-REVISTA DA FACULDADE DE DIREITO DA UERJ- RFD- v.1, n.25, 2014

METHOD, CRITICISM, MYTH: A REVISION OF THE "LEGISLATIVE PROCESS"[1]

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ABSTRACT

With these, we intent to present the guidelines to a "critical methodology" for an analysis of Law. This analysis shall be relevant to a Philosophy and Theory of Law, and to a "praxis" of Law, as well – since it can be useful to dogmatic kind of legal text lectures, and to the analysis of the texts about the texts of laws, as the Doctrine or Precedents.
Thus given, we present our proposal for a "critical methodology" for Law Studies, developing it in generic terms, applying it to a critical regard of the Legislative Process as a mythological phenomena of modern societies. To finish, we aim to offer a tool to any legal analysis of discourse, of any legal area.

Keywords: Critical methodology; Myth; Legislative Process; Rational Legislator.

MÉTODO, CRÍTICA, MITO: UMA REVISÃO AO "PROCESSO LEGISLATIVO"

RESUMO

Visamos, com este artigo, esboçar uma "metodologia crítica" para uma análise do Direito a qual possua relevância tanto para uma Filosofia e Teoria gerais do Direito, quanto para certa "prática" jurídica, a partir do momento que pode auxiliar no trato dogmático que se dá aos textos das leis, e aos textos sobre os textos da lei, quer seja a doutrina ou a jurisprudência.
Por isso, apresentamos aqui nossa proposta de uma "metodologia crítica" para o Direito, desenvolvendo-a em termos gerais e realizando, em seguida, uma pequena "aplicação" na

[1] The translation of this article was done by Juliana Candido. The authors do not assume any responsibility for the translated text, only for the original version, in Portuguese.
This article was authorized for publication by the authors in 24/06/ 2014. Version in Portuguese received in 22/05/2013, accepted in 14/02/2014

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leitura do Processo Legislativo enquanto um fenômeno mitológico das sociedades modernas. Por fim, apresentaremos nossa proposta de forma a oferecer uma ferramenta útil para toda e qualquer análise do(s) discurso(s) jurídico(s).

Palavras-chave: Metodologia-crítica; Mito; Processo Legislativo; Legislador Racional

1. **"Critical methodology"**

It is true that quotes give relevance to a text. The quotes in this sub-title have the following intent: to lead the reader to take, with these two words, the same care that we took in order to make use of this linguistic tool.

The proposal of a methodology gives us, in first place, the possibility of seeing some connection with the subject of greatest interest to us here – which is, the Law - and the notion of "Science"[4]. We could even say that the method is the essence of science[5], if we could in essence without contradicting the own method of methodical doubt[6]. This type of "doubt", however, does not hold an exclusive and unique connection with the methodic and subjective doubt of Descartes, and it *does* allow one to be influenced by the existential doubt of Pascal or Kierkegaard[7].

[4] In a somewhat classic way, or even illuminist, Ferraz Junior, "Science consists in a set of statements that aims to transmit, in a highly appropriate manner, accurate information about what exists, existed or will exist." p. 10 and "A science may have many and various techniques, but can only have a sole *method. Method* is a set of principles for the evaluation of evidence, canons for judging the adequacy of the proposed explanations, criteria for selecting hypotheses, whereas *technic* is the set of instruments, variables according to objects and subjects. The problem of the method, therefore, concerns the very notion of the true statement", p. 11, in FERRAZ JUNIOR, Tercio Sampaio. *A Ciência do Direito*. São Paulo: Atlas, 2007.

[5] About the "essence" of science, it is also interesting to consider the Heideggerian reflections about science as a manifestation of the Technique and as Metaphysic of the Modernity, which makes that this do not think, but to develop, to explain, to corroborate, but do not think, among others, HEIDEGGER, Martin. *Überwindung der Metaphysik*; Gesamtausgabe – Band 7. Frankfurt am Main: Klostermann, 2000.

[6] In the Heideggerian thesis, science overlaps the traditional metaphysics transmuting the truth of the essence, by the physical and chemical ones, among others, which, however, also do not have the power to reveal the truth of things in their simplicity. Although and therefore, the metaphysical and scientific explanations beinge totally different, they could fill the same role in the oblivion of the Being.

[7] The methodical doubt of Descartes is known to have influenced, and a lot, our conception of science, from *The Discourse of Method*, approaching the ideal of science to the "mathematical concepts", to the "Cartesian Plane." In addition, an *existential* question that tries to integrate the concrete subjectivity, questioning the relationship of this with the objectivity "of the world" in a more rhetorical outline and pre-Kantian (Pascal) in a dialectical outline and post-Kantian (Kierkegaard).

We do not intend here to elucidate all relevant discussions regarding the "Science of Law" – we do emphasize, however, that to us, science of Law comprises the set of writings, activities, meetings, seminars, lessons, ultimately, of *speeches*, whether materialized or not, which assume the character of scientificity by the submission to the institutional rules, contextualized and historical-culturally located that define a scientific speech and have, as object, the Law.

Law, in its turn, is here understood as a complex phenomenon which can be analyzed by numerous biases, each one legitimate in its field: the linguistic, the socio-economic, the historical, the pedagogical, the forensic-explanatory, among many others[8].

However, it is precisely by the fact that these "institutional rules"[9] are especially formal that it allows a flexibilization of the concept of science, in particular, because it concerns a "human" science. It is clear, then, that the *legal interpretation* permeates form and content of scientific speeches making room for the construction of meaning in a broader way rather than the classical conception of science, as "causal evidence or private purposes logic" - opening a door to the influence of philosophy and politics over "dogmatic readings" that, even so, do not cease to be scientific.

It is also clear that a first point for the "methodology" of the science of law is the adaptation to forms. A second one, derived from the permittivity of such rules is: how to insert external elements - such as the "criticism" - without misinterpret the scientific nature guaranteed by formal rules?

We aim to present here the answer to this question, but not in a *direct* way, not in a statement with Subject-Verb-Object.

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[8] Even if this definition is circular (which can be summarized, not lossless, roughly by the "science is a set of rules that defines something as a scientific or scientifically relevant, and the texts which fit to these rules") we see that it is necessary to shift the science function of "the true", as Ferraz Junior and Luhmann do. Often the purpose of a scientific speech is to be considered valid within a certain context of acceptance (which Luhmann characterize as moral, "consideration") regardless of the degree of accuracy of his statements. It approaches, for example, of the notion of establishing a "paradigm", as proposed by Kuhn, or simply the anarchic field of achievement and error as by Feuerabend.

[9] To elucidate, we mention "examples": it is considered as scientific-legal every text published in this or that magazine; it is considered scientific every class taught in all Law Schools recognized by the body which the Law qualifies as competent to do so; it is considered scientific-legal every book written accordingly to the ABNT rules - among others possibilities.

This criticism, while an external element, may be welcome within the scientific speech – even if it comes to questioning the very scientificity of the speech, or even the existence or necessity of the existence of the speech in itself, as it has actually occurred with the Houslmanian idea[10] of criminal abolitionism, with its radical criticism to the criminal-legal science, to mention as example.

What we aim to understand by "criticism", however we do explain according to some reference points. First, a key reference is the paradigm of *Critical Theory*, related to the famous "Frankfurt School", where we focus in particular on the work of Adorno and Horkheimer, *Dialectics of Enlightenment: Philosophical Fragments* (São Paulo, 1985). With this work, Adorno and Horkheimer argued that "myth is already enlightenment and enlightenment eventually revert to mythology" (idem, ibid. 15) and, thus, aimed at a "methodological" critical procedure of Humanities and Technical Society as a whole - a subject which will be discussed below.

We do not share, however, the materialistic bias intrinsic to this criticism, nor his *negative* conception of Myth - as it will also be developed below.

Another paradigm is the one regarding the philosophy of language and the assumptions of the linguistic turn, which we will not analyze in detail, although we do emphasize: 1) the role of deconstruction as a manner of research; 2) the analysis of speech as an instrument of inquiry; and 3) the practical hermeneutics as a method of reconstruction which always demands a decision by the researcher.

As for the deconstruction [11]; this is based on the assumption of the existence of the text, and basically, the possibility to connect the notion of existence to the notion of text, and, perhaps, to nothing more than that. That given, it is the reality expressed as text, while the Writing, in the words of Derrida, and its inscription exist thanks to the differAnce, of which

[10]For more on the subject, see FOLTER, Rolf S., On the methodological foundation of the abolitionist approach of the criminal justice system - a comparison of the ideas of *Hulsman, Mathiesen and Foucault*. In Revista Verve, Nu-Sol, PUC-SP, São Paulo, 2008, No. 14.

[11] See DERRIDA, Jacques. Grammatology. São Paulo: Perspectiva, 2009; idem. *Writing and Difference*. Sao Paulo: Perspectiva, 2010 These are the two main sets of writings that "merge" the deconstruction, though talk in foundation/grounds is very risky. On Derrida and the deconstruction, see: http://www.cecl.com.pt/rcl/03/rcl03-02.html (consultation held on 18 October 2011).

we can only get the *trail*. This means that the sense does not comes from fixed structures (meaning/significant; image/referent), but it is build up and mutates, sliding through the words, shaking the binary conceptions (high/low conceptions; right/wrong, etc.) that shape our *logo-centric* world vision[12].

Regarding the analysis of the speech [13], this reveals, with Bakhtin (1995, 2002), that the human action builds its significance not according to the dead rules of semantics, but according to thematizations (semantic-objectal) presented under the form of dialogical statements – no matter how monologic is the speech. We also learn that speeches become partially stable under speech genres, which are publicized by Literature, in all of its forms. With Foucault (2005, 2008) we learn that it is possible to "dig" the surface of speeches in search of structural relations and primary references. With Pêcheux (1993), finally, we learn that a speech can also develop itself "automatically", but, unlike that might suggest, such automation strengthens the role of the subject on its constitution.

Finally, hermeneutics, according to Ricoeur (1986, 2008), teaches us that, even if we criticize the deconstruction stylish (or even Nietzsche's radical stylish critique or Heidegger's destruction) and analyze speeches in search of ideological aspects (Bakhtin, Pêcheux) or structures of power relations (Foucault), we must take a comprehensive approach at some *point* of the reading, resorting to a dialectics between understanding and explanation, and know that impartiality is not even desirable over here, in case it means an absence of values - the same applies to our present reading of the texts that form the "Legislative Process".

Due to the omnipresence of the interpretative duty, not only by the legal scientist but also by the militant jurist we intend to bind together what these various "Critics" have in common, without, however, making an unfortunate confusion between their "methods" - for this, the key point is to overcome the Cartesian model of method and science.

If there is a science of Law, therefore, this must be stated looking at its own

[12] The "logo-centric" neologism makes direct reference to the greek origins of the western thought, in particular, the binary logic of classical Greece, which also influenced the great binarities of the Law: public/private being the matrix guidance.

[13]

methodology, and, our option, is that this look shall be given *critically* on the research subjects and the methodology itself, although it does not imply an unreasonable and unbridled criticism, either of legal texts, doctrinal positions or judicial decisions - so that we can contribute to understanding both the phenomenon of Law in society as an analysis substratum, as for the future judicial "decisions" that will constitute the future of many research subjects, but, much more seriously, as it will affect the lives of several people.

2. A **critical methodology from the Myth – elucidating the concept of Myth**

As we mentioned above, Adorno and Horkheimer gave Sociology an interesting thesis that, we do believe, provides a prolonging position of "critical thinking" to infinite levels - *ad infinito*, something that, in a deconstructive-analytical phase, is an immeasurable advantage: it is an inter-relationship between Reason and Myth. This relationship, as proposed by Adorno and Horkheimer, has assumed, however, an almost Manichean division that considered Myth and Reason as "opposes" to then bothof them in touch. Myth as "illusion" (Freud) and 'ideology' (Marx), and Reason as "acting according to ends" (Hegel, Weber). It is easy to see the influence of this mechanistic logic once applied to read social relations[14]. It is true that, especially from Horkheimer, who, in his mature writings, became less fierce regarding the themes of "spiritual-religious world", this concept was partially revised.

Such negative/pessimistic assumption of myth, is an inheritance of a classic division (in the historical sense, including) between Reason and Myth and reaches Adorno and Horkheimer practically intact . We mention Bacon's work, "The Wisdom of the Ancients" (2002), as the spark of this opposition, although his opinion regarding the myth was much

[14]See ADORNO, Theodor W, Negative Dialectics, São Paulo: Zahar, 2009. Habermas developed a considerable part of his work also having as a reference the Dialectic of Enlightenment. His criticism, however, is in the sense that if there is an exhaustion of every possibility of rationality in the Reason refered to ends (as Weber called it), the Criticism in itself would lose its foundation. For this reason, Habermas proposes a "split" in the very concept of Reason:Reason refered to ends and Communicative Reason. We do not follow here, this rational conceptualization, since we believe that every reason which is based on the need, or, even in the assumption of consensus loses its critical potential by ignoring the unconscious forces that motivate a "(apparently) rational communication" - albeit certainly the communicative theory of Habermas it is not exhausted at this point and has much to contribute to a more democratic application of Law.

more positive (good) rather than the modern one[15]; the empiricism of Bacon contributes, indirectly, to this construction[16].

Reason is good, Myth is false – this would continue to have, certainly, great historical and literary value, but not any more scientific one and therefore it escapes from the "discourse of truth"[17].

We do believe that this opposition needs to be revisited, without abandoning the dialectics of enlightenment itself (which is the connection Reason-Myth).

To do so, we must question the image that freezes the Myth in the *past*, as something distant from *our scientific* and *modern* time, as a kind of narrative that seeks to "explain" the phenomena of the World and that has no more value in this sense, since science explains these phenomena with accuracy.

Another image that is to be questioned is the one of the interconnection between Myth and Religion, giving to this last its own space, which shall not be confused with the one from the Myth[18].

Campbell questions the idea that the Myth has an "explanatory" function, relying on Jungian psychoanalysis, and stating that "myths are clues to the spiritual potentialities of human life" (1998). With this simple statement, Campbell tries to assert that, although the Myth talk about World phenomena (thunder, floods, pregnancy, death, sun, among others) it always makes reference to the "human life" and its mysteries, giving that the Man-World

[15]The very title of the work alludes it: Bacon saw in myths the "wisdom" of the ancients, this, however, can only be transmitted in a "mythological" way which must be re-read under the light of the progress of reason - in philosophical, scientific and political terms. We let the author himself speak: "There are, however, other evidence, and not the most despicable, that such fables contain a hidden and implicit significance: some of them are so absurd and so foolish, that if we simply stick to the report, that is to believe they are announcing something away, proclaiming they carry a parable", In, Op. Cit, p. 19.

[16]For more on the complex relationship of Bacon with the idea of Myth and how it influenced our contemporary reading of Reason, DOURADO, Pedro. *Myth and Reason in Criminal Law*. Rio de Janeiro: Lúmen Júris, 2012.

[17]Check, FOUCAULT, Michel. *The Order of Discourse*. São Paulo: Loyola, 2009. Foucault supports the thesis that, alike the Law that, in a way, has lost its intrinsic authority and had to seek support and justifications in legal-political theories (etc.), the statements about the nature, given by the authority (it once was religious or family authority, among others), has lost its value *per se* and now requires *proof*.

[18]How we are not able to develop this subject over here, we do recommend the work of BULTMANN, Rudolf. *Jesus Christ and Mythology*. São Paulo: Fonte Editorial, 2008, and a possible "content" of the religious LUHMANN, Niklas. *The Religion of the Society*. Madrid: Trotta, 2010.

relationship is a topic of great importance to mythology, but not an explanation of the World *per se*, which was always a task of Natural Sciences, starting with ancient *Physis*.

Thus, the narratives about the "thunders of Zeus" do not intend to give an *explanation* about the origin of the thunder. One must understand that there is a transfiguration, a process which we call mythological transmutation, and that resembles to the effects of a "movie" which resorts to symbols and to a hermeneutical analysis of Myths. This is why the association of "thunder" with the most important male figure in the Greek pantheon can be replaced by some *other* possible readings – in particular for a Freudian or a Jungian, as psychoanalytic readings, to mention one example[19].

This short review, which runs through the work of Campbell, allows us to question the opposition Reason-Myth, but does not allow us, however, to cross the barrier which puts that Myth is the kind of narrative part of a "bookish" set called *mythology* and that refers to the "ancient" societies, which no longer exist.

Against this idea, we raise the impressions of Ricoeur and Eliade on the relationship between Myth and Time, in parallel way with some important analyzes regarding the time, made in the Philosophy of the twentieth century.

Eliade[20], in first place, relates the myth to the "primordial time" as the following: the maintenance of the myth allows, for the "regular" performance of the ritual narrated by the myth, a "revitalization" of such primordial time. This primordial time was named by Eliade under the classic expression *in illo tempore*.

In a quite similar way, Ricoeur (1978) analyzes a possible dialectics between myth and symbol, saying that the first is ahistorical and semantically fixed, while the symbol is historic and keeps with itself a "reserve of temporal sense". For instance, the Oedipus myth, by its registered narrative, it is a fixed story with a sense (albeit superficial sense)

[19]This requires the existence of the element "thunder", or, at least some image of this element to the community of myth. This does not mean, however, that a scientific investigation of the origins of the natural phenomenon of thunder “invalidates” the stories of Zeus.

[20]See: ELIADE, Mircea. *The Sacred and the Profane: the essence of the religions*. São Paulo: Martins Fontes, 2001. In this classic, Eliade addresses only the issue of "primordial time" with reference to a certain "origin of the Cosmos", even relating it to the rituals’ spaces (the sacred opposed to the profane) as *temples* are related to the time itself - another reason we disagree with the extremlly close connection between Myth and Religion.

"immutable" - its history, its *text* is the same, so that to change Oedipus, one must change the myth itself[21]. Differently, the symbol maintains its signic shape, being able to gain absolute different meanings over time and to continue with the same appearance, such as, to mention one example, the symbol of the god Hermes, which has today not a direct reference to that particular divinity, but to the pharmacological sciences, despite keeping the same “drawing”.

With those two readings, we noticed - when studying the Myth in depth and beyond the prejudices that we reject - a special importance given to "Time".

Similarly, Heidegger (2010, pp. 421 ss.) sought, under his ontological philosophy, an explanation for the phenomenon of Being, considering its historicity, which originates itself in the temporality of Being, since this last only has meaning through the interpretative capacity of man, in terms of human *presence* (da-sein). This "temporality" of Being is not the same as "time" in its "daily" perception - quite the contrary, the *daily* dominates men, giving them some hermeneutical pre-conceptions that are related to the feeling of "anguishing".

It seems to be from this same "temporality of Being" which differs from the daily time, that Derrida (2002, p. 92) thought on a "past that was never present", which points out to the *trail* of a unique differentiation, for if we are able to speak in terms origin, it is because the search for the origin reveals itself as a search for the essence and thus seems to be exactly the search for the essence that was lost within his deconstructive analysis. This is due to the very existence ofa "past" (which refers to the idea of origin), but one that has never been present (thus, escaping from the perverse logic of the historical essence), it is in such past that lies the essence.

This reference to these four thinkers leads us to the conclusion that both the analysis of Myth as the deepest philosophical discussions can agree that it is possible to study temporality, the one of the past, of the ahistoricity, of the *in illo tempore* in radically different terms then those guided by the concept of daily time, measured by the clock.

What Ricoeur and Eliade have seen more explicitly, however, is that it is in the Myth that this analysis should also be developed with philosophical interests and not just literary

[21]Or, symbolize the myth, as Freud for instance, did with Oedipus the King when turn it into a metaphorical symbol that explains the psychological complex of "Oedipus complex".

ones.

Taken this, we realize that the time or even the temporal logic of Myth is distinct from the temporal logic of daily events, without this meaning that the Myths are paralyzed in bookish sets called "Mythology of people X" or "Folklore ", among others.

Therefore, Myth gains a more formal character rather than a substantial one: it is no longer a narrative that explains the world with supernatural/religious quotes, but *the narrative that develops the story of a character in a temporal logic averse to the daily facts.*

This character - a "hero" for example - leaves his daily facts life for a "journey", an "adventure", which is organized under the scheme "depart-event-return" and not under the scheme "cause-effect" (Campbell, 1997).

It is precisely the presence of this logic based on a depart, holding an event and the return of a character that allows the perception of "*illo tempore*" **in Mythological** logic.

The presence of the character allows an identification process, necessary for the Myth to perform its function in the psychological side of the "reader", which is to reveal the peculiarities of human life and of men as a whole[22] - this identification, however, deals with spheres of the unconscious with an intensity that the rational-scientific knowledge does not aim to accomplish.

This more "formal" vision of Myth, with its peculiar restrictions due to unconscious representations, allows one to explain why, among the Myth, it is possible to "fit" every kind of social discourse, from the religious (particularly in ancient mythology), to the political, through the legal, the artistic, the scientific, among others[23].

[22]We cannot meke here an extended analysis of the theoretical basis of the relationship between myth-character-identification, which we develop in a separate project, relating this proposal of critical methodology to other branches of legal knowledge (Now already published: DOURADOS, Pedro. *Mito e Razão no Direito Penal*. Rio de Janeiro: Lúmen Juris, 2012). There are, however, two exceptions for the readings of this relationship. The first, following Freud's theory, identifies an individual and unconscious relationship (Id-Superego) with the subject placed in the story. A second, which we follow, identifies not only a personal connection, but a connection of the mythical content to the collective mind, taken as a collective unconsciousness (Jung, Campbell) or as a social imaginary capable of "*creation ex nihilo*" of categories and social institutions from mythological stimulus (Castoriadis).

[23]Even in ancient myths, religion was a partially independent subject, or can't we say that Myths of Ancient Egypt, Classical Greece, Imperial China, among others, in which the explicit participation of the commercial trades and ethnic wars had no political role?

This multi-significant capacity of Myth allows us to classify it as Culture's "common denominator", so that the cultural content finds itself "shifted" from the solely conscious to a mythological sphere: partially conscious - because every mythic narrative is consciously seized - and partly unconscious.

3. The Myth on the Law - Myth in Procedural Law and the relevance of the Legislative Process

Anticipating our thesis, we stand as a presupposition of our "critical methodology" that todayLaw assumes predominantly the function of Myth in our super-complex Society.

This thesis, which certainly is not limited to this text, is based mainly on two findings.

The first is that Law has currently been presented as a *technology*[24], i.e., it became extremely formal, yet maintaining its textuality, which implies the "content" of rules, for example. The positivism, in particular, influenced Dogmatics by shifting the question of "justice", and this step was essential for the structural change on the "communication and discursive tools" of Law, which does depend on its content, but does not identify itself with the content, nor is limited to it.

This formalization, we do believe, did not occur, or occurs, so radically in any other "business culture" and it is essential that the Law can become the field on which all other matters might be discussed, while respecting the typical form of the Law - in the same way as it occurs with the Myth.

The second is the role of Procedural Law in the appropriation of Time issues into the Law. Not, yet, the daily time nor the time of historical narration, which refers to the daily time, nor even the time that includes actions in causal or mathematical logic, but a proper time related to the Law, which, unlike politics, arts, etc., may shift social issues to a perverse logic of a non chronological sequence of events.

It is the fact that the world needs to be *turned into a procedure* to makes sense in terms of Law - or even that for it to exist tor the Law - that gives Law the ability to "ignore"

[24]Based on the slightly presented and well-defended thesis by Ferraz Junior, in FERRAZ JUNIOR, Tercio Sampaio. *Introduction to the Study of Law: technique, decision, domination*. São Paulo: Atlas, 2007.

the daily succession of events, creating a particular time, similar to what occurs within the Myths - nonetheless, it is also usefull as an excuse for the "slowness of the judiciary."

Quod non est in acti, non est in mondo[25] and the "procedural truth"[26] are the two "discursive terms" taken from theprocedural fiel that allow us to affirm the role of Procedural Law for the characterization of Law as the Myth of Modern Societies.

First, as for the Latin brocade, for it shows that the Law ignores the space of the world (the profane - to say as Eliade) to only look at it as it submits to the logic of the procedure itself (the sacred – even if we are not talking about religion).

One cannot say "I own this land" – it is necessary to properly petitionate[27], to bring an adverse possession lawsuit, correctly mentioning all the elements that the Law determines as steps for a joint litigation procedure empowered by Law itself ...

Regarding the procedural truth, this topic radicalizes the statement of the Latin brocade. Radicalizes, and even more, as not only it creates a new "world" (of the files), but specifies that this world has its own internal rules, since the procedural truth does not "preclude" only over the substantive truth but also over the "procedural lie": including the procedural nullities, the incongruities of Substantive Law, and the unconstitutionality and illegality in general sense (see footnote 25).

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[25]Although it is not a direct connection, that necessary "proceduralization" is directly linked with the dogma of "social pacification", which is well summed up in: "at a given moment in history, however, and now with the State sufficiently strengthened, this entity, providing that its own existence is conditional to conflict resolution, *retained to itself the competence to solve them* " in HERETEL, Daniel Roberto. *Procedural Technique and Judicial Protection: the substantial instrumentality of forms*. Porto Alegre: Fabris, 2006, p.19, emphasis added.

[26]About this "truth", Ferrajoli: "[...] the procedural truth is basically "formal" and it is in a subsequent sense and more restricted rather than in the civil procedure, where are more important the legal bindings, and in the criminal procedure, based on forensic evidence; while "material truth", "substantial" or "absolute" are no more than a subjective claim and a dangerous illusion. This does not mean, however, as Carnelutti considers, that this illusion does not find place in the procedure: its place, as will be seen in paragraph 10, is increased when more unlinked is the free conviction of the judge of appropriate procedural guarantees on trial and defense matters, "In FERRAJOLI, Luigi. *Law and Reason: Theory of Penal Guarantees* São Paulo: Revista dos Tribunais, 2010, p. 76 - note 19.

[27] It is true, on the other hand, that the application of "pas de nullité sans grief" (no nullity without prejudice) may correct some formalistic abuses in Procedural Law - done must emphasize, however, that, exception made on the Habeas Corpus, regarding to the procedural nullity, this interesting Regimental Appeal on the Recurso Especial no. 907.517 – RS, which can be seen on: https://ww2.stj.jus.br/revistaeletronica/Abre_Documento.asp?sLink=ATC&sSeq=14092210&sReg=200602664718&sData=20110323&sTipo=51&formato=PDF (seen on October 19, 2011).

Those are requirements that submit concrete/daily facts to a specific logic, structured under the scheme "depart-event-return" and, therefore, mythological.

Before we proceed, however, we must establish as a landmark to our thesis that such statement cannot turn back to the origin of the Latin brocade, but has as a "hatcher" point the understanding that the Procedural Law is something different from the Substantive Law, and certainly this is not a conquest of ancient Roman Law, in which the subjective right was confused with the right of litigation[28].

This is a modern idea (in the historical sense) of Procedural Law.

The thesis of the *procedure's instrumentality* , which aims to inter-relate Procedure and Substantial Law after the "procedure *per se* thesis" being so long in evidence, only confirms that both really are distinct objects, even if one submits the ends of Procedures to the purposes of Substantial Law[29].

The thesis of instrumentality, nonetheless, presents an obstacle, if we consider that there is a certain unity in the conception of Procedural Law, so that the Legislative ProcessProcess can be included in the general concept of Procedure. This restriction occurs

[28]"Although ancient the procedure, it is very modern the procedural science. [...] The procedure as a legal science emerged only from the work of Bülow in 1868 "in SILVA Ovídio A.B; GOMES, Fábio L. *General Theory of Procedure*. São Paulo: Saraiva, 2006, p.36. More specifically: "The starting point of this period [autonomist] was the publication of the work of Oskar von Bülow, named *Die Lehre von der Prozesseinreden und die Processvorausstzungen* (Theory of dilatory exceptions and procedural assumptions), dated from 1868 [....] Bülow's merit was to have recognized the *existence of a parallel relationship to the substantial law, in the orb of the procedure*" In HERTER, Op., pp. 32-3, emphasis added.

[29]To HERTEL, Op Cit., p. 37 and following. The paradigm of "instrumentality" can be divided in two categories: the negative instrumentality, according to which the procedure is not an end in itself and the positive, according to which the procedure is the realization of the Substantial Law. Despite being extremely commendable, Del Claro raises an interesting critique: "The exagerated instrumentalism on the procedure states that all that matters in a judicial proceeding is to obtain a fair result considering the substantial standpoint. It would have no relevance the decision-making process, but only the decision itself. This perspective is closely connected to an activist State vision and a jurisdiction that has scope for the implementation of policies and not the defense of rights", p. 95, and the author proposes, in place of this, the "material direction of the procedure", according to which "the judge does not watch the conduction of the procedure as a referee watches a football game", p. 176, focusing only on formal aspects on the direction of the process, how to summon, to dispatch...but also acting on the direction on the substantial right required, respecting the procedural guarantees of the parties, "the judge that materially directs the procedure clearly acts in favor of the procedural justice. There is not an interest in obtaining a particular result, but rather a clear interest that the procedure does not ignore the parties' will and autonomy", p. 177 in DEL CLARO, Roberto. Material Direction of the Procedure. Doctorate thesis submitted to the University of São Paulo, São Paulo, 2009.

because, in the Legislative ProcessProcess there is no juridical-substantial purpose to be reached, but one (or several) to be established, to be created, to be juridified – in the same way as a "statement of appeal" on Civil Court juridifies the *Mondo* to open the *Acti*, a Bill of Law is the juridification of a social demand of pre-legal nature, so that it integrates the body of the legal system.

And at this point we realize the preponderance of the Legislative ProcessProcess in the development of Law as Myth: it is the Process as a creator of Laws, the procedure that creates the Substantive and Procedural Law, and the Process that changes to itself[30]: it is the main primary source of the primary source of contemporary Law: the Law itself.

It is for this reason that we will analyze, from now on, with our critical methodology, the "Legislative Process", in order to attempt to not only make a conceptual definition of this object so relevant to e Law as a whole, but also to bring critical contributions to the health of the Brazilian Legislative.

4. **Critical analysis of the "Legislative ProcessProcess" - the text of the law and the law of the texts[31]**

At this point it becomes necessary a delimitation of what we consider Legislative ProcessProcess, not searching for its essence, but in a search for a semantic-objective delimitation common to both us and the reader.

For this, it must be understood that the very delimitation of the object is already a discursive event that deals with the discursive event.

Our thesis is: what is meant by Legislative ProcessProcess *is* not the practical-political phenomenon that occurs in the National Congress. What is seen in the Congress, the set of actions that sets up what is called as "Legislative Processprocess", must always come to us as a text - actions as texts, as concrete statement, as done works - but those "texts" differ from the constitutional delimited "text", on Articles 44-69 of the Brazilian Federal Constitution of 1988 - which, however, does not mean that such political praxis to which we refer is

[30]We will not discuss here the luhmannian thesis of "autopoiesis", even though the modification of itself may be considered as "to create to himself."
[31]Due to the context we will be limited to discussthe Federal Legislative Process.

unconstitutional.

With this we aim to state that the Legislative ProcessProcess is a complex tangle of texts and speeches that involves not only the day-by-day practice of the National Congress, the letter of the Constitution, but also what it is mentioned about the Process, in ordinary and complementary law, in the Doctrine, standards in the Internal Regulation of the National Congress, on the case law of the Supreme Court and still - with slightly lower relevance - to the news about the Process, the non-juridical scientific impressions, among many others.

4.1 The "Legislative Process"

In an effort to define the concept of "Legislative Process", a reference to the etymology of the word "*procedure*" should be made. It comprises a set of coordinate acts and actions and derives from the Latin word *procedere*, which means "*to move on*", "*to address to*", in other words, enforces the idea of always being directed for a particular purpose. Therefore, there is not a process *per se*.

Thus, when applied to legal purposes, specifically to the concept of "Legislative Process", comprises a complex of acts and actions aimed, directed, for a particular purpose - *in casu*, the creation of laws. Still, in order to the existence of the Legislative Process in a given legal order, it must contain some assumptions, that without them the legislative acts[32] would be triggered independently of a process.

The first assumption consists in the existence of a Parliament in *lato sensu*, which means that the Legislative Process depends on the existence of an agency with legislative powers. It would be strange to imagine the existence of a "Legislative Process" in an Absolute Monarchy or a Pure Dictatorial State in which the created laws would result from essentially arbitrary acts. For this reason, contemporary States seek to ensure the effective operation of

[32]By legislative act, it is meant a certain act, that when emanated has the ability to create rights and obligations, thus innovates the legal system. Not every legislative act comes from the Legislative Process, for instance, the *Decree-Law* provided in Article 55 of the Constitution of 1967, whose text and provisions were amended by Constitutional Amendment No. 1 of 1969, and represented a direct antecedent of the current constitutional amendments.

the Legislative Houses, structuring them in order to turn protect them from the interference of another state power, based on the *Principle of the Separation of Powers*.

Secondly, the legislative proposal is also assumed for this purpose and it is the act of proposing a legislative document in an legislative agency, based on a written or oral justification. Then, it is necessary to demonstrate the legitimacy of the proposition, or rather, the entitlement of legislative initiative. Finally, the Legislative Competence constitutes the competence to legislate on certain subject.

Therefore, considering these assumptions, we can consider the existence of Legislative Process. It unfolds, on one hand, in static and abstract principles, which José Afonso da Silva lists them as: *the principle of publicity, of orality, of the separation of the discussion and vote* (regarding the conduct of voting only after a discussion), *of the unit of the legislature and of the previous examination of projects by thematic committees*. Moreover, the legislative process unfolds also on the concrete and practical parties of the Procedure.

About the procedure, specifically, the Federal Constitution regulates it from Article 59 to Article 69, even though quite disorganized. It establishes primary standards, listed in Article 59, which have support on the constitution itself: ordinary laws, complementary laws, delegated laws, constitutional amendments, provisional measures[33], legislative decrees[34] and resolutions. However, it is also important to emphasize that the Legislative Process is also subordinated to the formalities of the Internal Regulation of the Legislative Chambers. We may distinguish, however, three possible ways to proceed: (***i***) the ordinary process, related to the creation of ordinary laws, (***ii***) the especial process, for the creation of other legislative

[33]It is discussed if the provisional measures are subject or not the Legislative Process, although it appears in section V of article 59. José Afonso da Silva puts in *Procedure of Creation of Laws*, which "*are not, strictly speaking, subject to the Legislative Process because they are not drawn by the Legislative Power, since its formation is not under this procedure*" (p. 42), but pursuant to Article 61. Nevertheless, it is undeniable its primary character, and adds Manuel Gonçalves Ferreira Filho, in The Legislative Process: *"... the provisional measure is a typical primary and general normative act. Edited by the President in the exercise of a constitutional competence, a competence, which, we insist, it comes directly from the Constitution.*" (p. 241).

[34]The legislative decrees have the function of regulate matters of exclusive competence of the National Congress, which have *externa corporis* effectiveness, differing from the Resolutions dealing with subjects of Congress and their houses competence, but with *interna corporis* effectiveness.

texts and (***iii***) the summary, for the projects of exclusively (or not) initiative of the President of the Republic.

Accordingly, it is imperfect - or better - *incomplete* is the notion that the mere compliance with the procedural norms and the observance of the applicable principles would fullfill the procedure for the formation of laws.

Evidently, it must be considered a third element to this process: the *political debate*, the dialectical discussion between political forces, in the defense of their interests. However, even though is evident, this third element is constantly subtracted from debates and legal-dogmatic considerations, being very little mentioned in the main doctrines regarding the Legislative Process, and, in its place, there is the figure of the "*rational legislator*" or the "*ideal legislator*", a dehumanized and apolitical creature responsible for legislative creations.

The political debate constitutes the heart of the creation of laws, so that Afonso da Silva considers that "*every phenomenological transformation is created due to a process, whose content comprises contradictory aspects, opposition of divergent interests*" (AFONSO DA SILVA, 2007) . The Law itself is the product of the confrontation of divergent positions and this struggle is more complex than presented by the Hegelian dialectic, as it opposes a *thesis* against its *antithesis* in order to emerge the product of it, a *synthesis*.

This confrontation, in fact, occurs within a plurality of interests and ideologies, not necessarily complementary, which are played under debate. In this regard, José Afonso puts that the relationship between the Legislative Process and the clash of ideologies and interests cannot be instituted "*with the ideology of the people, but with the political ideology of those in power*" and concludes that, although there is the possibility of being identical, "usually they are *antithetica*l" (DA SILVA , 2007) .

So, if the Legislative Process is composes of some abstract and static principles, the Legislative Process and also of the clash of social interests, we note, therefore, that it has a purely formal character. The first two constitutive elements are predicted by constitutional rules, whose breach can lead to the invalidation of the entire procedure, preventing the Law to be considered valid. Since the third and final element has only its outcome, or its product, exciding the process and reaching the formal expression or, more clearly, what ends up being

expressed in the letter of the law is only the summary of the political debate, there are no longer access to the dialectical game and proposed basis to justify or challenge the bill of law.

4.2 Critical-mythological analysis

If the Law is mythological, where it would fit in the legislative process? Well, in two stages.

The first stage is the one related to the old question of political representation, of direct or indirect democracy and, consequently, of our entire political-party structure.

However, this question is not merely political. It has been also transposed to a juridical debate which provides its mythological power. The juridification of the legislative posture is given, primarily, by the constitutional text. A first analysis, merely textual, reveals us that if "all power emanates from the people" (Article 1, paragraph one), none is directly "exercised" by them (example: "The legislative power is exercised by the National Congress [...] ", Article 44, main clause).

The three powers, while branches of "entire power", emanate from the people, *its source*, not a dynamic body, but a permanent and static *locus* from where is taken something away and to which it refers in search of acceptance. Thomas Hobbes feels respected; the power emanates from the people, but it is incapable of exercising it; is how the nature, wild and violent, needs a further technical incidence.

When it comes to the legal-normative production, this power is attributed to the National Congress. But, when the analysis is shifted to "technical vocabulary of lawyers", a figure appears which is not a myth, but the main character of one of them: *the Rational Legislator*.

This Rational Legislator of the 21rst century' legal theory is no more that rational legislature of a few centuries ago, as a pure manifestation of *Reason*; but a legislator who works with the idea of legislative "union"/"concentration" in a coherent single pole which is capable of acting according to purposes previously established and subsequently verifiable[35].

[35]We are, obviously, summing up the subject. For a more detailed and with more categories discussing regarding the "Rational Legislator", see FERRAZ JUNIOR, T.S. *Introduction*...

What is, however, the function of this abstraction? Let us see the dogmas that it deals with, first of the "Union", a), and of the "rationality" *strictu sensu*, b).

a) The dogma of the union makes that every jurist which makes use of the term passes over a *reality*[36] in the Brazilian legislative production. The important role of the executive power, by editing laws through Provisional Measures, the important role of committees by interfering in the writing of normative texts, the problem of the normativity of international agreements regarding the Constitution, the individualism that affect in the negotiations Executive *versus* –party benches[37]: at last; a multitude of issues from the *praxis* of legislative production are abstracted from a stroke in the beautiful narrative of the Brazilian legislator.

It is important to consider that the narrative of the Legislator has an institutional role for the very maintenance of Representative Democracy as the one we have today. The role of the Legislator is added to an idea of customization of the people (while a unit that provides meaning and emanates power) in order to accomplish the catharsis of Democracy.

Democracy means for the Brazilian today the active political participation: to spend every two years a few minutes in a row, to push some numbers in the Electronic Urn and *voilà*. We are all democratic, but few of us are those who have some political activity in the intermediary period between the elections and even rarer those who have access to some ways of participation in the Legislative Process, either at the municipal level, or even less in

[36]We know how it can be problematic to use the deictic argumentative "reality." We do not intend to give it any deep socio-philosophical thematization of the concept of "reality", even if this can concept be worked with the psychoanalytical view, marxist, nihilist, luhmannian, or simply with the brief conception of "common sense" which is the notion of reality based on watching the news. We keep using the word "reality", as opposed to legal micro-vision, based in any "epistemological framework" (Bachelard), maintaining the concept of "structured heterogeneity [we would say also *articulated*]" as it appears in VILANOVA, Lourival.

[37]"This chaotic scheme of 'trading desk', this 'desk' around which operate the most creative and unusual bargains in the parliamentary environment it is, therefore, sustained by three political phenomena that overlap: the strength of individuals or private groups to sufficiently influence in the legislative procedural flow; the increasing fragmentation of interests that conflict in a society that every day acquires greater degrees of complexity and, worst of all, lack of scruples of politicians in defend, in many times even in a passionate way, private interests over the public interest" - from another perspective, these are the ills of the legislative process that are engulfed by the image of the Brazilian Rational Legislator. Excerpt In: RIZEK JUNIOR, Rubens Naman. *The Process of Consolidation and Legislative Organization.* Thesis presented on the Faculty of Law, University of São Paulo (USP). São Paulo: 2009, pp. 38-9.

the state and federal level[38].

The Rational Legislator takes the role of the hero, that leaves, each day, in a real legislating epic, symbolizing the people in itself, which should leave with their "power" to self-regulation (democracy), but is content with the its heroic-shadow that fights the political battle on this behalf.

The role of the Congress (and other agencies that legislate, as the figure of the President by his Provisional Measures) is the materialization of the *event* in which the legislator is involved; which consists on its own 'battlefield' with particular rules that are better when more ignored - after all, it is minimal technical-dogmatic production around the rules of internal procedure of the National Congress, still rare the knowledge the lay citizen has about it.

Each law enacted, each rule established is the *return* which institutionally sanctified the representative democracy as an act of the people by themselves, for themselves. This is a "constructive return," and, therefore, the resultant law needs to gain the attention of the people to whom it is addressed - here is the symbolic role of various legal texts, and *symbolic* is not here a mere allusion to the language, but the prevalence of the media impact on its effective functionality[39].

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[38]Certainly, there are exceptions, as the Participatory Budget. Not that these exceptions do not present problems, it is true. Our criticism goes against the idea of Participatory Democracy, as it applied today, based not on the power that emanates from the people, but on that power that do *not* emanates, leaving the political-legislative praxis in absentia and the party of corruption. The "solution" to this does not imply in Direct Democracy in the habermasian model, but it seems clear that a greater integration could be made by a qualification on the public sphere debate, with higher injection of information on the state apparatus and larger *feedback* openings for the extra-partisan citizen action. In this sense, an interesting proposal: SOARES, Fabiana de Menezes. *Theory of Legislation: training and knowledge of the law in the technological age*. Porto Alegre: Sergio Antonio Fabris, 2004. Another attitude that already demonstrate a higher level of integration between the people and the power that emanates from it, would be a greater attention to the monitoring of the corruption in Brazilian politics.

[39]This is an issue really discussed in Criminal matters. The two pearls in the field of symbolic criminal legislation are the heinous crimes law and the environmental crimes law. The first (Law No. 8072/90), symbolic even in the labeling of the crime (which is now, largely a labeling), as hediondo - a word chosen after long lexical search on the best portuguese dictionaries. The aversion to heinous crimes, the increasing on the punishment for heinous crimes (since they are *hideous*), and the context in which this law was produced - all of this makes up its symbolism in a pejorative sense. The environmental crimes law (Law No. 9605/98) is the congressional response to the environmental issues: indeed, if there are trees being felled, rivers being polluted and animals being tortured, we only need a law with severe punishment. The effects of a media with the power pressure over the Congress, the context of a few years after the Rio-Eco-92, the context of the year's discussion

Therefore, the Legislative Process becomes the founding myth of the Law. "Founder Myth" is not understood here as the *lie* that tells about a *fact* occurred in an originating past related to show something/someone for the first time. The Founder Myth as the effective origin (conscious and unconscious) of the Law in its production *praxis* that is, at the same time, the justification and legitimation for the maintenance of unconstitutionality of the Representative Democracy.

b) the rationality attributed to the Legislator is still seen as a prerequisite for the proper functioning of the Law as a System, and for maintenance of the legal system as a cohesive body. If this rationality is an assumption, it must be proved: it is not the point that the legislator is not rational, but that the rationality of the Legislator would be required to the maintenance of the Legal System – we doubt about it.

If it is possible to think that the normativity of a law is linked to the notions of competence, effectiveness, strength, violence, rather than rationality [40] - how we effectively believe it is - the rationality of the Legislator ceases to be an unjustified and unlikely requirement every time that the Legal System is required.

The rationality of the utility of the law, for instance, when two people use the legal text regarding the Tenancy (Law No. 8.245/91) to sign a lease contract, disregard the *intrinsic* "rationality" to the Tenancy Law. The greatest proof of this is the ancient and still applicable notion of *Custom*, in particular in the International field[41]. Another example is the Franchises

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of the Kyoto Protocol: aspects which materialize the pejorative symbolism of this ineffective law. See also COSTA, Helena Regina Lobo. *Criminal Environmental Protection: viability - effectiveness - protection for other fields of the law*. São Paulo: Saraiva, 2010.

[40]Foucault works this perspective in terms of "governmentality", but this was an idea his death did not allow him to go further: "Since the eighteenth century, we live in the era of governmentality. Governmentalization of the state, which is a particularly nifty phenomenon, as effectively the problems of governmentality, the 0techniques of government have become the key political issue and the real space of the political struggle, the governmentality of the state was the phenomenon that allowed the State to survive. If the State is what it is today, it is thanks to this governmentality, at the same inside and outside the State [Foucault refers to economic issues]. The government tactics that allow the definition on every moment of what should or should not compete upon the State, which is public or private, which is stable or not, etc." In: FOUCAULT, Michel. *Microphysics*...p. 292.

[41]The International law, as a whole, presents a great point of questioning the conception of the legislator. We may speak on "Legislator", in the singular, and in reference to state paternalism, when the International Criminal Court performs the displacement of *jus puniendi* to an extra-state performance? We may speak on Legislator when faced with an increasingly “heavier" soft law that is produced, among others, by non “juridical”

Law (Law No. 8955/94), which is so vague, that is unable to provide a minimum of guidelines for the establishment of franchises, and even though, is still valid.

Our analysis seems to shift the Rationality of an assumption of a normative construction of the performance of the Legal System, for a requirement, a guiding principle and internal regulator (debate at the Congress level, for example) and external (role of the citizens in the civil sphere and judicial hermeneutics in a local level and constitutionality control, to mention a few examples).

The second point of our critique is directed at a later stage in the production of law, where this is already a *data*.

Focuses mostly on Public Policies, understood here in a very broad way as the action of the Executive for the execution of the laws and in the Judicial Praxis, as the moment of the binding interpretation of the law by the judges.

This is a second stage because is detached from the first one. If there is, in Brazil, a political complacency generated by the mythical image of the Rational Legislator, presupposed and reproduced in both specialized legal discourses as in the common-lay knowledge, this complacency reflects in the manner how the State and the citizens uses the Law and the normative texts available in the Legal System.

The Rational Legislator becomes, for the application of Law, a support, an excuse for the legalism, or in the words of Sá: creates a "Law shield"[42]. As the rationality is assumed, the interpretation creates shortcuts: if the law is already considered as rational, the political debate is now considered finished, the responsibility for interpreting falls to critical levels - *in claris cessat interpretatio.*

By "responsibility for interpreting" we mean an understanding on the part of the interpreter (public official, citizen, but, especially the judge) their role in society as social

International Organizations (World Health Organization, for example)? Can we speak on legislator when an individual before an International Court is able to interfere in a decision that balances the normative system of a country (as in the *Maria da Penha* case before the Inter-American Court of Human Rights)?

[42] SÁ, Alvino Augusto. The term was widely used in classes and lectures given by the professor at the University of São Paulo in 2011. The professor, with this expression refers to the judge defending himself of a responsible interpretation of the legal text, by appealing to the self-clearly existence of the law and simply applying it.

interpreter and politically situated.

In this sense, the "branch" of the Law in this mythological influence of the Rational Legislator has less effect is in Criminal Law and this is due mainly to the Criminology and the Criminal Policy.

The Criminology (SCHECAIRA, 2011), on one hand, complains that any "crime" is determined solely by legal legislation of a given society – on other words, a crime it is a "legal offense" also, but not only.

To Criminology, therefore, a crime is understood in a complex manner, doubts the imposing rationality and self-sufficient law.

The Criminal Policy, on the other hand, denounces the self-sufficiency of the criminal law through a radical hermeneutics that provides to the interpreter. By listing the principles of Criminal Policy, Chaves Camargo states (2002, p. 165): "the principles that guide the criminal policy are those of constitutional origin, related to the guarantees and fundamental rights, basis of the Criminal Law in a Democratic State ".

It is important to realize that with this definition, the political content of Criminal Policy is extracted from *legal* concepts that reveal not only integration events between the powers (as in the phenomenon of constitutionalization of the Law, which subjects all the legal system to the primacy of the Constitution, raising the role of the judiciary by stating what is and what is not constitutional), but also that the mere choice of a reading of a legal text also is a political choice.

Thus, the Criminal Policy implode the notion of *mens legislatoris* and seeks no longer the "will of the legislator" in abstract - mythical, we would say - but the political reality that determines the application of the Criminal Law from the social reality and the corollary of Fundamental Rights and Constitutional Law.

The critical potential of the Criminal Policy becomes radical when the law itself recognizes it, indirectly, in the text itself: "The judge, regarding the culpability, the personal historic, the social behavior, the personality of the agent, the grounds, the circumstances and consequences of the crime, as well the behavior of the victim, will establish, *as necessary and sufficient in order to disapprove the behavior and crime prevention*: I – the applicable

penalties among the enforced ones [...] "(Article 49, caput, Penal Code, emphasis added).

The consequences of this are that, despite many achievements still remain to be fullfilled by the Criminal Law towards the *guarantee of Right to Trial*, the applicators of criminal law (judges, prosecutors, lawyers) are perhaps, the legal professionals that more asily led to question the *Law* as an Open System, aware of the concrete existence of the System as a result of countless political games of fight against the crime (and not necessarily against the criminal)[43].

It is common to see a more critical positioning of the criminalist in relation to the Penal Code rather than any of its peers, especially because of criminology and criminal-political influences - of course, when they are present in his background.

The patchwork that is the Criminal Code, due to numerous subsequent interventions made by the Rational Legislator, often in an irrational manner, leads to the applicators of criminal law to a position of distrust on the rationality of law and the democratic applicability of Criminal Law.

We cannot to go deeper in this subject, but we can mention some interesting cases: see, for example, the kind of "undue appropriation of social security contributions", included in the criminal type of undue appropriation (Article 168-A, Penal Code) as long the crime against the property it is actually, a crime against the Public Order[44]. The doctrine and case law realize, therefore, juggling to fit the criminal type in its real systematic application and not to treat this crime against Public Order as a legal classification that would have as Legal Interest protected someone's heritage: greatly distinct worlds[45].

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[43]Not that the law is so, he states. Guarantee aspects brought by the criminology and from the criminology to the Democratic State leads the lawyer to think the Law - which, as stated, is often irrational and a mere tool for achieving other purposes rather than the originals of Criminal Law.

[44]"Public Order" understood in a broad way. The crime firstly provided in Article 95 of the "Organic Law of Social Security", Law No. 8212/91. As already stated the Supreme Court, there was a "transfer of the regulatory text" of the type, which was reproduced in the Penal Code in Title II, "Crimes against Heritage." See: HC 96337 / MG – Repporteur Joaquim Barbosa Justice. Available in: http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=618104 – access on October 27, 2011. The decision is from November, 2010 – we do emphasize how much the "confusion" of Rational Legislator was problematic with the thesis of *abolition criminis* of undue appropriation of social security contributions.

[45] Another problem raised by this little lapse of the Rational Legislator, is the issue of the application of the principle of insignificance that has been mistakenly disregarded - in our view - in cases which should be

Another example of partially unfortunate intervention of the Legislator, after the Code elaboration is the legislator's intervention on the text of sexual crimes. If many of the changes were welcome by the society, the current criminalization of rape (Article 213, Penal Code) is a true open criminal norm in an area of enormous tension as the sexual relations that offend the human dignity: any lewd act to be compared to the "historical" carnal conjunction seems to be a misunderstand - and it is[46].

In this case, it is the victimology, as a specialized branch of Criminology, which provides a differentiation in the analysis, providing a more sensitive interpretation of the case in relation to punitive posture of the law[47], which, certainly, works in conjunction with a revision of teleology of the law, and then with criminal politics issues, and all this provides a responsible hermeneutics, a conscious posture by the criminal application.

Therefore it seems relevant to mention the case of Criminal Law in order to expand this position to other branches of Law.

If, on one hand, it is true that the proportions should be kept, considering that the Criminal Law seriousness is not (or should not) seen in other branches; on the other hand, to face the Law as minimally systematic and based and built on facts of language, allows us to think that it is possible to combine this critical posture of Criminal Law – what we read here in terms of our critical-mythological methodology - to other branches of Law.

See, for example, the case of the institute of *typicality*. The typicality, main basis of

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effectively applied. See the HC 107.041 / SC - Rapporteur Minister Dias Toffoli Justice. Available at: http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=1501369 – access on October 27, 2011. We note that in the decision the principle of insignificance is disregarded. The (insignificant) importance of the injury to the Legal Interest protected is confused with the importance of the Legal Interest – to which the principle of insignificance does not affect it. We do emphasize that the value by which there was a conviction is smaller rather than the one that the Treasury considers itself in terms of non-criminal prosecution.

[46] Basically, today, a more lustful kiss may be considered by the letter of the legislation in the same level of sexual abuse with anal penetration, for instance. Read this ordinary appeal in Habeas Corpus 22800 / SP, STJ. Available at: https://ww2.stj.jus.br/revistaeletronica/Abre_Documento.asp?sLink=ATC&sSeq=7197680&sReg=200800000239&sData=20100802&sTipo=51&formato=PDF - access on October 27, 2011. In the case, the "patient" is condemned by the kisses that gave, in the same way that there is a rape conviction by attempt of carnal conjunction in other situations mentioned as case law, in order to support Justice's arguments.

[47] In this sense, see Marco AurélioJustice vote in: HC 97052 / PR – Rappourteur Dias Toffoli Justice. Available at: http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=627298 – access on October 27, 2011.

the theory of Crime, was born - as we know it today – in the Criminal Law, by the development of the German doctrine in the late nineteenth century, early twentieth century.

Today, the typicality has a great relevance to the Procedural Law (in particular, the typicality of evidences) and - in a sense, even more distantly - to the Civil Law.

The case of Civil Law becomes especially for a critical-mythological analysis, as becomes evident how much it is possible to consider the Law textually and to build and re-build it from hermeneutical principles. Basically, in the Theory of Contract, today, there is a conception that a contract can be classified according to logical categories (bilateral, onerous; periodic) and qualified according to specific types, that bound the notion of "kinds of contracts" (purchase and sale, leasing, services) – since is developed, this original conception of the Criminal Law, with the help of the Civil Law, return to the Public Law by reaching the formation of government contracts[48].

We expect that the adoption of a critical-mythological paradigm in various sub-fields of the Law - especially in the analysis of the legislative process - could be a way to reveal processes unconsciously handled and that can be improved due to a better realization of the huge list of rights still not effected provided for in the Article 5 of our Constitution.

5. **Significance of the criticism and final conclusions**

An important point, and that leads us to assume a reflective position before the critique to the Legislative Process and to other categories of Law, as the only intention of this text, is the explicitness of the thematic meaning; the extent of this criticism.

What would mean to say that the "Legislative Process" as practiced today in our country is mythological?

Certainly, we don't mean that it is something *negative*. That would contradict one of our critics: myth and lie are not necessarily synonymous - and we do not believe they are at all.

Critical, for this reason and the "criticism of the Legislative Process" - consequently – is no longer the "destruction" of a current discursive body such the one is being composed.

[48] Check: http://www.estig.ipbeja.pt/~ac_direito/Gosson.pdf - access on October 27, 2011.

This is not the project of criticism, in our view.

The mythological-critique as a critical methodology, have in mind a language paradigm that always prevents that the criticism to become absolute: i.e., that the criticism is given from an “a-mythological” point of view.

Why? Because the analysis of the myth aims to reveal, above all, that the human culture develops itself consciously and unconsciously - and the same language that gives wings to a type of development, gives wings to another.

Thus, there is no position that would be absolutely clear - which does not mean that we should to accommodate ourselves to our current position.

The critical methodology of the myth aims to enhance the level of awareness, as we do believe this should be the paradigm to be adopted and, perhaps the last and sole task of the Reason after many years of fierce criticism.

We propose, then, in a conclusive basis, a reversal of the "myth of the cave" by Plato.

By adopting a critical methodology of the myth, the researcher must realize that, in first place, he is *in the cave* - and *he will stay in the cave*.

There is no place outside the cave - at least not in a first moment, while the cave and its limits are not known.

The procedure that aims to understand reality as a text, aims a hermeneutic of reality and thus, its appropriate understanding - that's what we call of "potentiation of consciousness" – since in an attentive hermeneutical move the text is used to open the sense direction and not to the implement hidden meanings - which does not exclude the role of the unconscious mind nor before nor during nor after the understanding.

The unconscious mind, moreover, can be understood as the darkness in the cave – and the awareness by the hermeneutic movement as the act of illuminate the cave. The researcher should bear in mind that whenever when lightening his left side it will be left the shadows on the right side. Whenever brightening his front left, it will be left the shadows of the past. He must also to keep in mind that when putting a blue light over the objects – they turn into blue.

Finally, a complete lighting of the cave (a *cleaning* on the cave, would say Adorno and Horkheimer) is actually to bring the outside of the cave into it: to unset the cave.

To iluminate the cave, but to keep its mysteries, is to be aware that the world will always keep your secrets and often, to consciously understand the phenomena of Law, Arts Politics can be much less effective than a dream-like statement. We shall never forget that, as in the Machado de Assis' "*The Psychiatrist*", madness can be on the *right* side.

REFERENCES

ADORNO, Theodor W.; HORKHEIMER, Max. **Dialética do Esclarecimento: fragmentos filosóficos.** São Paulo: Zahar, 1985.

ADORNO, Theodor W. **Dialética Negativa**. São Paulo: Zahar, 2009.

BACON, Francis. **A Sabedoria dos Antigos**. São Paulo: UNESP, 2002.

BAKHTIN, Mikhail. **Estética da Construção Verbal**. São Paulo: Martins Fontes, 2002.

_____. **Marxismo e Filosofia da Linguagem**. São Paulo: Hucitec, 1995.

BULTMANN, Rudolf. **Jesus Cristo e Mitologia**. São Paulo: Fonte Editorial, 2008.

CAMPBELL, Joseph. **As Transformações do Mito através do Tempo**. São Paulo: Cultrix, 1997.

_____. **O Poder do Mito**. Entrevista concedida a Bill Moyers, PBS. Disponível em: http://www.youtube.com/watch?v=eoTMzvQIha0 e vídeos conexos. Consultado em 18/12/2010. 1988.

CHAVES CAMARGO, Antônio Luis. **Sistema de Penas, Dogmática Jurídico-Penal e Política Criminal**. São Paulo: Cultural Paulista, 2002.

DA SILVA, José Afonso. **Processo de Formação das Leis**. 2ª ed. 2ª tiragem. p. 50-52. São Paulo: Malheiros, 2007.

DERRIDA, Jacques. **A escritura e a diferença**. São Paulo: Perspectiva, 2009.

_____. **Gramatologia**. São Paulo: Perspectiva, 2009.

DOURADOS, Pedro. **Mito e Razão no Direito Penal**. Rio de Janeiro: Lúmen Júris, 2012.

ELIADE, Mircea. **O Sagrado e o Profano: a essência das religiões**. São Paulo: Martins Fontes, 2001.

FERRAZ JUNIOR, Tercio Sampaio. **A Ciência do Direito**. São Paulo: Atlas, 2007.

_____. **Introdução ao Estudo do Direito: técnica, decisão, dominação**. São Paulo: Atlas, 2007.

FOUCAULT, Michel. **A Arqueologia do saber**. Rio de Janeiro: Forense, 2008.

_____. **A Ordem do Discurso**. São Paulo: Loyola, 2009.

_____. **Ditos e escritos II: Arqueologia das Ciências e História dos Sistemas de Pensamento**. Rio de Janeiro: Forense, 2005.

HEIDEGGER, Martin. **Ser e Tempo**. Petrópolis: Vozes, 2010 .

LUHMANN, Niklas. **La Religión de la Sociedad**. Madrid: Trotta, 2010.

PÊCHEUX, Michel. *Análise Automática do Discurso*. In: HAK, T e GADET, F (orgs.). **Por Uma Análise Automática do Discurso: uma introdução à obra de Michel Pêcheux**. Campinas: UNICAMP, 1993.

RICOEUR, Paul. **Du texte à l'action**. Paris: Seuil, 1986.

_____. **Hermenêutica e Ideologia**. Petrópolis: Vozes, 2008.

_____. **O Conflito das Interpretações**. Rio de Janeiro: Imago, 1978.

SHECAIRA, Sérgio Salomão. **Criminologia**. São Paulo: Revista dos Tribunais: 2011.

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