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INDIVIDUALITY AND LAW IN LATIN AMERICA

Abstract: The text explores the undue use of the method of the natural sciences for the social sciences, and the presence of reason and rationality when adopted the solution based not on true premises but on premises that do not have more than a note of acceptance. The individuality emerges from this process, because the juridical decision will reflect the values of the society or the sustainable values at the time of the decision. The text deals with the presence of negative sentiments in Latin-America, and with the role of the individualism, because only the ethical behavior is able to support a better social development.

Key Words: *Individuality – Individualism – Topics – Ethics in Latin America*

1. INTRODUCTION

When we think about the relationship between social sciences and natural sciences, two orders of problems may be highlighted: a problem of method and a problem of ethics. As far as the former is concerned, the big question is the undue use of the method of the natural sciences for the social sciences. Additionally, we have to consider how to understand the presence of reason and rationality when adopted the solution based not on true premises but on premises that do not have more than a note of acceptance.

Inevitably, the individuality emerges from this process. And the result of consensus still needs more the presence of individualism, because only the ethical behavior is able to support a better social development.

2. SOCIAL SCIENCES AND NATURAL SCIENCES: A PROBLEM OF METHOD

As far as the problem of method is concerned, there is an old discussion about the possibility of having a common method for both sciences.

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In 1708, the Italian political philosopher, rhetorician, historian, and jurist Giambattista Vico established some remarkable distinctions between these two methods in his *De Nostri Temporis Studiorum Ratione* (“*On the Order of the Scholarly Disciplines of Our Times*”), a lecture which was pronounced at the University of Napoli.

The precursor of systemic and complexity thinking reminded his contemporaries that it was impossible to forget the lessons of the ancients. The Greek-Roman tradition was not able to be hidden by the premises of the Cartesian method, and by the flattering perspectives of the modern sciences. Vico shows us that the Cartesian method as well as the topic-rhetoric method have to be used simultaneously, because only the latter is useful to be applied to the social sciences.

The Cartesian method deals with the idea of the predictable behavior of natural objects. It is worth creating a system of enunciations able to describe, explain and predict, with the starting point at the *primum verum*. This must be considered all over or without doubt. The consequence of the Cartesian method is a great precision, if the *primum verum* is really *verum*. This method deals with the ideas of truth and falsity. But it is impossible to apply this method to social sciences. In the *De Antiquissima Italorum Sapientia* (1710), Vico argues that:

[...] to introduce geometrical method into practical life is ‘like trying to go mad with the rules of reason’, attempting to proceed by a straight line among the tortuosities of life, as though human affairs were not ruled by capriciousness, temerity, opportunity, and chance. Similarly, to arrange a political speech according to the precepts of geometrical method is equivalent to stripping it of any acute remarks and to uttering nothing but pedestrian lines of argument.

For the social scientist, it is quite impossible to build absolute predictions. Deductions are limited. But some social theories accepted that it was possible. Interpretation was avoided and abjured, because it creates a perturbation on the strict logic-based foundation of the deductive system.

Indeed, the ideas of falsity and truth are unfitted to the social sciences. Basically, these ideas must be replaced by the ideas of acceptable or unacceptable. Then, instead of true or false, it is necessary to use the concepts of credible and not-credible. The starting point is the *sensus communis*. The final point is the agreement with the argument. The logics could be a bit out on the edge of it, but the wisdom only occurs when the prudence and consensus can be established. As Aristotle argued, the consensus consists in “those opinions accepted by everyone, or by the majority, or by the wise – and among the wise, by all or most of them, or by those who are the most notable and having the highest reputation” (*Topics*).

Then, Vico tried to establish a sort of conciliation between the new (natural) and the old (social) sciences, by claiming that it is impossible to impose the Cartesian method upon the second ones.

But these advices pronounced in 1708 were not followed properly. The idea of rationality remained unconsciously, creating a certain complex of inferiority for the social sciences and their method.

Some years later, the abandon of the topic-rhetorical method conducted to the theories of legal positivism, with its unacceptable comprehension that the law sys-

tem could be a closed system, logically organized, with rules hierarchally built. An example of this kind of excess was the Leibiniz's *ars combinatoria*, with the impossible dream of the judge machine.

But not only the bad use of the Cartesian method created radical theories. The bad use of the topic method generated the legal realism, which is another kind of excess. For this theory, any solution could be logically explained, and a decision will be made only by the discretionary power of the decision-maker. As we can see, they forgot completely the lessons of the use of rationality, which always need a consensus established between the participants of the discourse.

Virtus in medium, explained the ancients, and the right use of the method is the only way to avoid the unreasonable path.

3. SOCIAL SCIENCES AND NATURAL SCIENCES: A PROBLEM OF ETHICS

Another aspect of the relationship between the social sciences and the natural sciences belongs to the field of ethics: how to control the use of the discoveries of natural sciences?

But, how will it be possible to establish the ethics? Then, let's go back to the method of social sciences.

4. INDIVIDUALITY, REASON AND LAW

Is the topic-rhetoric method a rational method? Of course, yes, but only partially.

Law is not logic at all, and the results are not always predictable, what can cause a certain horror to hard sciences.

The reasons for this phenomenon are related to the process of decision-making. Its first phase is not logical, and its second one, when it has to consider the current circumstances, deals with some level of uncertainty or unpredictability (but never deals with subjectivity, full discretionary power or irrationality).

Aristotle, and more particularly, Cicero, described the decision-making process as topics. There is a pre-logical phase called invention or *euresis*, when the law operator will choose an argument that he believes that will be useful to win discussion, and, consequently, be accepted by the participants of the discussion. The choice is individual, not logical (or only internally logical). The law operator will try to define the possibility of acceptance of his or her argument, the weakness of the opposite arguments, considering the values of the group and the weight of the precedent solutions that used the same argument. Someone can imagine that the law operator will use only personal values, but he or she really needs to imagine an association with the social, acceptable and valid values if he considers the acceptance of his argument. He acts using his own values but he or she knows that they must be associated with social values (if he or she wants to offer the acceptable solution).

The law operator has to take into account the change of circumstances, and he or she has a large range of arguments to use. These arguments are *common plac-*

es or *regular arguments* for any discussion (*topos*, in Latin, then *topics*, the description of this process). The individuality emerges from this process, because the initiative to choose the best argument belongs to the law operator, and it is undoubtedly that the expertise of the law operator will enormously facilitate the decision-making process.

The deduction is the second and externally logical phase, dedicated to the last phase, the *conclusio*, when the consensus will be adopted. We have to remember that the logic, if present at the first phase, was not under test or evaluation. Only at the second phase it will be possible to test the argument, putting a counter-argument or exploring its logical consequences. The solution will be logical because the acceptance must be rational.

The process of law decision-making is successfully described by the argumentation's theory, and some of the most remarkable authors in this field are Theodor Viehweg and Robert Alexy in Germany, Chaim Perelman in Belgium, Recasens-Siches in Mexico and Ronald Dworkin in GB and USA.

Thus, it is very important to understand that with this comprehension the solution is given by rationality of the individual, not by the state or the sovereign, because the solution is based on the consensus aimed by the law operator, not always member of the Judiciary Power. At the constitutional law field, it is common place to talk about an interpreter's open society, because the constitution is lived every day by everyone (see a German Peter Haberle, in his work *Die offene Gesellschaft der Verfassungsinterpreten*).

5. ETHICS AND INDIVIDUALISM

Then, the sentence will reflect the values of the society or the sustainable values at the time of the decision.

But what happens when the negative sentiments defeat the positive ones, like in Latin-America, where the level of tolerance against the impunity and the corruption is very high?

What does it happen when selfishness and self-centered egoism predominate, or the beliefs that the State is a not credible institution and to take advantage of any situation is preferable?

The law solutions will unavoidably take the directions of the predominant values, at the risk of bypass the law (now just a formal law), or of lack of the rule of the law.

But why to affirm the presence of negative sentiments in Brazil or the bad use of individualism as a rule?

The roots could be associated with the fact that Brazil was a former Portuguese Colony, and the Brazilians learned to avoid the Portuguese authority, oppressive and abusive. This lack of respect regarding the authority created a culture of disrespect to the law, or a lack of common sense of governance. In Brazil, the creativity was used to escape from the law, the original thinking was used to avoid the state. This behavior even took a particular name: the "*jeitinho*" (in English, "an untrans-

latable term that corresponds roughly to a ‘knack’, ‘twist’, ‘way’ or ‘fix’”, according Keith Rosenn, in his article *The Jeito, Brazil’s institutional bypass of the formal legal system and its developmental implications* – 1971).

There is only one solution to change this situation: education, education and education, and ethics, ethics and ethics.

It is necessary a change of mentality and examples are the best way to create it. Individualism must be reoriented to a personal responsibility, no longer self-centered, but altruistic and ethical.

The path for this new individuality needs not properly leadership, financial aid or governmental initiative. It needs personal and individual examples, not the inaction after waiting somebody’s initiative, public or private. Good governments or examples could not be in bad hands. Financial aids mean infantilization of some societies. They forget that the values must be lived, not given.

6. CONCLUSIONS

Then, the path to this new individuality needs to avoid the lack of individualism.

The modern academies of arts and sciences, like the World Academy, have a great role for the development of the individualism. That is to say, they establish strategic partnership with private and public institutions, promoting research, creating observatories or implementing the ethics, building, at the end, the best sense of individualism.

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