes of socialisation, in which engaged agents internalise repertoires, modes of representation and identities, ensuring the conditions of reproduction of the system.

## 5.2 Fairclough's three-dimensional model applied to Law

Fairclough (1998; 2003; 2010) proposes that every discursive event must be analysed simultaneously as *text*, as *discursive practice* and as *social practice*. In the case of Law, this includes the analysis of judicial sentences, petitions, opinions, laws and parliamentary debates, that is, *legal texts*. One asks, for example: how was the figure of the defendant discursively constructed in the sentence? What meanings were mobilised to describe him? How was the legal argumentation structured? Textual analysis is the first moment of access to the empirical data, to the discursive surface that can be observed and described from the legal text.

At the level of *legal discursive practice*, the processes of production, distribution and consumption of the text are analysed. In the legal scope, this involves questions such as: who produced the text? In what institutional context? With what objectives? Under what temporal, procedural and hierarchical constraints? How was the *legal text* produced? How does it circulate? Where is it published? How does it circulate through the media? How does it reach the knowledge of the parties and society in general? How is the text interpreted (consumed) by its different recipients?

In turn, *legal social practice* is the broader context of institutions, relations of power, ideological structures and hegemonic struggles that shape and are shaped by the underlying levels. Social practice belongs to the domain of the *real*, that is, to the

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itself as multiple and provisional. Complementing the limitations of this synchronic approach with Margaret Archer's stratified and diachronic perspective, it is crucial to recognise that these positional negotiations do not occur in a vacuum, but are invariably mediated by the historical-temporal trajectory of agents, whose previous socialisations, internalised as *habitus* and constantly filtered by an internal reflexivity, operate as a temporal background that gives thickness and continuity to the self. Archer (2011) reminds us that subjectivity is not merely an ephemeral product of momentary discourse, but emerges over time through a continuous dialogue between the subject's ultimate concerns, his reflexive capacity to monitor and evaluate situations and the structural contingencies he encounters, so that discursive positioning in each interaction is always appropriated and resignified in the light of a biographical past and a life project, generating, thus, a subjectivity that, although discursively shaped, maintains a personal agency that unfolds and consolidates in the historical duration of each existence.

causal mechanisms, deep structures and generative powers that explain the observable phenomena at the levels of text and discursive practice. When we deal with *legal social practice*, we must consider as underlying mechanisms: the division of social classes, which determines who has access to justice; gender relations, which influence the interpretation of crimes such as feminicide or practices of gender violence or even the recognition of women's sexual and reproductive rights; racial hierarchies, which manifest themselves in the selectivity of the penal system; the economic structure, with the right to property that grounds and organises capitalism; political institutions and their modes of distribution of power; and hegemonic struggles, that is, the multiple social tensions that give rise to Law and cannot be dissociated from it.

### 5.3 Legal interdiscursivity and connection with the extra-discursive

One of the most frequent risks in discursive approaches is textual enclosure, the idea that semiosis ontologically exhausts reality. Contrary to this risk, Norman Fairclough's social theory of discourse, in its critical realist anchoring, refuses this kind of fallacy.<sup>4</sup> Thus, *legal discourse* maintains a dialectical connection with non-discursive practices, that is, with material activity, with social relations of production and power, with mental phenomena and with the natural world. This connection is ontological, not merely epistemological. In this sense, Chouliaraki and Fairclough (1999, p. 6) are emphatic in postulating that discourse is dialectically related to

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<sup>4</sup>For Roy Bhaskar, the epistemic fallacy consists of the logical-philosophical error of improperly transposing questions relating to being (ontology) to the scope of knowledge (epistemology), thus reducing reality to its cognitive apprehension. In "Enlightened Common Sense: The Philosophy of Critical Realism" (2016), Bhaskar formulates this critique by demonstrating that such a fallacy amounts to the assumption that statements about being can always be translated into statements about our knowledge of being, which suppresses the analytical distinction between the object of investigation and the theoretical constructs employed to apprehend it. The epistemic fallacy is directed, in particular, against post-structuralist and linguisticist approaches that subscribe to the so-called "linguistic turn", according to which social reality is exhausted in its discursive representations. For Bhaskar, such a position commits the fallacy by confusing the intransitive dimension of reality, that is, the causal mechanisms and objective structures that operate independently of perception or discourse, with the transitive dimension of knowledge, which refers to the historically situated theories, concepts and languages through which science apprehends the world. By denying the existence of a stratified reality, composed of three distinct ontological domains: the empirical (experiences), the actual (events) and the real (mechanisms and causal structures), such approaches prevent scientific investigation from accessing the underlying generators of social phenomena, which subsist beyond any linguistic description. Language, therefore, is recognised by Bhaskar as an indispensable mediating resource, but never as uniquely constitutive of the very existence of the real, which is why science must endeavour to unveil the deep structures that persist independently of the knowledge that may be had of them.

other dimensions of reality, not being reduced to any of them.

*Legal discursive practice* does not occur only at the semiotic level: it involves *bodies* (the materiality of the courtroom, the attire of judges, the position of defendants), *relations of power* (the asymmetry between who judges and who is judged), *material activities* (the production of evidence, the administration of prisons) and *mental phenomena* (intentions, beliefs, values). Legal discourse figures as one of these moments. The dialectic between them means that each moment internalises traces of the others, without being reduced to them. Legal discourse is constituted by material structures, but is also constitutive of them, for a sentence can trigger a strike, a legislative change or a political crisis. There is no "outside of discourse" in the sense of absolute exteriority, as if there were a brute reality entirely independent of language. But there are other moments of social practice — material activity, social relations, mental phenomena — that maintain with discourse a dialectical relationship of mutual internalisation without reduction.

## 5.4 Legal discourse, antinomism and power

The relationship between Law and power constitutes one of the central themes of contemporary legal critique, being addressed systematically by multiple and distinct theoretical traditions. For Luis Alberto Warat, Law does not act as a mere neutral instrument of social regulation, but as a fundamental mechanism of legitimation and reproduction of existing power structures. According to the Argentine legal philosopher, political semiology aims to analyse signification as an instrument of social control, as a normalising and disciplinary strategy of individuals, as a formula producing consensus, as an illusory stage of values of representation, as a regulating fetish of social interaction (Warat, 1995, p. 9).

This critique deepens in his work "*A Pureza do Poder*" (*The Purity of Power*), where Warat demonstrates how legal epistemology, especially in the Kelsenian tradition, contributes to the legitimation of power by excluding from legal analysis political, economic and ideological factors, creating the illusion of a neutral discourse that, in truth, "fulfils the function of legitimating the very exercise of State power" (Warat, 1983, p. 24, our translation).

The process of naturalisation of the presence of power within legal practice occurs, fundamentally, through the *stereotyping* and *fetishisation* of legal discourse. Warat defines stereotypes as "terms employed to obtain the consolidation and acceptance of the dominant values of society" (Warat, 1995, p. 36, our translation), which allow "introducing, under the supposed appearance of an objective description,

an ideological dimension not formulated in legal language" (Warat, 1995, p. 37, our translation). Discursive stereotyping, Warat affirms, fulfils a fundamental role, for it subtly covers significations with a canonical form, recovers them for the dominant institutional metaphysics, ornaments them with truths, makes them ahistorical and, finally, steals them from the original sense of their enunciation (Warat, 1995, p. 51).

This process is analogous to what Bhaskar identifies as "ontological monovalence", that is, the reduction of reality to a pure positivity, which eliminates the possibility of thinking negativity, absence and change (Bhaskar, 2008, p. 4-5). *Fetishisation*, in turn, operates through the presentation of social constructions as if they were natural or essential data, so that "legal culture can be seen as a fetishised discourse" (Warat, 1983, p. 29, our translation).

In the wake of debates on social processes of domination, Roy Bhaskar develops, in his work *"Dialectic: The Pulse of Freedom"*, a theory of power that distinguishes two fundamental modalities, providing a powerful analytical instrument for understanding the complex dynamics of domination and emancipation. *Power<sub>1</sub>* is defined as the "transformative capacity intrinsic to the concept of agency as such" (Bhaskar, 2008, p. 60), a creative and emancipatory capacity inherent in every human agent. Bhaskar emphasises that "every *power<sub>2</sub>* relation is simultaneously a *power<sub>1</sub>* relation, but the converse is not true" (Bhaskar, 2008, p. 60). *Power<sub>2</sub>*, in turn, is defined as the "transfactually effective capacity to achieve a direction against (i) the manifest wishes and/or (ii) the real interest of others" (Bhaskar, 2008, p. 60), dealing with generalised master-slave-type relations that manifest themselves in social structures of domination, exploitation, subjugation and control.

This distinction is fundamental for the analysis of complex social relations (among which Law is inserted) because it allows us to understand that power is not a monolithic phenomenon, but a dialectical relationship between the creative potency of agents and the structures that continuously constrain it.

The distinction between *power<sub>1</sub>* and *power<sub>2</sub>* illuminates the contradictory character of social relations, for the structures of *power<sub>2</sub>*, at the same time that they suppress and alienate the transformative capacity of agents (*power<sub>1</sub>*), depend on this capacity to reproduce themselves. Bhaskar argues that "it is in virtue of our complex biological constitution that human agents have the powers we do; while denying, against reductionism, that a power can be reduced to its material basis" (Bhaskar, 2008, p. 51). This tension between the creative potency of agents and the structures that constrain it is the motor of social dialectics. Furthermore, Bhaskar's theory provides an ontological basis for social critique and emancipation, for *power<sub>1</sub>* is the basis from which agents can recognise, criticise and transform relations of *power<sub>2</sub>*.

Bhaskar (2008, p. 169) affirms that "agents endowed with desires have an interest in removing the constraints on their freedom to satisfy their desires, their wishes and, more fundamentally, their needs". Emancipation, in this perspective, is not only the abolition of structures of oppression, but the full realisation of the transformative capacity of agents.

Articulating Bhaskar's theory of power and Warat's semiology of power enables analytical deepening in the legal field and, consequently, the critical understanding of the relations between Law, power and society.<sup>5</sup> The application of the notions *power*<sub>1</sub> and *power*<sub>2</sub> to Warat's theory can be established at some levels.

*Power*<sub>2</sub> corresponds to what Warat identifies as the "power of legal discourse", that is, the capacity of discursive and institutional legal structures to impose significations and control behaviours. Warat affirms that "legal discourses always make themselves heard to the subjects of power. Correspondingly, legal discourses, dependent on a complex and institutionalised emission, confer on these subjects the power of discourse" (Warat, 1983, p. 26, our translation).

In turn, *power*<sub>1</sub> finds its correspondent in the Waratian emphasis on the transformative capacity of social agents, for "the semiology of power as a demystifying programme of the distinct discursive practices of law and the knowledge that legitimises them, also aims at the destruction of various organising myths of legal knowledge" (Warat, 1995, p. 9, our translation). This demystifying activity is, in itself, an expression of *power*<sub>1</sub>: the capacity of agents to criticise and transform the structures that constrain them (demarcating an ontological option in the Waratian epistemological development that dialogues with critical realist ontology).

Warat's analysis of *stereotyping* and *fetishisation* of legal discourse can be interpreted as an analysis of the specific generative mechanisms through which *power*<sub>2</sub> operates in legal practice. *Stereotypes* are "the nuclear element of the transmission of ideological contents" (Warat, 1995, p. 36, our translation), vehicles through which *power*<sub>2</sub> is naturalised and perpetuated, concealing its own nature as social construction and relation of domination.

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<sup>5</sup>Both authors start from a critique of the alleged neutrality of scientific and legal discourse. Bhaskar criticises the "epistemic fallacy" — the reduction of being to knowledge of being, which "functions merely to cover the generation of an implicit ontology, on which the domain of the real is reduced to the domain of the actual" (Bhaskar, 2008, p. 4). Warat, in turn, criticises the "principle of methodical purity" of the Pure Theory of Law, which "constitutes, by definition, the starting point and the vertebral methodological principle of the theory" (Warat, 1983, p. 17, our translation). Both authors identify in the pretension of purity and neutrality a mechanism of concealment of the relations of power that structure knowledge and social practice. The common critique unfolds into an analysis of the ideological function of legal discourse, in which Bhaskar argues that "the epistemic fallacy (...) merely masks the generation of an implicit ontology" (Bhaskar, 2008, p. 205), while Warat affirms that "the language of legal science speaks about something that is already language prior to this speech" (Warat, 1995, p. 19, our translation).

Seeking to unveil the relations of power in social practices, both authors emphasise the importance of *critique* as a method of unveiling relations of power. Bhaskar develops the concept of "*immanent critique*" as "the most basic form of critique (in philosophy, in science and in everyday life)" (Bhaskar, 2008, p. 26), while Warat proposes an "ideological (critical) reading that will reject certain interpretive clichés, placing us before their own silences, ambiguities, weaknesses and ideological effects" (Warat, 1983, p. 11, our translation).

Thus, analyses that articulate the analytical categories *power*<sub>1</sub> and *power*<sub>2</sub> allow a deeper understanding of the process of legal alienation operating in legal practice and, more specifically, in its socialising dimension (intermediate entity), for, as described by Warat, legal culture produces an imaginary reality (placed in the perspective of common sense) that makes naturalism prevail: a true make-believe world instituted as the natural reality of Law (Warat, 1995, p. 60). Legal alienation is thus the separation of agents from their critical and transformative capacity (*power*<sub>1</sub>) through the internalisation of the fetishised significations of *power*<sub>2</sub>.

## 5.5 Antinomism and transformation: legal discourse as a field of dispute

The Bhaskarian transformational model of social activity, *mutatis mutandis*, can be extended to understand the structural contradictions constitutive of Law not only as constraints on agency, but also as possibilities of hegemonic struggle.

Legal discourse is, therefore, a field of dispute. Social movements can appropriate *stereotyped dogmas* such as equality, dignity and prohibition of social regression to produce social change. The right to equality was used by Black movements to combat structural racism; the right to freedom was used by feminist movements to conquer political and sexual rights; the right to housing and access to land was used by movements fighting for urban and agrarian reform.

However, this appropriation always occurs within narrow limits. Law is not a neutral tool that can be employed equally by anyone. The legal form has a structural bias: it is more easily mobilised to defend individual rights, of those who already have them, than to transform structural economic relations. The antinomies are simultaneously the condition of possibility of legal struggle (for they open interpretive breaches) and its structural limit, for the struggle must always wear the already existing language of Law.

Legal discourse is, therefore, a privileged *locus* for observing the dialectic between social reproduction and transformation. In it, ideology operates continuously

to naturalise domination, but in it also, the dominated can find breaches, resignify stereotyped dogmas and instrumentalise legal antinomies to evidence deep social structures, producing fissures in the dominant discursive order and opening paths for social transformation.

## 6. Conclusions

This essay started from the recognition that legal theories that incorporated the linguistic turn remained at the analytical-descriptive or prescriptive levels, without developing theoretical models capable of connecting legal language to relations of power, ideology and social transformation. Seeking to contribute to theoretical efforts to overcome this gap, we resorted to CDA, specifically to Fairclough's dialectical-relational approach in its articulation with critical realism. This articulation demonstrates how semiosis can be treated as a causal mechanism and how the dialectic between structure and agency is mediated by processes of variation, selection and retention of discursive forms. On this basis, we proposed a concept of Law in two complementary dimensions: as antinomial socio-historical practice and as intermediate entity (processes of legal socialisation). Legal discourse was then defined as the semiotic component of this practice, in which the dialectic between social reproduction and transformation is observed. The task of a critical analysis of legal discourse is precisely to identify both the mechanisms of reproduction and the moments of fissure, as well as to contribute to the struggle for a more transparent and substantially just Law.

## Declaration on the Use of Artificial Intelligence

During the preparation of this work, the authors used the ChatGPT tool (<https://chatgpt.com/>), version GPT-5.6, to revise spelling, agreement and orthography. After using the tool, the authors critically reviewed and edited all content, taking full and complete responsibility for the published manuscript, including any inaccuracies or errors.

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