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LITERARY KNOWLEDGE AND THE STEREOTYPING OF LEGAL KNOWLEDGE

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ABSTRACT: Postmodernity reveals a crisis situation, especially in the contempt shown to the distinctive character of democratic institutions and individuals, which might find in difference an important driver of inclusive policies. This process of knowledge encapsulation and condensation of literature supports the society of instant information, and is not authentic knowledge. The search for democratic spaces that enable a dialectical understanding of knowledge passes necessarily through the breakup with this frame and resumption of the intellectual character of law, from a rapprochement with literature.

KEYWORDS: legal knowledge; literature; stereotyping; democratization.

INTRODUCTION

Lex mercatoria rules conduct standards, peculiar language and spreads out by gigahertz, like a sickness. Some might say it is a new disease of the century, much more fatal than tuberculosis in the past.

This enchantment generated from constant subliminal messages created pressing necessities, previously relegated and classified as useless ones. The collective sense is dead and gone. In its place, there is a stereotyped subject who, molded to market, leads on playing the role of

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consumed-consumer. And the seduction of liberalism lies precisely on the psychological archetype of an irresistible offer of safety and freedom.

In such context, the State, together with Law itself, become inevitable victims and easy prey for the Market-Leviathan. In Law, the seduction of consumerist instruments were substituted by a promise of speed embodied in the forms of standardization of legal cases. Similarly to the hedonistic world of consumerism, in Law the qualitative criterion gives its way to a massive process of serial production, which is very distant from the intellective character that is part of the legal science. Demands lose their personality and yield to a conceptual universalization that imprisons interpretation and hinders the singularity of the cases.

The death of the free consumer, thus, finds its match in Law: a capital punishment for causes and jurisdictions that stand for clear justification and democratization of a decision which is typical of humanities, focused on qualitative and intellective criteria.

Law, hence, mislays its literary character and queues towards culture mercantilization. Filled with fake makers, jurisdictions get far from democracy and condone standardization, which tramples on the values of difference and inclusion from Post-modernity. The judge has ceased to be a producer and became a product. Product of a system that "purges" intellect and yields to the productive gears of quantification. Producing is needed! Deciding is needed! Jurisdictions galore! The peculiarity of the case and the personality of the participants are not important matters.

As well as in Literature, jurisdiction drops out the impossible simplification of what is complex, in search for quick, ready-made, synthetic answers. There is no way to glimpse an "act of convincement" within a decision that excels in such characteristics, and that fulfills the constitutional precept or even the premise of Socrates, issued so long ago. It seems as though the justifications have become unimportant, arguments ceased to be crucial, and what has become critical is the amount of decisions, even if they are spit out in a serial manner, as another edition of the massive hedonistic shopping center that covers up the whole world.

POST-MODERN LEGAL CRISIS

Modern State faces an identity crisis, as no political theory has been created in order to conceptualize the profile reached by this State – in which at times public freedom is condoned, at other times social rights are dealt with as pinnacles of citizenship and often become minimal, hostage of the variations of the financial market.

On such track, it is essential to realize jurisdiction acts in their historical and ideological dimensions, as well as to explicit their content and contextualize them facing Modern State's crises, recognizing the need for a democratization of the jurisdictional act and Law's temporalization – reconnecting with the past – by (re)building truth and decision theory, minimizing the interference of a market-liberal paradigm and valuing the application of social and individual rights, with the scope of strengthening inclusion policies.

The liberal-individualistic paradigm we can see in the current block of history represents a permanent conflict against Social State, which prefers to grant rights, diffusively, to collectivity. This conflict reaches even the Judiciary Power, which has registered a growing conceptual closeness to the Executive Power, considering the different attributions of both, coined since Montesquieu (2001). Clearly, when the tripartite theory of the State is mentioned, one does not intend to give it an absolute character, nor to delegate to it the role of a last stronghold of democratic State. Its fragilities have been particularly notable throughout time. But the State crisis, which has directed the contemporary debate, has not yet repelled Montesquieu's idea, probably due to the lack of something better, even though Ovídio Baptista da Silva considers it a chimera and legal decisions get even farther from the genetic traces of tripartite.

Thus, economical politics, which are born within the executive power, have found, in the Judiciary, reflections that could not be seen, as they integrate typical actions of the executive power, whose fundamentals include the protection of rights and basic guarantees, a task that denotes the main preciput of State-Judge, considered as forbidden its programmatic retirement.

Of course one does not intend to take hold of the analytical idea that economy has a determined action niche, and, because of that, cannot influence Law, as it would mean sealing the application of an orthodox positivist matrix dependent of the pure Law theory of Kelsen (1996), which, intertwined to a linear Cartesian view, registers no relevance in (Post) Modernity, as the conception that recognizes different knowledge areas as parts of a whole is the one which prevails and, hence, all sciences produce interference and mutual influence over one another.

The conception that comes mainly from constitutionalism is the idea that a Rule of Law, conceived democratically, must not forget the liberal point of view, which is based on the respect for the inherent differences of a plural heterogenic society, nor should it ignore the communitarian view, founded over the right for equality, and the conception of social organizations that share common interests. However, normative pretention has not found receptivity in political, economic or even legal praxis. The truth is that even countries with governments that call themselves socialists – mainly in Europe – end up giving in to market, prioritizing freedom and living passively together with a gargantuan increase of poverty.

Here, so, the search for the real / material truth, together with procedural instrumentalism and standardization do not deserve a place. Courts around the country cannot simply start again from scratch and "create" a (new) thesis, in a Darwinian conception, as if the act of judging were like a lab experience, physically analyzed. It is essential, thus, to state the difference between effectiveness and efficiency, especially following the thoughts of Gaiger (2009), Chevallier (2009) and Jania Saldanha (2009). Saldanha compares the (so-called) effectiveness to a procedural standard forged to meet individual demands, and states efficiency as a universal concept ruled by the World Bank that aims at spreading its claws all over the planet, always concerned with quantitative criteria.

Starting from a recognition of the need for reaching an ethical-social value in the jurisdictional act and a (new) conception of effectiveness, it is necessary to combat the idea of setting economical-liberal aspects as fundaments of a legal decision, by considering what is unconditional in

social and fundamental rights, and having the Constitutional State as a reference.

THE MISCHIEVOUS INFLUENCE OF THE LEGAL PANOPTICON AND THE NEED FOR A REDEMOCRATIZATION OF DECISIONS

The legal panopticon imprisons the desire for democracy, vilifies the possibility of breaking paradigms and, similarly to Medusa, transforms Law into stone. And stone here means immobility, absence of actions, a feeling of a useless life imposed by another. It should be desired, though, that Law, free from the oppressive chains of the panopticon, could represent the other meaning of stone, the one of strength, firmness, character sharpness. Unfortunately, the stone that goes together with Law inhabits the images of lace cuffs, starched petticoats, and is far from the population as it accompanies the five o'clock tea of an inert judiciary, inquisitor and lover of standardization, imposing concepts and emasculating democratic knowledge.

Authorized speech suffocates democracy. Judges forget the iconoclast, polychromatic beings that inhabit the Cortazian semiology revived by Warat (2000). They were transformed into pale ghosts of a harsh, gray, cadaverous everyday. Democracy needs gardens, multicolored gardens. It cannot survive amongst weeds and black roses.

Brazilian Judiciary lives the schedules of decision industrialization, of the (un)personalized massification of the tried, forgetting about the people who (still) insist in existing and being the reason for the pleas that knock on the doors of the State-Judge. Mischievous technology motivates the quantitative evaluation criteria; and the whole machine, created to serve men, now subdues them. Jorge Burgos, Umberto Eco's bling monk (1996), whose baptism, purposely, happened in a library, Jorge Luís Borges' favorite scenery – which influenced decisively the Italian writer –, would tremble before the unfortunate.

Law gets close to self-help literature and the manuals flooding bookshops and classrooms, and becomes very distant from the pulsating thinking and the labyrinthine erudition of Borges (2007). It translates the hedonist consumerism and the lack of culture that has spread throughout Post-modern society. This Law that sadly should be questioned about is but

a byproduct of a crooked world that thinks authenticity is a flaw to be banished.

Those who do not share with the responsible structures of such sad scenario need to be as patient as a goldsmith. And if it is certain that there is no hero of the nation who could blow the ember and set fire to the truth that wants to uncover itself, it is also a fact that these subjects (jurisdictional-product), now taken by a kind of Saracen sadness, with mournful eyes and opaque black skin, need to keep alive the indignation capacity, under penalty of sealing the end.

The use of standardization in court cases resembles the hermeneutic delirium of Macondo's banana company in the novel by Gabriel García Marquez. Facing the sophist statement of the American lawyers, who claimed there had never been workers, opposing the sober memory of the Buendías, "the fake ham of Virginia, the miraculous pills and the Christmas reservations were dissolved, and court decided in Judicial sentence and solemn decrees that the employees did not exist" (Marquez, 1967, p. 182). The standardization of Law has this pretension. The same pretension shared by the banana company's attorney, when transforming something that exists into something that does not exist (Marquez, 1967, p. 182).

Although omitted from the seraphic brightness and from Melquiades' parchments, one should hope the massification tendency in Law changes its path and the truth is not uncovered too late, which would lead to the same fate of the Buendías of the mythical Macondo.

Such adjudications that register the pretension of implementing a univocal sense reveal impostures. They carry along a genetic problem of lack of authority and, despite being strongly sealed upon, are not democratically legitimate. Democracy is not oppressive, it brings freedom. Democracy does not restrict, it includes. Democracy has not got a monologic discourse, but a plural one. Democracy translates the possibility of full prosecution of will based on difference, which, if existing, multiplies alternatives and compounds the mosaic of values that hold up the Rule of Law. When will this blade-shaped, carnivore face of standardization be banished by democratic candor? Time will tell. A realization of the end's

closeness is needed. The refutation of jurisdictional democracy. The recovery of tradition. The return to the human element.

The foundation of universalizing practices, which register the firm purpose of execution of a judicial power project underpinned by the institutionalization of a monolithic group, do not contribute to the democratization of the Judiciary.

This process of robotization and vain attempt to (reduce) bureaucracy in the Judiciary paralyzes what is human, rejects the intellectual capacity of building decisions and gags all acts of transformation. While the world is founded on the existence of increasingly organized groups that translate the forecast of evolution of civil society's consciousness by Gramsci (2000), the judiciary has become indifferent to social demands, dipped in the same stigma that pays homage to the litigation that has characterized it in the past two centuries.

Men are disappearing to make way for stereotypical men-machines, performers of a spit-out symptomatic jurisprudence from higher courts. This sort of "holy grail" dwelling in the universalizing motivation of standardization instruments is surely the result of neoliberalism, which imposes a terrifying management and focuses on the "consumption" of "products" skillfully coined by the Judiciary.

The process coined by higher courts, besides imposing the smug look of unquestionable and planned decisions, relegates the parties, judges and cause lists on their own, capturing the language and weakening democracy. It is necessary to urgently overcome the attempt to formalistic democratization and recognize the enormous need for material democracy, one that is able to rescue men completely and (re) customize demands.

THE IMPORTANCE OF LITERARY KNOWLEDGE IN THE TECHNICAL ERA

Sensitivity was cut off from decision-making acts in Law. The tears dwell only on the black complexion suburb people, the gaunt face of the homeless and the unrequited yearning of those who, devoid of better access, suffer from the indifference of jurisdiction. As asserts Eduardo Galeano,

translating his mission: "I write for those who cannot read. The ones from below, from the waiting queue for centuries in history" (2003, p. 16).

Law gets farther and farther from Galeano's dream, from the Pedagogy of the Oppressed of Paulo Freire (2003), from the Carnivalization of Warat (2000), the blindness overcoming of Saramago (1995), the soul awakening of Garcia Marquez (1967) and the labyrinthine look of endless libraries of Borges (2007). Law in Post-modernity is still tied to traces of Romantism and the foundations of Consciousness Philosophy, and, together with its neoliberal nature and litigation claims, it also sets apart from the truly democratic practices, which should reach the marginalized and produce a "street Law": "Oppression, which is an overwhelming control, is necrophiliac. It is nourished by the love of death and not the love of life" (Freire, 2003, p. 45).

The Law of common sense is not something desired. What is needed is a Law that listens to people and is developed in the neighborhoods, considering the reality of each location in each community, considering the vast cultural mosaic that creates Brazil. Definitely, there is still a judiciary profile that, trapped in offices, waits to solve disputes in series. The memory of the parties, rarely, is in the vague memory of the judge, certainly motivated by procedural outlines or uniqueness of the case.

In fact, the speed of communication and the advancement of information technology widely used to build logical reasoning and schematic diagrams, have jeopardized intellectual knowledge, which proposes alternating assumptions and innovation of thinking. The organization of society in computerized networks has not only fostered communication, but the constant imprisonment of inventiveness and the ability to change the course of knowledge. What should be feared is the organization of the Post-modern society to become hostage of the *interpreter-machine* (Freire, 2003). In this framework, "[...] the nature of knowledge does not remain intact. It cannot submit to the new channels, and become operational, unless knowledge can be translated into quantities of information" (Freire, 2003, p. 48).

Never before have humans cared so much about themselves from the determination of another. Never has authentic life made so little sense and the imposition of the social factoid specimen grown so voraciously. The

current situation suggests a "horizontal or network model, fragmented and multicentered, in which the identity micro groups are juxtaposed in a heterogeneous space of tastes, aesthetics and practices" (Freire, 2003, p. 57).

But as Bauman warns, "the current situation emerged from the radical melting of the shackles and handcuffs, which, rightfully or not, were suspected of limiting individual freedom to choose and to act" (2001, p. 64). Hereditary estates and tight corporate training, which ensured the *status quo* and encapsulated reversal possibilities, caused the "fluidity" (Bauman, 2001) of time, the relativity of the structures. The temples of consumerism (Bauman, 2001), which suggests a false likeness of the actors, a sense of belonging, and which results in a polychromic man-consumer (Lipovetsky, 2007) with the pseudo-necessity of essential goods, as the picture of neoliberalism that, despite the need for serious discussions as a state policy, carries the *status* of absoluteness in the consumerist market.

And the archetype that justifies such a finding is very well built on sound levels, signed on principles and statistics which are periodically renewed: "The places of purchase/consume offer something that no external 'real reality' can ever give: the almost perfect balance between freedom and security" (Lipovetsky, 2007, p. 26). Jónatas Machado exposes the new limitation imposed on freedom of expression, as the convergence of competitive impulses is the basic metaphor of the *free market place of ideas*, endowed with a suggestive power and a persuasive force that influence the freedom of communication (Machado, 2002).

When inquiring about the genealogy of power, Foucault, starting from the recognition of the mass existence of domination instruments and restriction of consciousness freedom, with the clear desire to equalize the people and also institutions, realizes, via questioning acts and dialogue, the possibility of disruption of the monologist power core. The "coercion of a theoretical, formal and scientific discourse unit" (Foucault, 2008, p. 44) must be countered by a reheating process of local knowledge that gather more productive features of opposition to universalizing practices.

This "local discourse" (Foucault, 2008) may establish an antithesis, a questioning *locus* for the hierarchical scientific knowledge, firmly attached to the power genealogies that have surrounded power structures for centuries. That way, full freedom, regarding sexuality, power, and all typical manifestations of individual personalities of a community will be able to find its place, *pari-passu*, tangled by pretentious inclusion programs, within the closed niche of standardized and hermetic knowledge: "The silence, or rather the prudence, with which the unitary theories avoid the genealogy of knowledges might therefore be a good reason to continue to pursue it. Then at least one could proceed to multiply the genealogical fragments" (Foucault, 2008, p. 56).

Law, inevitably, has also become a result of this avalanche of thoughts yielding to the increment of a hedonistic consumption (Lipovetsky, 2007). The risk is that the claimants become consumer-products and that the jurisdiction itself becomes a shopping center, zeroed of the intellectual character that has compounded the Science of Law since the dawn of civilization. Sadly, this process has already started. The consciousness awakening of how ineffective and crooked this standardization can be should make it stanched. Even now, "science has not lost its rights. Within the alcoves, virtues and vices are discussed about; religious fundaments, the ways of happiness, the classical distinction between nature and convention are discussed about" (Leford, 1990, p. 33).

Such *homus economicus*, consumer transformed into merchandise (Leford, 1990), that represents this age, independently of the name it is given, is a victim of the lack of alternatives, of the absence of otherness and plurality, of the unification of scientific thought and profile equalization. And the whole process is spiced by the running time and the procedural massification: "A Law in which the speed is converted into a metavalue becomes a victim of itself and reaches a new degree of pathology" (Leford, 1990, p. 35).

Undoubtedly, the "technical era" (Heidegger, 2006) has arrived. Machines take over men, and men, when acting, try hard to become similar to machines, as if this were the conclusive paradigm of the future. The pinnacle of such stigma is made real by the hedonistic consumerism

working in the collective unconscious. A figure that exemplifies it well could be the user who, taken by anger due to the lack of satisfaction for a service received, gets a pale calm good-bye from the human-robot operator, passively accepting the wrath of the customer: Do you need anything else? Our company is thankful for your contact and wishes you a good day.

In a century when information technology strides forward, when information speed is overpowering, it should not be acceptable that people lose their right to have the State's tutelage, to have a human treatment. It is one of many typical activities that cannot afford to substitute men for machines. Zizek calls attention upon another risk the technological dive generates in the contemporary world: biogenetical manipulation. Based on Heidegger, it is made clear that the danger is not in the premise of such activities, but in the risk of success of the manipulations, "when it happens, it will be a full circle closing up what used to characterize the human being" (Zizek, 2008, p. 21).

Enough. Humanity needs consciousness about the limits of science. Even though "ontological dimension is irreducible to ontical" (Zizek, 2008, p. 28) and there is no possibility of measuring the risk of what is (apparently) impossible, it is necessary to decide where is the borderline of humanity. Standardization of cases also ignores the limits of humanity and sentence the whole species to a court crossroads: if Law was made for man and is man-made, can it become a cyber law, a byproduct of the machine? It is expected that the apparent order of things is reversed and the lack of a human aspect in Law is undone.

FINAL THOUGHTS

Pressed and calcified by the bustle of the days, smothered by a close but paradoxically bleak everyday, man forgets himself and rejects any breath of appreciation of the uniqueness. Little by little he ends up being swallowed by the equalization dictated by a growing standardization sponsored by the media, by the means of production that increasingly

underpin massification, and also by Law, encapsulated in a kind of postmodern subsumption, wearing positivism of another guise, but with an even more detrimental effect. Mirrors indicate how the man would like to live, but does not. The veins are still bleeding...

The pale ghosts of everyday do not resist the stereotyping process that lay their greedy claws, more intense each passing day. They seem narcissistic zombies and unconsciously worship appearance, forgetting the network relations and the concept of a collective individual, inherent to the democratic act. The cyber age, as sentenced Lafontaine, leaves its most pernicious legacy: the murder of intellectualized and critical knowledge. Information becomes increasingly shorter, synthesized and direct. Thought gives place to limited assimilation, shedding a mere internalization and getting distant from the understanding. Relationships expanded by electronic communication eventually generate futile, shallow, anti-intellectual production. The network, despite being a space with great potential for the exercise of democracy, became the idiotized *locus* of repetition of an apotheotic frenzy guided by equalizing profiles.

The theoretical model of cybernetics, in a disorderly way, reduced humans to a genetic code. It is the era in which man, compared to machine, is encrypted, reducing the living beings to an informational situation which (dis)regards skin color, semiotics, complexion expressions or even inventiveness. There is no place for the construction of knowledge, but only for the babbling of a vain idea, of useless words that are repeated in a sterile manner, the result of a technification process developed in absentia of the human element.

The present situation, result of the persuasive and subliminal authority imposed by the market and institutions, stereotyped by this invisible will, firms up in the interpreter-machine and the paradox of man without the human element. The effort of technification of knowledge and literature condensation (if the term applies to such products) frames much of the (re)producers of information. And information is

distinguished from knowledge, as the former, at least in postmodernity, is presented in an uncritical and armored way, burying the democratic spaces of dialectics.

To witness this proof that the world, although looking gray, still registers watercolors that one can color with, which can give life and awakeness, is a necessity.

It is necessary to break with this parallel, non-literary, apocalyptic world. To break with the Violent Land, and the picture of the way without starting. It takes uncertainty. It takes disorder. It takes inconstancy...

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