

A POSTMODERN PERSPECTIVE IN ANALYZING SOCIO-LEGAL PHENOMENA

Antonio Sandu*

Abstract

The characteristic of postmodernism as a cultural paradigm is deconstruction. The fact that this concept – deconstruction- allows a hermeneutical adrift, centrifuge and without poles, shows the difficulty of understanding the ways of thinking, supreme tolerance, which accepts any text. No interpretation of Deconstruction, in Derrida's way as the sense of universality of language, it is not possible, because any interpretation goes in same direction as deconstruction. From the deconstructive-reconstructive hermeneutic methodology we can analyze the existential meaning of historical or social phenomena in terms of understanding the socio-historical reality as a construct that was generated by a "reframed" interpretation. Philosophical issue is "a pretext" of the hermeneutical process of creating the significance. Constructionist epistemology is a structure close to postmodernism perspective in manner of the vision of Lyotard, under which our image of reality is a narrative one, a consensus of speech. The legal discourse is a particular form of speech and can be analyzed in constructionist manner as a textual analysis. The analysis of the legal system must take into account the collective character of interpretive construction. Radically changing the interpretation or the context we modify the interpretation of the representation of reality which consciousness substitute for reality itself. In Foucault's view, Power is internal and constitutive to the discourse.

Keywords: Postmodernism, Deconstruction, Social Constructionism, Epistemology, Legal Discourse, Foucault.

* Dr. Antonio Sandu aLecturer at „Mihail Kogălniceanu” University, Iași, Romania
Contact: Tel. +40 740 151455; antonio1907@yahoo.com

Kant's attempt to found the metaphysics of nature as a rigorous science is regarded by Ilie Pârnu as the "highest synthesis of the modern science" [1990:160]. The Post-Kantian philosophers have realized the deadlock of philosophy as a science which can no longer refer to being, but to the forms of being. Thinkers who followed after Descartes, they understand The Universe as a whole in "itself", the Transcendence being neither denied nor affirmed, but remaining outside of knowledge. The Positive science, though it criticizes the dogma, is based in turn on a set of dogmatic-axiomatic structure, for example: "What exists, may also be known", "Knowledge is possible because the nature entirely obey its laws" From positivism to materialism was a single step. Divinity is excluded from the scope of science, as the world is operating mechanically and appropriate without the presence of Godhead. In this sense, Popper puts modernity by replacing the idea of God with Nature, and thereby building a new religion of modernity around the idea of Nature [1998:113]. Adrian Paul Iliescu believes that the history of modern thought is a "history of the gradual but systematic elimination of transcendent from the Universe"[1989: 25].

Modern paradigm requires to philosophy to retreat to the space of interiority of human being. If it is properly observed, the Scientific Reductionism saying that "*everything is as it appears*", is in opposition to the phenomenological reduction, that has significance only what appears to us and how it appears for us, putting in brackets any discussion about "*how it is in themselves*". The Phenomenology by targeting of the speech, toward the Human Subjectivity and to his own inside, opens the way to refusal of the generalized mechanicism which sought the Philosophy to turn it into "*ancilla scientia*", after in the Middle Ages, the philosophy was "*ancilla teologiae*". What we have presented earlier, allows us to understand the postmodern trend to the affirmation of freedom as a refuse of any existing structure. Freedom is no longer an understood necessity. Freedom is the basis for creating the difference. The right to be different certifies to us the level of reality we achieved. In other words, the more existence I have, the more I manifest as different. Tyranny expressed by obsession of harmony and order is replaced by an obsession with promoting, as a person, or as a group: social promotion, political promotion, cultural promotion. Postmodern thinkers replaced ontic terms with axiological value terms, and will base their mission through praxis. Everything seems to be done for the world to be as it appears to be, no matter of apparent contradictions.

Postmodernism is the paradigm that gives interpretative frameworks and expectations of postmodern civilization. Postmodernism is a cultural and ideological current and postmodernity, is societal paradigm, referring to contemporary social and economical processes. The following aspects are considered to be part of postmodern society: transition to a post-industrial society and economy (A. Touraine), post-capitalist society, (P. Drucker), Information Society (M. Castells), digital society (N. Negroponte, D. Tapscott), knowledge society (L. Thurow) Consumer society (D. Lyons), services society (O. Giarini), transparent society (G. Vattimo), the show society (G. Debord), placed in the process of globalization. However, the period of postmodernity -Toynbee is the first to use this word in this regard [Huzum, 2002:2] marks a new period in human history. As a cultural paradigm, the characteristic of postmodernism is deconstruction The fact that this concept – deconstruction- allows a hermeneutical adrift, centrifuge and without poles, shows the difficulty of understanding the ways of thinking, supreme tolerance, which accepts any text. No interpretation of Deconstruction, in Derrida's (2001) way as the sense of universality of language, it is not possible, because any interpretation goes in same direction as deconstruction.

The words take any sense that we want to give to them, and metaphysics could be a grammar of The Being. Meanings are no longer derived from the properties of objects, but attributed in the communication game, where sets of rules are imposed random by the discourse needs. There is a significant and fundamental difference between reality and our perception of reality. The individual does not respond in accordance with reality, but with his own image or "map" of reality. "Our personal map of reality may differ fundamentally both the reality recognized as such and the maps of other persons" [Sandu, 2005: 74]. "The map of reality" is a paradigmatic model in which individuals structure their knowledge as a cognitive and interpretive model, based on several approximations and reduction of the "unknown" to knowable size, in concordance with specific cognitive model or paradigm. We will seek to analyze some

meta-text items which based articulated postmodernism on postmodern civilization as a cultural dimension.

From legal hermeneutics to philosophy of law

We call hermeneutics of the reality the effort to understand the fragments of reality we come into contact with, the way the interpretations of this reality are negotiated, and how the map of this reality is composed on some object or event.

Administration of justice is essentially a process of interpretation of a "factual reality" called the "case" throughout a hermeneutical grid given by the legal framework on one hand and the negotiation of interpretations of case occurred between the parties involved in the administration of justice on the other hand. For a good legal hermeneutics we believe that the future lawyers first need to understand how is formatted a scientific theory and the argumentation of a factual truth in both science and the social field.

Theories about truth, objectivity or subjectivity of it, in terms of validating the assumptions, will be translated into practical techniques of analysis of a case, of a specific law, or in the process of creating the laws. The implications of general epistemology in particular legal sciences frameworks will be easily deduced by the lawyer in whose preparation elements of social epistemology were presented.

Transforming ethical standards in legal rules, the correlation between them and empowering the judiciary towards ethics allows the future lawyers to understand the human frameworks that these rules work, to designate them, and to understand by reference to rules and individual values on one hand, and those of the social on the other.

The evolution of ethical theories and concepts on the other hand allow lawyers and politicians implications in legislative processes, to analyze the development of the society that need to be marked by new frameworks and how a certain ideological paradigm puts his mark on the social development at some point. We exemplify here through Foucault's studies on the evolution of concepts on philosophical theories of punishment depending on theoretical vision of the person and its own body. The punishment evolves from concrete physical punitive action, torture against the guilty person and finalized with body mutilation, to symbolic punishments related to the nature of rational human being. Interpretation of legal fact with instruments of social hermeneutics that may be considered as originated into the work of Gadamer who considers that in order to express the meaning of text (including a law text) must first translate it into our own inner language (Gadamer, 2001). Starting from Gadamer's affirmations, Gregory Leyh proposes a constitutional hermeneutics that the magistrate has to make, taking into account the balance between the individuals' interests and the general direction of society in the spirit set by the founders of the U.S. Constitution (Leyh, 1988:369-387). We can notice, reported to the Romanian cultural space, an interesting volume of social hermeneutics proposed by Professor Scripcaru Gheorghe and Valeriu Ciuca and Scripcaru Calin in 2005, called *Psychoanalysis and legal hermeneutics, a plea for unconditional love*. The volume proposes the hermeneutical approach of the law in terms of medicine, criminology, psychoanalysis, social hermeneutics and legal sociology. As the authors admit the orientation of legal hermeneutics that the psychoanalytic perspective is originated in Derrida's philosophy, seeking to build a hermeneutical grid based on philosophical assumptions (Scripcaru et al, 2005).

Current social theories, and also the scientific theories in general have a meta-theoretical construction with philosophical character which forms the basis of our understanding and acceptance. The assumption of human actions rationality or those of their irrationality are two ways to be realized both by philosophers of the social space and sociologists, both specialties often being found in the person of the same researcher. Analyzing the core of a theoretical construction in the social sciences they are usually presented as a hypothesis and a methodological construction came to validate that hypothesis. In this step of the science we have at least one meta-theoretical premise with ontological character, which may not evident during the demonstration, but it allows the foundation of the particular approach. The most obvious such premise is that reality (social reality) exists, is independent of us, and can be known rationally.

Reformulation of philosophical issues from a specific kaleidoscopic of the contemporary world that is denying the great structural approaches can be fractal developed through the convergence of sequences completely disparate. The method of this research is to overcome the phenomenological structuralism through deconstruction of real as a negotiation of interpretations.

The historical event (or juridical case) in itself is reconstructed as meaning through a process of "negotiation of interpretations". In this process the significance of the reformulation counts more, because one single event under other convention of language is completely phenomenological altered. Fractals reconstruction integrates various and kaleidoscopic aspects of different interpretations starting from the identification of permanent discursive elements and interpretative constants remaining from cultural contamination. Kaleidoscopic appearance is programmatically in order to comply with ideal deconstruction of language structures and conventions of language. Beginning with the deconstructive-reconstructive hermeneutic methodology we can analyze the existential meaning of some historical or social phenomena in terms of understanding the socio-historical reality as a construct that was generated by a "reframe" interpretation. Philosophical issue becomes "a pretext" of the outbreak hermeneutical process of construction of the act of creating significance. Starting from the historical event as a pretext of research, we will try to find a kaleidoscopic space to display it and to follow the adrift of interpretative process in the contemporary world.

An different epistemology is built by starting from the implicit assumption that the researcher is part of reality and he cannot be ignored in research's result Knowing how to design any epistemic approach, the researcher in humanist or social sciences could understand the underlying assumptions of either paradigm and thus avoid pseudoscience, just by reporting the meta-theoretical level and at the epistemic level contained by that theory.

Social constructionism as a postmodern epistemology

Complementary to postmodern deconstruction, constructionism kept its antirealist character, the plurality of experiences and interpretations in a plural world or in a plurality of worlds, given by linking meaning with the interpretive will. It emerges from Derrida's postmodernism through the cultural or social mediation of interpretation of social reality. There is no unique meaning to correspond to a single truth, but a plurality of meanings, reflection of the whole in the various levels of fractal existence. Constructionist epistemology concerns the development of scientific, social and cultural paradigms as a "negotiation" of the interpretations given to data derived from empirical reality, or in other areas such as theoretical knowledge, models, etc. According to the constructionism the "*map*" that we read the reality through is no more than a continuous negotiation of interpretation. Understanding concepts, as they are taken from scientific language in cultural discourse, is a paradigmatic model, relatively independent from the scientific one from which it derives. Cultural derivation of the meaning of the concepts underlies the semantic convergence of any socio-cultural paradigms. In the mentality level occurs the most profound restructuring, by the transition from understanding an objective, knowable and unique world, to the pattern of a plurality of worlds, of which indetermination is theoretically predicted.

New epistemology can no longer be a positivist one but rather holistic and hermeneutic one (in the way of Diltay's understanding of the difference between understanding and explanation) having necessarily the assumption that research should include the researcher system and his correlation with the object sought. It is slipped from a hard core of the concept of reality as pure objectivity to a plurality of possible realities which by the researchers' intervention is rearranging into a single set of results-consequences. Reconstruction of the "*painting of the world*" is a constant negotiation patterns correlated with new experimental data. Constructionism is seen as part of the postmodern paradigm because of the relativization of models and reporting the *reality* to the results of negotiation of interpretation. Constructionist epistemology is close to postmodernism, by the structure, specifically to the Lyotard vision who says that our image of reality is a *narrative*, a consensus of speech – also considered by Hacking (1999:196).

Social Construction of legal discourse

Legal discourse is a particular form of speech and can be analyzed in constructionist manner as textual analysis. Constructionism can be used as methodology, starting from the epistemic subject's in the social construction of truth. Social constructionism term can be applied to a series of theories that have as their starting point the Gergen's work from which the following article can be considered definitive: *Social Constructionism movement in modern psychology* (1985), *Towards a generative theory* (1987), *Affect and organization in postmodern society* (1990), *An invitation to social constructionism* (2009), *Postmodern potentials* (2000). Constructionism is concerned mainly with explaining the processes by which people come to describe, explain and take note of the world they live in and includes them (Gergen: 2005).

Social constructionism applied in law

Frederick Schauer (2005) considers that the concept of law is changing with time, depending on the evolution of society, and the cultural context in which it is interpreted. The author proposes "*Beneficial Moral Consequences Thesis*". His theory starts from the vision of legal positivism that morality is a necessary condition of legality, made by Fuller. The correlation between morality and legality, says Fuller (1959), could lead to a denial of citizens and authorities to submit to laws which contains article of law with an immoral character. In contrast to this view, Hart (cf. Schauer 2005), affirm the independent nature of the law relating with morality, the legality of a principle not being a guarantee of its morality. Relating to the positivist conceptions of Fuller's and the naturalistic ones of Hart, Schauer argued in terms of methodology the acceptance of either theory cannot be simply based on its benefic character from a moral point of view. Law is a socially constructed institution says Schauer (2005), and has no ontological value in itself (it is not outside the social system where it appeared). Therefore analysis of the legal system must take into account the collective character of interpretive construction. The set of collective interpretation in a society constitutes the "culture" of that society. In these circumstances it is possible that in certain societies, attached to moral values, building laws to be consistent with its moral implications. Other societies may give up the moral value of law in favor of its social usefulness. There are many possible interpretations of how the social construction of legal institutions, each dedicated to a particular culture, ideology and historical time.

The reality as narrative discourse in Foucault's book *Discipline and Punishment: The Birth of the Prison*

One of the fundamental discoveries of postmodernity is to identify ways to blend the ontology as a theory of the existence with semiotics, understood as the science of signs and their interpretation. If for the empiricist "to be" is equivalent to be perceived for a postmodernist such as Derrida and Foucault "to say" is equivalent with "to do" (Cretu, 2004: 20). The "linguistic turn" generated by the emergence of semiotics, transfers the philosophical interest over the discourse and its capacity of building and reconstruction the reality.

Foucault was associated with Structuralism, a movement from which he distanced himself, with post-structuralism and postmodernism. He takes distance to all of these particular systems, and prefers to be considered a post Nietzsche philosopher.

Foucault analyzes the "discourses" that we now understand as being economy, biology or philology, which is science, seeking distinction and at the same time substitution of "words and things". Foucault's speech is more interested in power that is generated by discourse and power relations produced by it. (Cretu, 2004:40).

The central theme of the book *Discipline and Punishment: The Birth of the Prison* is power, and discourse that legitimizes the use of power. Foucault studies philosophy in general and philosophy of history in particular not to understand the laws of history but rather the laws of narrative (discourse)

(Cretu, 2004:55). The history and the social are pretexts for the exercise of speech. Radically changing the interpretation or the context of the interpretation we also change the representation of reality which for conscience, replaces reality itself. The power is internal and constitutive to discourse. "The power produces discourses and discourses produce power effects" (Cretu, 2005:177). Compared with marginal and deviant, the punitive mechanisms place the body in the power relationship. "Instead of treating the history of criminal law and human sciences history as two separate sets whose intersection would have on one or the other, perhaps on both, a disruptive or useful effect, is better to examine whether there is a common matrix, and if both are not derived from a process of epistemological, legal training, briefly to place the technology of power as a principle of humanizing the penalty (Foucault, 1995).

Origin of modernity can be seen from Foucault's perspective in a complex of legal and scientific factors. Normality and abnormality becoming the object of criminal justice, it multiplies its functions simply ceasing to punish but rather diagnosing and healing (Cretu, 2005: 215).

The punitive power is organizing its three devices each with its own speech. The first is seen by Foucault as coming from the monarchic law system. Power has regulatory role in the relationship between sovereign and subject and is external to individuals so it has a realistic nature (corporal). The blame towards the victim is doubled to the guilt against the sovereign as representative of the law. In this type of discourse by identifying the guilt of an individual with the offense of public order against the state and sovereign, the power of law is under the state's power, which gives rise to the function of the prosecutor as a representative of the King (2005, 216). Torture was no longer an expression of pure violence but an encoded technique of using power through which the power was kept and maintained and through which truth is produced. Since the monarchic law supposed the truth (an absolute truth), it requires a specific form of knowledge which takes form as judicial inquiry. The investigation initially replaced the medieval canonical law of proof procedure involving judicial duel as a direct confrontation between accused and accuser. The investigation is therefore needed as an instrument of knowledge and at the same time as a power technology.

The Philosophy of Social Contract introduces a penalty reform by limitation of arbitrary and replacement of the absolute power with absolute ownership. The Ownership is vested with the capacity to be the vehicle (carrier) of both political and judicial power. Violation of the law is no longer an offense against the sovereign, but to the society as a whole. Crime is redefined as a social danger. The role of punishment is to protect society and not to avenge the king. Physical punishment in form of torture is gradually replaced with symbolic penalty representation usually a representation of death penalty as public executions. "Punishment is not a ritual" that has to be known, but a sign that should prevent (a future social danger). Criminal is no more a direct retributive one but especially a preventive one. This philosophy leads to the codification of crime and individualization of punishment according to social risk. The penalty comes just from the results of a research which is done in the manner of a scientific knowledge, or it should be so, if justice is understood as preventing the crime. This penal philosophy is based on realistic humanism.

The objective of this philosophy is to control the criminal acts and especially the ability and probability of committing the facts. In Foucault's view the introduction of the danger and control of the criminal acts concept extends penalty outside the legality control (Foucault, 1995). Discipline involves an active social control rather than a penalty of facts. The principle of innocence until proven guilty becomes a probabilistic calculation of risk of crime. From Probation and Paroles institution derives the restorative penal system, a new vision which replaces criminal punishment, understood as 'negative retribution' of antisocial acts with alternative penalties (to prison) which will take into account the restoring of the "status quo" previously committing the crime (Balaur 2001).

Foucault says that the humanist discourse is the result of a process of codification of individuals, of classification in terms of individual or population. The role of penal philosophy analysis in all Foucault's work is to establish the priority of discourse and of meta-discourse, and of the ideological component of discourse or the dominant social paradigm in Kuhn's view, in the process of social creation of reality. Foucault sees the modern society as a generalized surveillance one, where surveillance is distributed throughout the social body. In the philosopher's vision, there has not been a transformation of

consciousness throughout history, but of the styles of power which transforms from legal to normative (Foucault 1995). The maximization of efficiency and perfect governance are the side-effects of the process of reinvention of the society in its entirety, as in the model of prison (Foucault 1995).

Foucault's social philosophy is a holistic one, the author seizes upon the mix of individualistic speech with the general and global type. Foucault's analysis opens the way of understanding social reality as a construct, as a negotiated interpretation of the juridical (and social reality in general) and where "signs are masks" (Nietzsche cf. Cretu, 2005:227) with the specific role to impose an interpreter and not establish a meaning. Foucault's ontology is based on hermeneutic; the Being was understood linked with language that serves as a mediator between the living (and the existence itself) and the world. It is a two-way relationship between the man who speaks in a language and the language which creates the man. Language experience is dialogue, thus assuming an otherness. For Foucault otherness is loaded with the event and therefore is objective. Knowledge is an understanding of the meaning (Cretu, 2005: 234) of a discourse on a constructed reality than of reality itself. Hermeneutics as a theory of interpretation is operating not just to the knowledge but also the very existence, because of the specificity of a social construct given to reality Foucault opens the door to subjective understanding of social and juridical reality as a negotiation of interpretation that operates in a meta-narration level.

The transformation of the speech on the "human body" follows a historical reconstruction of the idea of power over the individual, and the effective exercise of the power. The corporal punishment is influenced by an "ideological construction" that the power is outside the individuals. The corporal nature of the Power requires a corporal nature of punishment. The subjectivization of ideas about power (the legal power in Foucault's example) transfers penalty from the specific level of physical aggression into the social imprisonment of the punished one. Misobjectualisation of the manifestation of power brings out a new understanding of criminal sanction that is the symbolic punishment.

Postmodern Openings

Postmodernity is based on the imperative of freedom. Freedom is seen as both creative attitude and the rejection of shape empire and of any structured frames. Postmodernity requires renunciation of form subordination as an expression of transcendental, and proliferation of possible worlds to the detriment of the real world. Having as foundation the ontological expression "God is dead" the metaphysical center of postmodernity migrates from absolute to human: From a metaphysic search and an artistic query of "What is", postmodernity turns (linguistic turn) into inquiry "What is for us " or "What does it mean to us what is for us ". Contextually, "what is" becomes negligible quantity in front of "what is significant" that is what we can set.

REFERENCES

- Balahur, Doina (2001). *Fundamente socio-juridice ale probațiunii* Iași : Editura Bit.
- Crețu, Gabriela, (2004), *Discursul lui Foucault*, Editura Cronica, Iași.
- Derrida, Jaques, (1997), *Diseminarea*, Editura Univers Enciclopedic, București.
- Derrida, Jaques, (2001), *Writing and Difference*, Editura Routledge, U.K
- Foucault, Michel, (1995), *A supraveghea și a pedepsi*, Ed. Humanitas, București.
- Fuller, Lon L., (1958), *Positivism and Fidelity to Law – A Reply to Professor Hart*, Harvard Law Review, vol 71 (1958), pp 630-72; H.L.A. Hart, 'Positivism and the Separation of Law and Morals,' Harvard Law Review, vol 71 (1958), pp 593-629.
- Gadamer, Hans-Georg (2001), *Adevăr și metodă*, Editura Teora, București.
- Gergen, Kenneth J. , Thatchenkery , Tojo Joseph (1996), *Organization Science as Social Construction: Postmodern Potentials* in The Journal of Applied Behavioral Science, Vol. 32, No. 4, 356-377
- Gergen, K. (1990) Affect and organization in postmodern society. In S. Srivastva & D.L. Cooperrider (eds.), *Appreciative Management and Leadership* (pp.153-174). San Francisco, Jossey-Bass.

- Gergen, Kenneth J. (1978), *Towards a generative theory* in *Journal of Personality and Social Psychology*. Vol 36(11), Nov 1978, 1344-1360.
- Gergen, Kenneth, (1985), *Social Constructionism movement in modern psychology*, in *American Psychologist*, vol 40, no 3 March 1985, USA.
- Gergen, Kenneth, (2005), *Social Construction in Context*, Sage Publications, Londra, Marea Britanie.
- Germiné, Thomas, J., (1995), *The Quantum Metaphysics of David Bohm*, consultat pe www.goertzel.org/dynapsyc/1995/tgermine.html.
- Ghideanu, Tudor, (2003), *Kant și postmodernismul*, în vol. Ghideanu, Tudor (coord.), (2003), *Integrare europeană prin educație multiculturală*, Editura Lumen, Iași.
- Hacking, Ian. (1997), *The Social Construction of What?*, Harvard University Press.
- Huzum, Eugen, (2002), *Postmodernitate – postmodernism: distincții necesare*, în: *Revista Ekpirosis* nr. 1 nov. 2002, Editura Lumen, Iași.
- Iliescu, Adrian Paul (1989) *Filosofia limbajului și limbajul filosofiei*, Editura Științifică, București.
- Leih, Gregory, (1988), *Toward a Constitutional Hermeneutics* in *American Journal of Political Science*, vol. 32, no.2 editat de Midwest Political Science, Association.
- Pârvu, Ilie, (1990), *Arhitectura existenței*, vol I, Editura Humanitas, București.
- Popper, Karl, (1998), *Mitul contextului*, Editura Trei București.
- Sandu, Antonio, (2005), *Tehnici în Asistența Socială*, Editura Lumen, Iași.
- Schauer, Frederick (2005), *The Social Construction Of The Concept Of Law: A Reply To Julie Dickson*, în *Oxford Journal of Legal Studies*, UK.
- Scripcaru, Gheorghe, Ciucă, Valerius, Scripcaru, Călin, (2005), *Psihanaliza hermeneutică, juridică. O pledoarie pentru iubirea necondiționată*, Editura Fundației AXIS, Iași.
- Silion, Bogdan George, (2002), *Ființă și limbaj*, în: *Revista Ekpirosis* nr. 1, Editura Lumen, Iași