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The Science of Law in Postmodernism Period - General Considerations

Emilian CIONGARU*

University Bioterra Bucharest - Faculty of Law; Associate scientific researcher, Romanian Academy - Institute of Legal Research "Acad. Andrei Radulescu", Bucharest, Romania

***Corresponding Author:** Emilian CIONGARU, University Bioterra Bucharest - Faculty of Law; Associate scientific researcher, Romanian Academy - Institute of Legal Research "Acad. Andrei Radulescu", Bucharest, Romania.*

ABSTRACT

The postmodernity is presented as a work of social transition, dominated by the globalization process and by searching, sometimes categorically asserting new forms of organization and leadership, of new institutions and ways of life. The advantage of postmodernism itself, which recognises a plurality of rationalities and a multitude of justices, requires increased caution on the part of the person who makes judgements about justice or about rules, forcing them to judge not only based on a single criterion, but on several. Postmodernism claims finding ways to reconcile different conceptions of justice and law, to adapt to rival claims and concepts about justice, such as: the community conception on protection, the legal conception on compensation and the conception on appeals and revisions. If, during the modern period, the liberal classic model of the rule-of-law state was based on the general and abstract nature of the law - as a prerequisite for formal equality -, the universality of individual rights, the postmodern orientation consists of the particularisation of legal regulations and of the specialization of human rights.

Keywords: *postmodernity; postmodernism; law; justice; rule of law.*

INTRODUCTION

Postmodernity represents a condition that refers to all the phenomena that follow modernity and includes a focus on the sociological, technological or other conditions that distinguish the Modern Era from everything that followed it. Postmodernism, on the other hand, represents a set of responses to the condition of postmodernity of an intellectual, cultural, artistic, academic or philosophical nature.

Mentioning from the beginning that the term postmodernity is sometimes considered synonymous to postmodernism (Lyotard, 1988, 97-99) or sometimes with postindustrial society, it can be said that the term refers to the most advanced stage of development of modernity, characterised by: asserting the lack of certainty of knowledge, discrediting evolutionary principles, applied to the interpretation of history and replacing it with the idea that history is non-teleological, in such a way that no type of "progress" can be sustained - in the sense of making change permanent, of the end of history, etc., through the establishment of a new social and political order in which the old doctrines and/or ideologies have become obsolete and new ones - such as environmentalism - are coupled with suitable social-political movements, possible generators of new alternatives of organization - such as the multiplication of authorities, the erosion of power, over-extended mobility, in time and space.

Therefore, postmodernity is presented as a work of social transition, dominated by the globalization process and by searching, sometimes categorically asserting new forms of organization and leadership, of new institutions and ways of life. (Ihab, 1987, 93)

General Considerations Regarding the Influence of Postmodernism on Law

In order to retain some specific aspects regarding the influence of postmodernism on law, there are some interesting considerations (Murphy, 1991, 122-124), which show that postmodernism is a reflection of the modern condition, consisting in that one lives in a differentiated society, in which certain symbolic areas coexist: the community area, the economic area, the bureaucratic area, the civic area, the cultural area and the reconstructive area. The public area is added to them, and it is situated on

a special place and has the functions of mediating between the other spheres, reconciling them, internalising and moderating the conflicts between the differentiated areas. Each of the areas consists of its own regulations, purpose, procedural rules, processes, values, distinct transformations and balances.

Each of these areas focuses on an element or another, and each has special claims and bases them on its own views about a better society, about fair or impartial treatment. As a result, in society there is no single justice, but a multitude of justices which coexist, either in relationships of friendship, or of conflict.

But the advantage of postmodernism itself, which recognises a plurality of rationalities and a multitude of justices, requires increased caution on the part of the person who makes judgements about justice or about rules, forcing them to judge not only based on a single criterion, but on several. Postmodernism claims finding ways to reconcile different conceptions of justice and law, to adapt to rival claims and concepts about justice, such as: the community conception (Micu, 2007, 33-34) on protection, the legal conception on compensation and the conception on appeals and revisions.

Some opinions (Sumner, 1991, 48-49) evoke the signals of postmodern sociology, such as: the appearance of a market economy which emphasises flexible specialisation, having effects on internalisation, on pragmatic individualism and on fast economic changes; diminishing the power of representative democratic institutions, in favour of a more effective, but more authoritative leadership of financial agencies, increasing the distance between the citizen and the centres of economic, political and cultural decision-making. All these have caused, with respect to the individual: deviation, fear, isolation and diminution of the prestige of law, law which has become a means used by the decision-making bodies of postmodernity to excuse or rather, legitimate, their actions, rather than to protect the population. The so-called "iron laws" of economic growth, of the market, as well as of the need for law and order are invoked to justify postmodern legal procedures and judicial decisions.

The quoted author shows that, in the postmodern period, certain specific tendencies of the evolution of modern law are reduced, while the practical purposes of law are placed first. If, during the modern period, the liberal classic model of the rule-of-law state was based on the general and abstract nature of the law - as a prerequisite for formal equality-, the universality of individual rights, the postmodern orientation consists of the particularisation of legal regulations and of the specialization of human rights.

Sumner's conclusion is the following: even if it is required to give up the Marxist concept of ideology, against which countless criticisms have been made, we must not trivialise the concept of "ideology" and only see something negative in ideology, and something positive in non-ideology, being able to look at law as an ideological form of a complex nature, which is preferable to the transformation of law (Niemesch, 2014, 77-79) in a system aimed towards profit, advantage, opportunism and instrumentalisation.

A portuguese author (De Sousa Santos, 1989, 113-115)estimated that the 20th century marks the beginning of the transition from modernity to another social-cultural paradigm which could be labelled, in the absence of a more appropriate name, ”postmodernity”.

Making a parallel between modern and postmodern evolution, the aforementioned Portuguese professor emphasised that, as modernism promoted the idea of the absolute autonomy of art from politics, morals and mass culture, the idea of "art for art's sake" in the field of aesthetics, so in the field of law, the development of a formalist legal science which took the outer form of the pure Kelsenian theory on law, took place.

Historical Evolutions of the Influence of Postmodernism on the Science of Law

Beginning with the 19th century, modern state law has been a unique, autonomous, glorified law, endowed with powers of social modelling and innovation, of planning for the future. In the last decade of the previous century, the ageing of state law and the emergence of fluid, ephemeral, negotiable and renegotiable forms of law (Dasse, Peregaux and Rey, 1999, 123), of certain regulations on the relations among corporations, as well as of community regulations, of a postmodern legality, consistent with the momentary interests of the parties concerned, were observed.

De Sousa Santos proposes as a solution, the renewal of direct, participatory democracy, not in order to replace representative democracy, but to strengthen it. However, he emphasises,

the renewal of participatory democracy requires a concept of law based on legal pluralism, and the postmodern battle for the law shall have as its objective, combining state law with non-state forms of law.

In another opinion (Sack, 1999, 247-249), it is deemed that the most important challenge that law must face at present, globally, is the reintegration of the social and the legal, through a more pluralist approach.

The Paradoxes of the Transition of the Science of Law from Modernism to Postmodernism

A characteristic (Arnaud, 1995, 33-35) which cannot be ignored, even in a brief treatment of the subject at hand, is that of the paradoxes inevitably accompanying the radical renewal which the transition from modernism to postmodernism represents.

- Paradox of the universal and the particular. When modern legal systems were formed, they were created on universal, individualistic bases, which allowed for the development of the concept of human rights. But the latter were excessively developed, which has led to their over-ideologisation, with the negative effects which we still feel today.

Since the last decades of the 20th century the myth of the universally valid and universally protective law has ended. However, universalism remains the foundation of advanced democracies which, without being perfect, represent the least bad contemporary political regime, although relativism is at the root of legal practices.

- The paradox of deregulation and regulation. Although serving the interests of economic liberalism, lawyers and politicians have tried to prove the benefits of legal deregulation; we are witnessing the manifestation of an increasingly stronger request for regulating certain areas associated with big threats, such as, for example, the field of bioethics. Even though state intervention is requested, it is criticized for excessive interventionism.
- The paradox which consists of the fact that the emergence of alternatives to state law is likely to produce perverse effects. Instead of ensuring the flexibility of relationships, within the civil society, alternative solutions sometimes cause a revival of state control.
- The paradox of the equal rights of subjects within a differentiated society. Simultaneously, more justice, more equality and more participation of citizens in social life are requested, on the one hand, and on the other hand, there are certain systems which represent alternatives to the legal regulation or judicial settlement of disputes within a differentiated society, consisting of subsystems generating their own regulations. However, according to the same specialist, it is better to have a certain dose of pluralism and a certain kind of pluralism so as to allow for the fight against state law. But we must not submissively accept any pluralism which introduces differentiation that single origin law might blur, or, even more, settle.
- The paradox of the marginalisation and, at the same time, the reconsideration of the role of the judge. While society is in search for alternative ways of settling disputes, other than the judicial one, the judge ceases to be the only "mouth through which the law speaks". He, along with other interveners and social partners, must find pragmatic solutions for cases subject to his settlement, sometimes even to the limit of the mandate assigned by law. Given the crisis of the justice system, the judge is becoming more and more responsible for the protection and education of individuals brought to justice.
- The paradox of the national or the global and the local, which consists of the fact that most local authorities are inclined to protect a small community against foreigners, with the exclusion of others.
- The paradox of the contemporary law learns to unwillingly manage the complexity of the world where it carries out its duties. This management is necessary, but it is not possible.

Conclusion

The following have been observed: the diminution of the role of law in the field of social transformation, the desacralisation and trivialisation of law, especially state law, the end of legal fetishism, of the monopoly of the state in the development and even the enforcement of the law and the emergence of legal minimalism. Inevitably, the following question arose: if the action limits of law are becoming more and more evident, if it is unable to resolve the most

serious common problems of humankind, why should we take it seriously? Under these conditions, alternative solutions are becoming more and more credible?

Legal minimalism means that legal relationships are increasingly subject to the relations of power, it means disarming social groups with no power, which are signs of a profound crisis of democracy.

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