

# THE ROLE OF LEGAL SCIENCE IN 19<sup>TH</sup> CENTURY SPANISH LIBERAL REFORMISM

## EL PAPEL DE LA CIENCIA JURIDICA EN EL LIBERALISMO REFORMISTA ESPAÑOL DEL SIGLO XIX

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**Resumen:** En el siglo XIX la sociedad española comenzaba a integrarse, muy rezagada y con sus particularidades socio-culturales, entre las sociedades *de la modernidad occidental capitalista*. Con sus diferencias y su “ser tradicional”, no podía permanecer ajena por más tiempo a un nuevo orden de configuración paradigmática de la realidad que, a su vez, per-formaba el orden de las cosas, los hechos y las categorías. De hecho, bien entrado el siglo XIX aún no se había embarcado con plenitud en los procesos de la modernidad occidental (secularización y democratización), porque tampoco podía asumir la ruptura con los valores culturales más enraizados, de sus costumbres y sus fueros medievales. El papel de la ciencia jurídica, especialmente a través de la escuela krausista, fue decisivo para el reformismo que la sociedad española necesitaba.

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**Abstract:** The truth is that 19th Century Spanish society began to integrate – with its unique socio-cultural particularities and somewhat later than other countries – into what we might call the world system of Western capitalist modernity, to the extent that it could – and indeed did – create the conditions for governing its own reproduction. Spanish society, with its differences and its “traditional way of being,” could not remain oblivious for any longer to a new order, a paradigmatic configuration of reality that, in turn, shaped the order of things, events, and categories. Indeed, well into the 19th Century, Spain had not yet embarked fully on the processes of Western modernity (secularisation and democratisation). The role modern legal science has carried out a crucial part in the Spanish contemporary history. It was essential in the arrival to Spain of the process of the Age of Enlightenment, linked to the principles of secularization and democratization.

# I. Introduction

Krause's work first became known in Spain through one of his most famous disciples, Heinrich Ahrens, who, in 1838, was claimed to have written one of the most precise syntheses of his master's legal philosophy: *Cours de droit naturel ou de philosophie du droit*, translated into Spanish in 1841, by professors Eusebio María del Valle and Ruperto Navarro Zamorano, a translation that was known to Sanz del Río, the genuine precursor of Krausism in Spain<sup>1</sup>.

Let us begin by noting that the concern for law expressed within Spanish Krausism became evident from its earliest codes. Naturally, the most pressing question, therefore, is why the opus of the most neglected of German classical philosophers, through the work of Julián Sanz del Río, achieved such widespread acceptance in Spain? Why was it able to spread –especially through Francisco Giner de los Ríos– so quickly, to influence and remain influential for so long (even

after the disappearance of the 'Krausist School') to the extent of revolutionising the institutional functioning of State structures? This was especially true in the field of education; indeed the Free Institute of Education is a good example of this. The trail left behind by Krause "was not erased in Spain as Hegelianism was, leaving no trace other than certain socialist derivations. Its vitality left such a deep mark that, even after the individuality of the school had disappeared, its doctrines, now without seal or origin, blended into the circulatory torrent of general thought, encouraging explanations, books and conferences, dominating the sphere of law, and sending from his tomb a parting beam of light, as if linked to human consciousness by an irradiation that can never disappear"<sup>2</sup>.

It should be stressed, however, there was no 'Krausist School' in the strict sense of the term. Although for a long time, there were several generations of intellectuals open to its numerous legal, sociological, scientific, and anthropological implications, whose interventions in public and academic life in those years were brimming with the democratic-liberal transformation needed by political institutions, the secularisation of Spanish reality, and the consolidation of scientific instruments as a mechanism for human emancipation and progress. Use of the term 'generations' is certainly no exaggeration. Following the chronological criterion established by Prof. Elias Díaz, we could even talk about 'classes': The first 'class' or generation would include, among others, Valeriano Fernández Ferraz, Federico de Castro, Francisco

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1. Julián Sanz del Río, a Doctor of Law and Acting Professor of the History of Philosophy, left Spain in 1843, commissioned by the Government to ascertain and import doctrines and knowledge useful to the social and political transformation that our country needed in the 19th century. He headed to Germany, impressed by the reading of Ahrens' work, –two years previously he had advised the government to replace the subjects of Natural Law, the Principles of universal legislation and the Principles of public law with a Philosophy of Law fellowship– fascinated by Ahrens himself and somewhat urged on by Victor Cousin. In Heidelberg, he made contact with Krausist authors (Karl Röder, Herman Leonhardi, etc.) and from that moment onwards devoted himself to spreading the teachings of Krause through his Fellowship in the Amplification of Philosophy, awarded to him in 1856.

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2. Méndez Bejarano, M., *Historia de la Filosofía en España*, s.f., p. 466, in Abellan, J.L., *Historia Crítica del pensamiento español*, Barcelona, Círculo de Lectores, 1993, p. 511

de Paula Canalejas, Vicente Romero and Girón, etc., all born between 1832 and 1835; the second would consist of eminent disciples such as Nicolas Salmeron, Francisco Giner de los Ríos, Segismundo de Azcarate, Juan Uña, etc., all born between the years 1838 and 1842; and finally, the third 'class', the last generation of Sanz del Río's direct disciples, would encompass Urbano González Serrano, Manuel Sales y Ferré, and José de Case y Blanco, among many others. They were all born around the middle of the century, between 1845 and 1850<sup>3</sup>.

Alongside other interpretations, such as those of Manuel de Rivacoba<sup>4</sup>, which emphasise the mythical-spiritual and/or religious affinity that Spain's religious tradition found in the rational metaphysics of Krause, Elías Díaz makes the case in even more precise terms: "In my opinion, the main reasons for Krause's prevalence in Spain are rooted –in addition to their concurrence with certain historical features of the national temperament, psychology and culture – in the fact that his philosophy resonates more deeply with the political-cultural ideas of certain (...) sectors of Spain's progressive liberal bourgeoisie in the second half of the last century: ideas expressed formally and coherently by this group of Krausist intellectuals and institutionalists who, even though they were from that social class, were able to synthesise their ideological, political (driven by a genuine push for freedom), and material aspirations (making the case for socio-economic order based on private ownership compatible with that freedom). Without such concordance, the

way in which this philosophy took hold throughout Spain would be inexplicable. It is not, therefore, merely or mainly because it coincided with an immutable traditional way of being in Spain, characterised in somewhat abstract, a-historical and timeless terms. The concordance was more specific and temporal, responding to the world view held at the time and to all kinds of interests (economic, cultural, etc.), which were characteristic of this Spanish liberal progressive bourgeoisie in the second half of the last century, whose help would prove decisive"<sup>5</sup>

## 2. Why was Spanish liberal reformism so important?

Regardless of any concordance or resonance, the truth is that 19th Century Spanish society began to integrate –with its unique socio-cultural particularities and somewhat later than other countries– into what we might call the world system of Western capitalist modernity, to paraphrase Wallerstein<sup>6</sup> (world empires/world economies), to the extent that it could –and indeed did– create the conditions for governing its own reproduction. Spanish society, with its differences and its "traditional way of being," could not remain oblivious for any longer to a new order, a paradigmatic configuration of reality that, in turn, shaped the order of things, events, and categories.

Indeed, well into the 19th Century, Spain had not yet embarked fully on the processes of Western modernity (secularisation and

3. V. Díaz, E., *La Filosofía social del krausismo español*, Madrid, Edicusa, 1973, pp. 180-184.

4. V. Rivacoba, M., *Krausismo y Derecho*, Santa Fe, Ed. Castellví, 1963, pp. 19- 20.

5. Díaz, E., *La filosofía social del Krausismo español*, Op. cit., pp. 26 y 27. V. also p.37.

6. V. Wallerstein, I., *El moderno sistema mundial*, Madrid, s. XXI, 1979.

democratisation). But, it could also not break away fully from its most deeply rooted cultural values, customs and medieval laws:

(i) because there was major resistance and resentment in Spain to the philosophy of the Enlightenment and the processes of modernity. These sentiments were rooted in the second half of the 18th century and grew stronger following the triumph of the French Revolution<sup>7</sup>. From that point onwards, they became the cause of schism and clashes –which turned into fratricide during the 19th Century– between supporters of the different Spanish traditions (the old) –who called themselves “rancieros” (ancient/established) and “casticistas” (purist)– and advocates of the ideals of Enlightenment and Encyclopaedism (the new), that is, of the modernisation of Spain. Resistance that embodied a much more complex and profound struggle than the mere conservation of Spanish laws or respect for its traditions. It was a struggle for power, and tradition provided the pretext that the classes linked to the Old Regime needed for a national and religious crusade in defence of their old interests and prerogatives. It was, quite simply, “the entrenchment of a society of blind immobilism that rebuffs even the slightest attempts to reform, the smallest change and any suggestion that verges on even the most elementary rationality.”<sup>8</sup> To do so questioned their privileges and destroyed

their expectations regarding the regulation of social order.

(ii) because the exaltation of traditional values, with their roots and their customary laws, was already a constant, since their re-discovery at the hands of reactionary romanticism in a time of counter-revolution and traditionalism. Against the claims of universality, abstraction, homogeneity, that is, in the face of the transformations that the scientific paradigm effected on life, language and the socio-legal mode of being, these Spanish romantics championed the national, the religious, the local and the concrete. Against the progress of particular sciences, natural history, grammar and economics, the romantics brandished emotions, traditional values, language and social criticism. However, against this traditionalist romanticism there was another liberal and progressive romanticism, concerned with tradition but open to the reforms so desperately needed by Spanish society and culture. Progressive Spanish romanticism, especially literary romanticism, provided a spillway for tradition in the face of expectations of historical transformation brought into play by Western modernity. It was the cornerstone to the permanence of “Spain’s traditional way of being”. The cultural rift that modernity inflicted on the old traditions of medieval customary laws could thus be neutralised, adapting tradition to new changes. The romantics recovered the old, made memories of the past, which they merged with the new, enabling cultural recovery within a socio-cultural context of profound renewal. One might say it acted as a bridge between *traditio* and *novum*. Spanish Krausism coexisted - albeit with certain differences - alongside this (liberal) form of romanticism. They both promoted “Spain’s re-encounter with itself

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7. V. the exponents of reactionary thought on the time: Fernando de Zeballos (1732-1802), Fernández Valcarce (1723-1798) o Antonio José Rodríguez (1703-1778), primero; y, después, a Antonio Javier Pérez López (1736-1792) o Antonio Vila y Camps (1747-1809), etc ; all of them clergymen o jurists .

8. Abellan, J.L., *Historia crítica del Pensamiento Español*, Madrid, Círculo de Lectores, 1993, Vol. 5, p. 199.

as a modern nation”<sup>9</sup>. This progressive romanticism thus became a decisive and inseparable movement from Krausism as it took its first steps. “The profound renewal -in a liberal and more modern sense that affects the vision of man- of the world, of life, of history, of society and of the problem of Spain, was being prepared at the time through Sanz del Río’s trip to Germany, where he drank deeply from the very sources of romantic philosophy, from which Krausism would emerge, along with the distressed, lyrical and metaphysical subjectivism of the generation of 98”<sup>10</sup>.

(iii) And because modern secularisation had failed to desacralise Spanish reality, too imbued, to paraphrase Eloy Terrón, with an anachronistic and arbitrary social order in which the crudest superstition was entrenched<sup>11</sup>. The socio-cultural configuration of Spain, inscribed with some variants in what we might call Western capitalist modernity, was still articulated in the middle of the 19th Century around a sequence that sacralised reality<sup>12</sup>. This

9. *Ibid.*, p. 345

10. Del Río A., *Historia de la Literatura española*, Nueva York, 1963, p. 108, en Abellan, *Op.cit.*, p. 346. See, also a Marichal, J., “La melancolía del liberal español: de Larra a Unamuno”, in *La Torre*, Vol. IX, 1961 o a Kirkpatrick, S., *Larra: el laberinto inextricable de un romántico liberal*, Madrid, Gredos, 1977.

11. Terron, E., “Estudio Preliminar a J. Sanz del Río”, in Sanz del Río *Textos escogidos*, Barcelona, Ediciones Cultura Popular, 1969, p. 61.

12. *The processes of sacralisation* entailed a *fragmentary differentiation* (or differentiating fragmentation) of reality (sacred-profane), always in alignment with basic empirical knowledge that perceives the world through dualities. The passage towards absolutisation is brought about through the *substantialisation* of those fragments inscribed within an oppositional logic (metaphysical oppositionalism that they all identify with the dualist separation between good and bad:

would explain how Krausism with its “rational metaphysics,” especially linked to the sphere of law, flourished in the liberal circles of a decidedly progressive, but also intimist and religious incipient social class, rather disinclined towards a secularisation of reality that was more than skin-deep<sup>13</sup>. One could say that, in Krause’s work, law was the very axis of the entire system. It was, to paraphrase Elías Díaz, a project of “rational iusnaturalism that sought to welcome the historical and positive elements of law.”<sup>14</sup> Hence, law

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heaven and hell, etc.). Insofar as the fragments are imbued with value/worth, they are ordered in accordance with value tables (for example, dualists or binary), and they are categorised as sacred or profane. However, at this time in which each partial thing (fragment) is endowed with substantivity, the worth we assign to them becomes absolute. In this regard, we are talking about absolute values that are opposed.

13. “To say, as is so often said today, that since the Renaissance, our ‘Western’ societies have become desacralised, is still a commonplace that in other respects encompasses a genuine error. It is a sacralised society that is founded on an absolute value, external and superior to the will of all the individuals who constitute it. (...) After the Renaissance, due to the development of trade and subsequently of industry, all aspects of human life -economic, political, intellectual and even moral-gained independence from the previous world view. In other words, our society became secularised, and religion was reduced to a “private matter.” But it was not completely desacralised, because it remained subject to an absolute purpose that was external and superior to the will of the individuals who made up that society, even if that purpose had no religious sense, the success of enterprises (both individual and collective) appears as self-fulfilling purpose” (Garaudy, R. , *La Alternativa* (original title *L’Alternative*, Robert Laffont, Paris, 1972, trans. by José Ma. De Llanos and Gregorio Fijos-Barba), Edicusa, Madrid, 1973, pp. 64-65

14. Díaz, E., “Filosofía jurídico-política del Krauso-institucionismo español”, in *Derechos y Libertades*, nº 12 (2003), p. 29.

was the path followed in the development of his metaphysics. That is why Antonio Jiménez García writes: “The last chapter of the practical consequences of Krause’s system refers to policies and is linked to the sphere of law, a field of patent originality, which many authors have been quick to heap praise upon, even those who criticise Krause in other areas of knowledge”<sup>15</sup>

Therefore, the stoic perception of reality, the intimism and mysticism of the Krausist philosophy found immensely fertile soil in the Spanish imaginary, because of the firm root Erasmus’ ideas had taken hold among Spanish intellectuals during the Renaissance<sup>16</sup>. There was no place for any other philosophy, bearing in mind the political-social conditions of the time<sup>17</sup>.

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15. Jiménez, A., “Apuntes sobre el sistema filosófico de Krause (1781-1832)”, in *Revista de Filosofía*, July-December, 1982, p. 219.

16. See Joaquín Xirau on this point: “Earthly humanity constituted by the organism of all its circles – in the family, in nations, in peoples, in friendship, in social trade, in the state, in the church, and in all the partial societies that make up the human race – is but a part of the universal humanity that constitutes the kingdom of God (...) The human community forms an organic whole with the image of the divine Being (...) Its highest and fullest expression is the human organism, that is, the organic personality of man. This intimist, radiant conception, concomitant on so many points with those of 17th Century humanists, bestows upon the figure of Sanz del Río and his circle a courageous and joyful vision of the realities of the world and life” Manuel B. Cossío y la educación en España, México, 1945, p.19, in Abellan, J. L., *Historia crítica del pensamiento español*, Op. cit., p.474.

17. As Eloy Terrón rightly points out, “its appearance was determined by the structural changes that occurred in Spanish society after the reign of Charles III, accentuated by the great upheaval of the War of Independence and consummated during the Civil War.” Terron, E., *Sociedad e ideología*

In any case, in retrospect, we can assume that the Age of Enlightenment and European philosophy eventually took hold in Spain, albeit it later (towards the end of the 19th and beginning of the 20th Century) in a context that was still dominated by the structures of religious power. And they did so thanks to the work of Krausists and institutionalists, concerned particularly to spread the ideals of reason and adapt Spanish society to the socio-cultural configuration of Western capitalist modernity. Krausist-institutionalism “is an important (late but successful) attempt to receive the scientific and philosophical proposals of European Enlightenment, including its legal philosophy, specifically here through the connection with the German rationalist/idealist philosophy of Kant and Hegel, as well as Fichte and Schelling, albeit it with K. Ch. F. Krause by way of the main pretext and synthesis”<sup>18</sup>.

This might have been predicable of any other socio-cultural traditions, with their internal dialectics and relations. However, within the specific context of the late birth of modernity in Spain, here the processes of modernity were commanded, as in the rest of Europe, by a specific socio-economic order (the bourgeois) in pursuit of political power and seeking to lay the foundations of capitalist development through the socio-legal transformation of the existing order, but, and herein lies the nuance, without expeditiously derailing the traditional laws and customs of Spanish society.

The new order that the Spanish liberal bourgeoisie intended to establish necessarily involved the creation of a new type

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*en los orígenes de la España Contemporánea*, Ed. Peninsular, Barcelona, 1969, p. 10.

18. Díaz, E., “Filosofía Jurídico-Política del Krausismo-institucionalismo español”, Op. Cit., p. 32.

of society, which basically required two agreements: (a) one on science and (b) the other on conduct within a legal order<sup>19</sup>. Hence, on the one hand, the (legal) conditions that would facilitate their socio-economic reproduction were strengthened and, on the other, the political design of new power relations was concealed through the adoption of (bourgeois) reason, abstract and universalisable, as a principle that definitively relocates man in history<sup>20</sup>. However, the internal structures were not radically bound in an absolute (sacred) way of perceiving reality. Despite their clashes with scholasticism and traditionalism and the looming threats of secularisation, they failed to desacralise Spanish reality, unable to alleviate the burden of tradition on the culture and institutions of our country.

This was, ultimately, what it was all about. To serve the new social order (the bourgeoisie), but without completely

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19. Note the tenor of the words spoken by Sanz del Río himself in the inaugural address of the 1857-1858 academic year at Central University: "(...) when education meets with law in an intelligent, active, rival cooperation, in the fulfilment of its intellectual mission, of the legislative and governmental mission accomplished so far (...)" Sanz del Río, J., "Speech delivered at the opening of the academic year 1857-1858 at Central University", in *Textos Excogidos*, Op. Cit.

20. Whatever the spaces explored, they are quickly conquered and subjected to the canons of reason. Understanding the history and explanation of the universe is now considered *res cogitans*. Reason is now the only rule worthy of man. For Sanz del Río, man (in the Ideal for humanity) is no more than an idea, "a living image of God (...) in progressive perfection", who, in his own finiteness "must realize the harmony of universal life". This was the view contained in his writings at least. Krause, K.Ch., *El ideal de la humanidad para la vida*, Madrid, 1871, p. 33, in Abellan, J.L., Op. cit., p. 471.

burying the old, naturalising its new normative conceptions about justice and humanity, through reason and law, in order to muffle what was, undoubtedly, a fierce battle to become a part of history. Thus, through science, the social contract, and the legal phenomenon, Spanish society was led to understand, through its roots and its enduring national culture, that it was moving towards new degrees of peace and coexistence, towards "the ultimate destiny of man and humanity"<sup>21</sup>, that is to say towards political happiness. Moreover, the pursuit of "common happiness" was made conditional exclusively as a political goal, seeking recognition (although not for all subjects of course) of the rights that the new bourgeois order needed to function (natural, inalienable and sacred rights<sup>22</sup>), and to ensure the adoption of rationalism as an ideology. Happiness, like freedom, was the product of reason. So anyone who did not believe in them as a political objective was simply considered the enemy of reason. This is not surprising given that, in the background, under the nominal, political –and even literary<sup>23</sup>–

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21. Jiménez, A., "Apuntes sobre el sistema filosófico de Krause (1781-1832)", in *Revista de Filosofía*, Op. cit., p. 219. See also Sanz del Río, J., "Discurso pronunciado en la inauguración del año académico 1857-1858 en la Universidad Central", en *Textos escogidos*, Op. cit., p. 223

22. V. Gauthier, F., *Triomphe et mort du droit naturel en Révolution, 1789, 1795, 1802*, PUF, Paris, 1992

23. Larra's case is the most significant. "If romanticism is freedom, and it undoubtedly is, substantially, Larra is the most romantic of all". "In all Spanish romanticism there is no more forceful proclamation of individual freedom than the utterances of Macías (one of his most tragic dramas)" (Alborg, J.L., *Historia de la literatura española. El romanticismo*. Volume IV, Gredos, Madrid, 1980, p. 216 and 274. Authors' parenthesis). In his essay entitled *Literatura*, Larra

search for freedom, efforts were geared towards the necessary transformation of institutions and relations of social production/reproduction, in order to shore up the legal foundations of bourgeois liberalism: individual freedom, security, private property, contract enforcement and, only at first, resistance to oppression.

We could, therefore, say that the Krausist-Institutionalist model of society was sustained, as was the ideology of the bourgeois middle classes of more advanced European countries, thanks to:

(i) a new conception of rationality. From Galileo and Descartes, with their respective contributions to the fields of physics and epistemology, to the philosophy of Kant, a commitment to rationality was forged, which culminated with the adoption of reason as a universal ordering principle, correcting the chaos of irrational societies, controlling nature and explaining phenomena through the principle of causality. It was without a doubt a society of intelligences. Sanz del Río himself called his philosophy “rational realism.” And his confidence in reason, in science and in the search for knowledge took root firmly “through the strong influence of Giner of Los Ríos and his disciples through the Free Institute of Education, in the generation of 1914, and the republican generation of 1931”<sup>24</sup>.

(ii) the replacement of the ontological social bond (Aristotle’s *zoon politikon*) with a social bond instituted as the absolute foundation of the framework for modernity,

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writes: “Freedom in literature, as in the arts, as in industry, as in commerce, as in consciousness. Here is the currency of the time, here is the sample, here is the yardstick with which we shall measure”. Abellan J.L, Op. cit., p. 316.

24. Díaz, E., “Filosofía jurídico-política del krausismo-institucionismo español”, Op. Cit., p. 44.

represented especially in the “individual” as a rational and dissociated (legal) subject, but, also –and here, another of the nuances that differentiate his philosophy from individualistic liberalism– within intermediate “groups” and “societies.” Let us not forget that Krausism-Institutionalism was a doctrine that had an organic vision of society - the social organism is the reflection of human nature. As Prof. Lacambra states, “organic liberalism has been as authentic an ideological and intellectual reality as individualistic, materialistic liberalism.”<sup>25</sup> The development of technologies -by virtue of their perfectible nature-, the positivist ideology of the sciences, and the fact that the social sciences lacked their own epistemological status gradually encouraged, in accordance with the prevailing mechanistic principles, a conception of the human being and of society as biological subjects of perfect functioning, comparable to that of a machine<sup>26</sup>. However, although an organic nature is the

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25. (Legaz, L., “El pensamiento social de Gumersindo de Azcárate”, en *Estudios de Historia social en España*, Madrid, C.S.I.C, 1960, Vol. I, p. 28). The teacher Elías Díaz also defines it that way (Díaz, E., *La filosofía social del krausismo español*, op.cit., p. 239).

26. This reductionist view of the human being was certainly not new. The subject had been undergoing these kinds of processes since the Renaissance. It was initially reduced to its strictly natural dimension. Already in the 17th Century, the process of rationalisation was brought into play (*ego cogitans*). Secularisation did the rest. Materialistic and/or positivist reductionism was introduced, either by economic (Marx), historical or sociological (Comte) or psychoanalytical (Freud) factors. According to the (scientific) creed, life could be understood in a bio-sociological way and in accordance with its physical-chemical conditions, not to mention representing the State as a person (Hobbes) or as a machine (Weber), that is, as a mechanism of perfect functioning. Social sciences, law, on the other hand, lacked their own epistemological status. They were therefore



characteristic of liberals inspired by Krause's philosophy, the truth is that their organicism was not biological, but rather spiritualistic. Among other reasons because they were humanists. The individual remained the crucial centre of reality. Krausist philosophy, especially that professed by Giner de los Ríos and Gumersindo de Azcárate –thinking specifically of some of their works such as *La persona social. Estudios y fragmentos* (1899) and *Estudios económicos y sociales* (1876), respectively–, was a response to this socio-biological organicism, which was widespread in the 19th century. In short, his radical liberalism was not individualistic (materialist), but rather democratic and organicist (not biological, but “ethical-spiritual”).

(iii) the assumption of the Enlightened idea of a nation, not as a romantic or historicist concept, but as an idealistic and anonymous reflection of the bourgeoisie as a class. The nation would be its class consciousness. Its collective and indissoluble idea of a social group (of nationals/citizens) constituted in the State. Their will would be the general will (although not the will of all). A will that was perceived as “something objective, timeless, as sacred as the truth. It is the truth of the nation.”<sup>27</sup> The nation, as the natural basis for the State – not as one of its constituent elements <sup>28</sup>– was now the

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governed by the same prevailing mechanistic principles.

27. Marina, J.A., *Los sueños de la razón. Ensayo sobre la experiencia política*, Op. cit., p. 176. See a Palmer, R., *The Improvement of Humanity, Education and the French Revolution*, Princeton University Press, Princeton, 1985.

28. The nation understood as an organic collectivity is not one of the elements that constitute the State, but the element by which the State is constituted, among other reasons because it is identified with it. Understandably, therefore, the Krausists were ideologically involved in the revolutionary

fundamental political unit, the measure that shaped the entire political system, channelled the exercise of rights, and ensured social loyalty. The State, writes Sanz del Río, “is the central sphere that must maintain unity and harmony between all organs and directions of human activity”<sup>29</sup>. This confidence in the State did not, however, attain bureaucratic centralism (centralisation of all social functions, of public matters within the State) characteristic of the modern State. Among other reasons because they were not statist (in the most Hegelian sense of the term) or, better yet, as Prof. Aranguren notes, because they were anti-statist<sup>30</sup>. This means that, in opposition to the centralist and bureaucratic systems<sup>31</sup> of modern

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construction of the idea of national sovereignty. Indeed, Sanz del Río himself, rather reluctant to abandon his civil anonymity, broke his isolation on the occasion of the July 1854 revolution, also known as “Vicalvarada,” which paved the way for a progressive two-year period from 1854-1856. From this moment on, his revolutionary involvement would remain constant until the revolution of 1868 and the six years of democracy that ensued. Cf. D, E and Nuñez, M., “Julián Sanz del Río: Textos inéditos”, in *Revista de Occidente*, nº 79, 1969, and Gil Cremades, J.J., “Krausismo y revolución”, in *krausistas y liberales*, Seminarios y Ediciones, Madrid, 1975.

29. DIAZ, E., “Filosofía jurídico-política del krauso-institucionismo español”, Op. Cit., p. 49.

30. Aranguren, J.L., *Moral y sociedad. Introducción a la moral social española del siglo XIX*, Madrid, Edicusa, 1966, p. 141.

31. “To understand the centralist system we must return to the legal question as a whole, as it has been passed down by Justinian and Roman law, distilled first in Europe, then throughout the industrial universe, on the basis of scholastic interpretations of the Middle Ages. Centralism is first and foremost just that: the historical-political operation that has installed our idea of what I would gladly call the religion of power, a religion perfectly defined in the first title of the Code of Justinian, when the

Europe, the Krausist-Institutionalists proposed a different, pluralistic and decentralised model of the State, which, far from being abstentionist, respected the freedom (autonomy) of each individual, but which in turn –as noted previously– made room for intermediate groups (societies) and national communities in the social design of its relationships<sup>32</sup>. The State is an instrument that serves societies.

So with science, the idea of an individual as an absolute established social foundation,

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theocratic emperor defines Reason, in other words the Trinitarian dogma. This is essential. Centralism is something that sets God's place on stage, to put in succinctly: *setting a place on stage*" Legendre, P., "La crisis del juridicismo" (interview and Spanish language version of Enrique A. Kozicki) in Id., *et al.*, *El discurso jurídico. Perspectiva psicoanalítica y otros abordajes epistemológicos*, Buenos Aires, Hachette, 1982, p.47.

32. Pay particular attention to the tenor of the manifesto proclaiming the essential principles of the revolution of 1868. Let us not forget the ideological influence, not to mention the implications –the little interest shown by Sanz del Río and Giner de los Ríos in this democratic revolution– that Krausism exercised over the "thought that prepared this revolution" (Aranguren, Op. Cit., p. 95). This would explain the pre-eminent role that Krausists played in the educational institutions of the new government. The Manifesto states: [Thus] Spain shall be able to move forward with a determined step, because it will no longer be weighed down by suffocating administrative centralisation, the cunning tool used by corruption and tyranny to confound and drain it. The individual, the municipality, the province and the nation can operate independently within their own orbit, without the distrusting intervention of the State coercing their powers or disrupting their manifestations as little as possible". (*Historia de la Educación en España. Textos y Documentos*, Madrid, Ministerio de Educación, 1979, Vol. II, p. 523). The recognition of the right of association written into the Constitution of 1869 provided explicit testimony of the influence this organicist liberalism exerted over Spanish political life.

and the idea of a nation as a metaphysical entity (grounded in the State), all weighed up a new way (Krausist and Institutionalist) of thinking and prefiguring social relations. Modern Spanish society was: (A) liberal, constituted upon the individual person –future subject of law–, in other words, on the individual (abstract and general, but also unique in his selfhood); (b) organicist –establishing relationships between subjects and the various associations, social groups and national communities– and patriarchal (*pater familiae*) –which made it impossible for women and children to reproduce socially by relegating them to the domestic sphere<sup>33</sup>–

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33. Of course it would not be fair to ignore the concern of some Krausists for women. Fernando de Castro, to name one. But their concern, grounded in their firm conviction regarding equality between men and women –in nature and capacity, not in functions– went no further than the need to instruct and educate them "so that women can respond to this ideal and always be an angel of peace in the family, mother of the household and a life force in human society". Abellan, J.L., Op. Cit., p. 550. His *Conferencias Dominicales para la educación de la Mujer* became famous. Therefore, despite Castro's concern for the education of women, the truth is that in general the prostration of women, in the new rational and political scheme of modernity, was a fact and evidenced the true nature of the declarations of rights they assumed, as the foundation of political life, the idea of equality for all human beings in their natural rights. This is nonetheless surprising in view of the contributions women made to the democratisation of society (Concepción Arenal is a good example of this historical testimony), as well as to the revolutionary processes (Olympe de Gouges, Madame de Staël, Rose Lacombe). (See Duhet, P., *Les Femmes et la Revolution*, Gallimard, Paris, 1971; Noack, P., *Olympe de Gouges*, Eds. de Falois, Paris, 1993; However, it would not be fair to ignore the efforts of Fernando de Castro or the Free Institute of Education to facilitate access for some women to University and, therefore, to the public and professional sphere.

of white<sup>34</sup> independent males, who were defined, first and foremost, as citizens and, above all, as owners.

### 3. On the (krausist) question of law as a system of science

With this initial approach, we seek to highlight the extent to which the Krausist vision of the legal phenomenon represented, for the Spanish liberal bourgeoisie, the most appropriate synthesis between the demands of the “bourgeois way of being” or capitalist production, the processes of western modernity –always linked to the promise of emancipation through reason– and the socio-cultural peculiarities of the Spanish social structure, which was still fundamentally feudal in the 19th Century. Clearly, we are not going to focus here on the importance of the law for Krausist intellectuals, which is a fact that has been widely confirmed and already indicated in this paper. What we are really striving to do is to elucidate how the law was the best option to embellish first and then accelerate social change according to the ideological expectations of its social class. This leads us to evaluate, firstly, the scope of the dependence assumed, according to Spanish Krausists, by the legal reflection of the instrumental ideal of sciences, since the law lacked its own epistemological status. This foreshadowed a conceptualising and abstract rationality,

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34. It should be said that Krausists and Institutionalists stood out for their open repudiation of slavery and the socio-economic conditions of its production. The Spanish abolitionist society, which first appeared in 1811, was testimony to the rejection of slavery shared by Krausist intellectuals. The most representative exponent of this view was Rafael María de Labra.

albeit not emancipated from metaphysics – the Krausists resisted taking the legal issue away from its natural foundation. Subsequently, we shall assess, more broadly, the true importance acquired by law in the design of their model of political society.

The assimilation between science and power, together with the unstoppable progress of technology, as a hallmark of human superiority over the world, led, among other things, to law being considered another science. This paved the way for the “science of law”, which, on the one hand, was referred to as a “system of science”, insofar as it is capable of self-producing, re-producing and repeating<sup>35</sup> itself according to a causal and self-referring scheme, and, on the other, was identified as if its attributes were identical in law, morality and science. Its way of discovering and learning would be that of modern science (instrumentalism) with its ideals of progress, uniformity, control, regularity, and predictability. And its ideology would be rationalism as a philosophical expression of “rational good order,” in the face of the chaos of nature and irrational societies. Hence, the so-

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35. An approach that has been pared down to the extreme in the Kelsenian idea that the law governs its own production. See Kelsen, H., *Teoría pura del Derecho*, (translation by Roberto J. Vernengo), Porrúa, Mexico, 1997. There have been ingenious attempts to synthesise this idea of self-reference and self-production of the law, even using a computer-based simile: law would be comparable to a cybernetic mechanism, insofar as, despite being a mechanised system, intelligence would have been transferred to it to operate autonomously and to evolve in a programmed manner according to carefully calculated schedules. See in this regard Trigaud, J.M., *Le droit et le futur*, P.U.F., Paris, 1985, p. 65 and *Persona ou la justice au double visage*, Studio Editoriale di Cultura, Génova, 1990, p. 75.

called “science of law” enters the sacred circle of science, a name that would please any self-respecting Krausist. Just look at the words of Sanz del Río himself: “(...) That is why there is a philosophy of law as a science in its own right, when before they were prolegomena, that is, logical preliminaries, in which some common concepts were gathered from here and there as a means of thinking judiciously and competently about the law, but not as a material and formal foundation of that science”<sup>36</sup>. Jiménez García argues in this respect: “Krause’s real contribution is to regard the entire universe as a superior scientific organism. The system of science comprises all knowledge, and the particular sciences integrate and relate to each other within universal science”<sup>37</sup>

We could say that legal reflection, inserted in the Spanish socio-cultural configuration of capitalist modernity (19th-20th centuries), also shifted its secular search for systematisation towards the ideals of progress, control and order, regularity and predictability. The Krausists attached exceptional importance to the redemptive capacity of the scientific paradigm – which Sanz del Río himself came to define as “the homeland of the spirit”<sup>38</sup>. Law, like all other knowledge (philosophy, theology, grammar, etc.), could not be subtracted from the processes and transformations

that the scientific paradigm effected on the reality of things. We should be very clear, if we wish to avoid anachronisms, that the law could not be conceived (imagined) at that time without the paradigms in force at the time, that is, the scientific creed and the doctrine of subjective rights.

**(i)** The Scientific Creed. After all, the principle of causality had already become the cognitive key to scientific development. This led Krausist authors to subscribe, with few reservations, to a concept of law that could be assimilated, in terms of its mechanisms of operation, to the sciences of nature. Hence, just as for the natural sciences there could only ever be one kind of reality, which had been thought of objectively, conceived through reason as the beginning and end of history, legal science, true to the currency of generality and universality, would now claim for itself the reality of law. This obsession with objectivity would lead legal reflection to displace the uniqueness of contingency and assume (functional) autonomy and autopoiesis as a systemic framework.

**(ii)** On the other hand, from the 18th century onwards, legal reflection began to orient its developments towards natural rights, in accordance with the theory of subjective rights, as a requirement of the liberal bourgeoisie, which needed to establish its own legal-political status. This would explain why the law is understood as the law or rights of (bourgeois) citizens, that is, as individual rights. But let us look, in greater detail, as to why this was so.

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36. SANZ DEL RIO, J., “El derecho como ideal fundamental en la vida. Carta inédita”, in *Boletín de la Institución de la Libre enseñanza*, nº 6, 1882, pp. 41-42. But Francisco Giner de los Ríos was the true precursor of the legal philosophy krausist: See “*Resumen de Filosofía del Derecho*” de 1898 o “*Sus principios de Derecho natural*” de 1873.

37. Jiménez, A., “Apuntes sobre el sistema filosófico de Krause”, *Op. cit.*, p. 203.

38. Id., *Textos escogidos*, *Op. cit.*, p. 222 y en Abellan, J.L., *Op. cit.*, p. 475

## 4. Social philosophy and reformism. The importance of law in the transformation project of Spanish society

Given this way of understanding the legal phenomenon, unsurprisingly, this became the appropriate instrument to transform the structures of Spanish society –pre-modern and traditionalist– in accordance with their expectations, which were as enlightened as they were bourgeois, regarding the socio-economic transformation of reality. If we agree with Joaquín Xirau that Krausism was not a doctrine, but rather a decisive instrument in the restoration of Spain<sup>39</sup>, it is not difficult to imagine that the law was seen, by the liberal programme of the Spanish progressive bourgeoisie, as an experience of possibility around what until then had been impossible: that this class might take power - indeed the words power and possibility have the same etymological root *posse* -. The law now operated as a kind of utopian regulation of society, with the capacity to legally constitute its model of liberal society, through the creation (imagination) of its own law. This conception of the legal, which identified law and science and moved away from contingency, was used by the other process that was being imposed in Spain at the time: Capitalism.

After so much enlightenment, *jus commune*, as a single body of laws, was insufficient for their ideals of emancipation as a social class. It did not meet their expectations regarding the necessary juridification of economic processes,

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39. Xirau, J., “Sanz del Río y el movimiento krausista”, *Op. cit.*, pp. 21 *et sequens*.

although it had always responded, through its attempts at systematisation and legal rationalisation, to strengthening their situation in a social model it did not yet control. Now they needed to create their own legal society. In this way, they ensured not only the creation of institutions and mechanisms to ensure their political and economic dominance, but also successfully justified the need to adapt to the international emergence of trade and the industrial revolution, that is, the progress of the economy.

As a result, legal experience became decisive, the test bank that modernity and its reality-shaping expectations needed. The law assumed, on the one hand, the role, invaluable to political liberalism, of designing social life, in accordance with the theses of contractualism and the political economy, as normative conceptions of the world. Capitalist society was thus outlined. And, on the other hand, it was attributed the function of legitimising the power of the State, this time as a reflection of the sovereign will<sup>40</sup>, within a paradigmatic transition that synthesised modernity with capitalism and science with law.

The keen perception of the Spanish Krausist philosophers was to intuit that law could provide the decisive instrument for achieving power. Hence their radical Juridicism. After all, modern law has simply tried to support legally, with its categorical constructions –private autonomy and economic constitution (Civil Code)– the transformations that the

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40. See Legendre, P., *El amor del censor. Ensayo sobre el orden dogmático* (original title *L'amour du censeur. Essai sur l'ordre dogmatique*, Editions du Seuil, Paris, 1974, trad. de Marta Giacomino), Anagrama, Barcelona, 1979, especially the pages 218-220.

capitalist system required as a historical process.

Therefore, however angelic the convictions and references of the Krausist philosophers to the legal phenomenon may have been –from Sanz del Río, to Azcarate or Giner de los Ríos– (“the law of the World or as the State of God on earth”, “Basic value of the idea of solidarity among all men”, “the order of good, free and necessary conduct for the fulfilment of the purposes of life”, etc.), and however they might have viewed the law as the best option to shape “good [social] order”,<sup>41</sup> to lead men toward new levels of peace and universal coexistence (*aequitas civilis*), that is, as a source of freedom or vehicle for emancipation, we should not be fooled into believing that emancipation (reason) triumphed in modern law, rather than regulation (authority).

Modern law was entrusted with the task of enabling social order through regulation. However, it did not pursue “rational good order”, as a solution provided by intelligence (thinking substance) to

the problems of the world, but rather “bourgeois good order”, in the form of the ideological-political aspirations of capitalism. This vision of modern law is attributed the function of regulating social order; hence, its emancipatory potential is delegitimised. Only in doing so does it establish order, since it enshrines the vision of things encompassed by that order, which is now a vision of the bourgeoisie as a thriving socio-economic order in Spain. Thus, the law becomes the docile instrument of institutional construction needed by Spanish bourgeois society at the end of the 19th century.

In other words, there was no better way –than through law– to regulate and schedule changes, to crystallise, in a new bespoke order, the social and political project that this new social class had needed practically since the mid-18th century. Was there a better way to naturalise the historical process, to reduce social progress to the development of the foundations of capitalism so recently introduced in Spain? Was there a better way to conceal, under the guise of revolutions and innovations, what was simply a question of taking power? In the transition to modernity, beneath the trappings of revolution, declarations and socio-cultural change, many things had not in fact altered. The same struggle was still ever present: the struggle to achieve power. And, once power had been taken, it was a case of wielding it by proscribing emancipation. A dogmatic conception of power still held sway. The contents (materials) had been attacked but the formalities remained unquestioned. Now it was the nation, as a reflection of the bourgeoisie as an emerging social group, that assumed the prerogatives of the king, just as the king had once taken them from

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41. Expressions not as illustrative as the following: “It is not mere scientific interest that should lead us to this Holy and beautiful idea of law” but a feeling of love and gratitude, a rational worship, as much as can be seen in this idea as the Law of the World or as the State of God on earth (...). Sanz del Río, J., “El derecho como ideal fundamental en la vida. Carta inédita”, in *Boletín de la Institución de la Libre enseñanza*, nº 6, 1882, p. 41. Let us also not forget the words of Giner de los Ríos himself when he refers to law as “the body of conditions which, depending on the free activity of each rational being, are necessary for the rational propose of all”. Díaz, E., *Filosofía jurídico-política del krauso-institucionismo español*, Op. Cit., p. 29; Landau, P., “La Filosofía del Derecho de K.C.F. Krause”, in *Reivindicación de Krause*, Fundación Friedrich Ebert, Madrid, 1982, p. 74.

the Supreme Pontiff<sup>42</sup>. The sequence of absolutisation of power had remained immutable (dogmatic), “like a reef”<sup>43</sup>. The historical scenario was now different but, although everything seemed to change, there was something that remained intact: the way in which power was understood, the place from which authority was exercised, and, of course, relations of power and domination (there were still subjects of domination)

Law, with its official status (backed by power), with its technical capacity (thanks to its cognitive-instrumental rationality that it had taken from the sciences) and its creative potential (power of nomination) could effectively delineate and/or re-compose the complex design –of institutions and rights– that the new model of society needed. For Krausist authors, law was always a decisive instrument in their proposals for the reform of Spanish society, that is, in the tasks of moral design and execution of “the lawful purposes of society”<sup>44</sup>. But it could also consecrate, as indeed it did, the socio-economic dictates required by the new pre-eminent position of the Spanish liberal bourgeoisie. There was no better way to legitimise the re-configuration of power, both political (the state) and economic, more thorough and less mystical in this latter case.

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42. Kantorowicz, E., “Mysteries of State: An Absolutist Concept and his Late Medieval Origins”, en *Harvard Theological Review*, 48, 1955, p. 88; in MARINA., J.A., *Los sueños de la razón. Ensayo sobre la experiencia política*, Op. cit., pp. 92 y 259.

43. *Ibid.* p. 93.

44. Diaz, E., “La filosofía Jurídico-política del krauso-institucionismo español”, Op. Cit., p. 54.

## 5. Conclusions

The purpose of this article is to show that, for Spanish Krausism, with its profound confidence in the moral solidarity of man and despite the egalitarian-democratic design of Enlightened modernity that represented –although also functional to the logic that owns the socio-economic order to which they belonged–, the law was not a far cry from the perception of its Western bourgeois contemporaries, who understood the legal sphere as the best option to manage the inevitable social change of irrational (pre-modern) societies, in accordance with their expectations surrounding the socio-economic transformation of reality.

We are not seeking to downplay the role of Krausist philosophy in the construction – as Elías Díaz concludes – “of the best of our intellectual, political and social life.” Among other reasons, because we think that Krausist philosophy holds a privileged place in the historical contemporary cultural shaping of our country: (i) it was decisive in the convergence - albeit somewhat late - in Spain of the processes of European Enlightenment, linked to the principles of secularisation (the polytheism of values, tolerance, religious freedom, as expressions of a liberal Christianity that is deeply rooted in all kinds of dogmatisms) and democracy (the principle of equality, participation, social pluralism, plurality of voices and reasons, etc.); (ii) its influence on Spanish political activity was, therefore, crucial, at least from the six-year period of democracy and up to the second republic; and (iii) its innumerable contributions to the field of education were weaving new channels and scenarios of democracy for Spanish society –which would crystallise in

the Constitution of 1931– through bodies such as the Free Institute of Education and the Council for the Expansion of Studies. Its open and generous confidence in the transformative capacity of education, understood as a decisive factor of change, implied a powerful educational proposal for the socio-historical transformation of our democratic culture<sup>45</sup>.

Suffice it to say, it was a whole pedagogy for democracy and responsibility. Education and responsibility –the latter as a priority objective of liberal education– became the crux of the model of political society proposed by Krausist philosophy. These notions were the force behind their social and political reforms of Spanish society. Their education model was one of comprehensive education that surpassed its traditional role guiding the preparation (instruction) of citizens for their professional future or for the system of social functions. The aim was, in the words of Giner de los Ríos, to awaken an “adult people,” a people where citizens would be able to live and commit themselves as free and responsible citizens. From this perspective, the ultimate aim of the education system proposed by Krausism-Institutionalism responded, on the one hand, to people’s life journey and the most appropriate means, and, on the other, to the excellence of students, thus enabling the discovery of people capable of independent and deliberative thought, able to lead and actively participate in strengthening the democratic principle. Democracy, for Krausist authors, necessarily involved education. They both interact with one

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45. V. also a Llopi, R., “Francisco Giner de los Ríos y la reforma del hombre”, in *Cuadernos del Congreso de la libertad para la cultura*, Paris, nº 16, 1956, p. 63). Education is, as Lacroix would one day say, “the core of our civilisation.”

another. Without reforming the heart of men, without educating them, integral reform of the values and structures of Spanish society would not be possible. Indeed, says Giner de los Ríos, “Spain’s problem is, above all, a problem of education.” As Prof. Abellán argues, it was “a revolution in Spain’s traditional scale of values, which would bring about profound changes in education and customs. In a way, Krausism represents, in a similar perspective, the genuine incorporation of the Enlightenment’s ideological assumptions into our cultural and social landscape.”<sup>46</sup>

However, as far as the law is concerned, we must say that it failed to avoid the shortcomings of social knowledge surrounding modern Spanish legal science, which would eventually drift –enticed by the liberal bourgeoisie, who needed to establish their own legal-political status– toward the unstoppable absolutisation of their (dogmatic) categories and of the legal formalisation of rights, which were beginning to be considered exclusively as the rights of individuals, of citizens (bourgeois), that is, as individual rights. In other words, in the context of Spanish modernity, modern law (scientific, positive, regulatory, but also historical and conventional) as a legitimiser of State law, began to operate on the side (at the service) of regulation and the ideological aspirations and interests of a specific order<sup>47</sup>, of a minority social class that

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46. Abellán, J.L., Op. cit., p. 476.

47. In relation to capitalism as an order: Graudy, R., *La Alternativa* (título original *L’Alternative*, Robert Laffont, Paris, 1972, trad. de José Ma. De Llanos y Gregorio Peces-Barba), Madrid, EDICUSA, 1973, pp. 63-64. Sobre el desarrollo y contenidos del capitalismo, véanse: Polany, Karl (1997), *La gran transformación*.



had, nonetheless, begun to dominate: the liberal bourgeoisie. However, our intention is not to reproach those who maintained Krausism in Spain for having promoted the regulatory dimension of law. Especially because it does not seem possible for the law cast off its regulatory endeavours (its coercive nature could be, as most doctrine has pointed out, a hallmark). Rather, what we regret here is that, despite the centrality of the legal issue in the Krausist system, they failed to unlock its emancipatory dimension (utopian side), represented here by the Krausist ideas of that “holy and beautiful idea of law.”<sup>48</sup>

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*Crítica del liberalismo económico* (título original *The Great Transformation*, trad. de Julia Varela y Fernando Álvarez-Uría), Madrid, La Piqueta, 1997, 466 pp.

48. Sanz del Río, J., “El derecho como ideal fundamental en la vida”, Op. cit., p. 41, note 32.

