JURIDICAL DISCOURSE AND EVOLUTIONARY DYNAMICS

Atahualpa Fernandez©

Abstract: This article propose an explanation about Law that crosses the scales of space, time and complexity to, by uniting the apparently irreconcilable facts of the *social* and the *natural*, integrate the perception of a normative network, of a social adaptive strategy, that certainly was created and exists in function of its contributions to survival and reproductive success during the long period of our evolutionary history, that is, to resolve recurrent evolutionary problems in an essentially social species such as ours that otherwise would not have managed to prosper biologically.

Human culture, and the law in particular, is a deposit of ethical, juridical and political precepts that include every type of specific order, value, prohibition, taboo and ritual. Since the most remote times, students of law have tried to organize these imperatives in a universal rational, harmonic and defendable system of norms and principles, but nothing like a consensus has been achieved to date. Mathematics and physics are the same for anyone and in any place, but the law (and ethics) still cannot reach a similar and considered equilibrium.

Why not? Is this objective illusionary? Is the law, after all, a subject of subjective taste (of political power)? Are there no juridical truths that can be discovered and confirmed, that are

© Postdoctor in Social Theory, Ethics and Economy/ Pompeu Fabra University; Doctor in Juridical, Moral and Political Philosophy /Barcelona University; Master in Juridical-Civilistic Sciences/Coimbra University; Research Scholar at the Faculty of Law/CAU- Christian-Albrechts-Universität zu Kiel-Germany; Research Scholar in Anthropology and Human Evolution at the Laboratory of Human Systematics at the University of the Baleatic Islands/Spain; Research Scholar del Center for Evolutionary Psychology / University of California, Santa Barbara; Specialist In Public Law/UFPa.; Professor Philosophy Law/ Amazonia University-Unama/PA; Honorific Collaborating Professor at the Department of Philosophy and Social Work/ University of the Baleatic Islands/Spain; Public Prosecutor –MPU/ Brazil.

not forced movements or merely serviceable truths[1]? Great edifices of juridical discourse theory and methodology have been built that have been criticized and defended, submitted to vision and widened and by the best methods of rational investigation and among these artifacts of human thought figure some of the most extraordinary creations of the juridical discourse culture. However, perhaps because they never paid proper attention to evolved human nature and to the structure and the material functioning of the human brain (for the instincts and the predispositions to create an exploit the relational social ties that are there and whose genesis should then be reintegrated in the evolutionary history of our species), continue without gaining an unconditional agreement of ideas and opinions of all those who have already studied them carefully.

It is not surprising then that exercising the law is one of the most problematic and publicly contested of all the jusphilosophical enterprises. It is not informed by anything that is recognizable as authentic theory in the natural sciences: neither law nor ethics have any sufficient verifiable cement of knowledge of human nature to produce predictions of cause and effect and just judgments based on them.

Indeed, the juridical discourse operators, when they approach the study of human behavior and the law, usually speak of diverse types of explanations: sociological, anthropological, normative, axiological and others, appropriate to the perspectives of each one of the respective disciplines and areas of knowledge, that is, without even considering the (real) possibility that there is only one class of explanation for understanding the jurisdiction in their methodological projection.

An explanation that crosses the scales of space, time and complexity to, by uniting the apparently irreconcilable facts of the *social* and the *natural*, integrate the perception of a normative network, of a social adaptive strategy, that certainly was created and exists in function

[1]In the in the very sharp observation by Dennet (1995), it is not "scientifism" to intend to give objectivity and precision to good science, in the same way this is not adoration of history to think that Napoleon dominated France for a time and that the Holocaust really happened; those that fear the facts will always try to discredit those that find them.

of its contributions to survival and reproductive success during the long period of our evolutionary history, that is, to resolve recurrent evolutionary problems in an essentially social species such as ours that otherwise would not have managed to prosper biologically.

If we focus, for example, on the standard models of juridical discourse, it can be said that they are insufficient, while: a) they do not take care or simply do not deal at all with the very important aspects of the problem of legitimization of the law from a previous conception of human nature (from its individual, separate and autonomous existence); b) they do not offer a method that permits, on the one hand, adequate analysis of our capacities, skills and limitations for the operation of the rational processes of juridical argumentation, or on the other hand, assess their results and impacts on what is referred to as our moral intuitions and emotions (both the culturally formed and especially the biological roots); and c) have a very limited interest (or hardly any) in the political context of facts or applicability of the proposals that they use as foundation[2], while they are little critical of the articulation modes and consequences of the relational social ties (communal sharing, equality matching, market pricing and authority ranking) through which humans construct approved styles of interaction and social structure, that is, the rights and duties that arise in evident community life[3].

---

[2]In this instance, an institutional model designed from a Republican and Democratic conception seems to be the most suitable, not only because the Republican tradition can recognize plurality in the motivations of human social life - that certainly is an enormous starting advantage compared to motivational monism of the Liberal tradition -, but mainly because its particular use of an open ethical political model has values of citizenship and juridical political methodology essentially useful to take the law as an instrument of social construction and, very particularly, to assimilate the formal and material exchanges in the process of decision taking in the face of the fluid (and sometimes crazy) dynamics of the world of every day life.

[3]I refer to the idea suggested by Alan P. Fiske (1993) whose innovating proposal I followed not only because of it good form quality, but also because of its amazing empirical richness – that answers many of the questions about the way the dominion- specific organization of the human mind affects human relations and conditions our moral intuitions. Based on a wide range of anthropological, sociological and psychological investigations, Fiske postulated the existence of four elementary forms of sociability, four elementary models by which man constructs approved styles of social interaction and social structure. The four elementary models are 1) Communal sharing; 2) Authority ranking; 3) Market pricing; 4) Equality matching. As these four structures are found very extensively in all cultures, and as they form part of the most important areas of social life, Fiske suggests as a possible inference that they are rooted in the structures of the human mind. In this sense, since it seems unthinkable to treat the juridical relation (that is, the personal relationships of man that the juridical discourse identifies as such) without taking the relationships that are forged in the course of human existence as a reference, to know characteristics of the four types of social ties proposed by Fiske permits the discovery of powerful means of articulating these forms of social life. And because all law and all order are relational in character, this is where, and the last analysis, the task of exercising with the law that, from a instrumental, pragmatic and dynamic perspective, comes to be conceived as an

In truth, any theoretical proposal of juridical discourse seems to be tendentiously destined to failure that intends to dissimulate or simply tries to forget the fact that all the argumentation that is carried out in juridical life is, basically, an argumentation about the various ways by which these (four) forms of social life are articulated rooted in the complex cognitive architecture of the human mind and irreducible among themselves.

In other words, admitting that the immediately specific diffusion of the links of communal sharing, equality matching, market pricing and authority ranking takes place because they are incorporated in a necessary way in our cognitive architecture (therefore links that underlie the universal traits of the culture), is, undoubtedly, the safest way to discover powerful, fertile and linking ways (juridical) of explanation and articulation of human contact and of relational social ties especially a wide range of badly conduct badly adapted to the current circumstances: suitable ways of combining them, of enhancing and cultivating their best aspects, and of mitigating or judging their destructive and dangerous aspects[4].

Thus the construction of a methodological proposal of juridical argumentation that takes into account the adequate ways of articulation of these relational social ties should lead, on the one hand to a greater and more direct approximation to the argumentation theories that develop in other areas of scientific knowledge, notably those elaborated by the sciences of the brain,

---

intent, a technique, to solve certain practical problems related to behavior in subjective interference of individuals (Kaufmann, 1999; Atienza, 2003). It is definitely a way that leads to considering the law as argumentation, that assumes, uses and in a certain way, gives sense to the other theoretical perspectives related to the structural, sociological and axiological dimensions of the juridical phenomenon.

[4] In this sense, because it permits facing the hypertrophies and hypotrophies of the different relational social ties: to the excesses and defects, that is, the relations of communal sharing, authority ranking, market pricing and equality matching and further the same social ties of equality in which the relationship of citizenship itself is inserted. Similarly, and equally, because it enables us to face the wearing away of a type of social tie by others: the anti-accumulative and anti-reactionary restrictions to the use of power, for example, try to prevent the authority social ties (the political power) from shaking the basis of community social life as the efficacy of freedom; the anti-alienating and anti-accumulative restrictions to use of private property, for example, seek to prevent the social ties of market pricing (the market) from shaking the basis of communal social life; the anti-alienating and anti-accumulative restrictions to the use of the right to suffrage, as we have seen, seek to prevent corruption of the citizen equality relationship by contagion of the market share ties. And the famous "eternal citizen vigilance" (Republican) that seeks to prevent the abuse of authority on the part of the more deceitful and selfish breaks the links of citizen equality and degrades the conception of justice in banalizing the use of power to the service of spurious and unjustified political and/or economic interests.

philosophy of the mind, evolutionary biology, primatology, evolutionist psychology, etc.; and on the other hand would oblige us to consider that every proposal of juridical argumentation not only has to develop in permanent contact with what is normally called the "theory of law" but also with a previous and very well-defined ontological, moral and political conception (liberal, republican, communist, etc.) about the human being.

To fulfill the essentially practical function of juridical argumentation this should be capable of offering a useful orientation in the tasks of interpreting, justifying, applying and producing the law, that is, based on the best data available *on how human beings are*, considered from a very much more empirical stance and respectful of scientific methods –use it to make changes for the benefit of mankind. And further that an evolutionary and biological perspective does not determine whether the exchange is adequate or which measures should be adopted to create a desired exchange, could certainly serve to inform on a question of fundamental importance: can who "exercises the law" try to act in harmony with human nature or against it; but is probable that efficacious solutions would be reached by modifying the environment where human nature is developed rather than taking on the impossible task of altering human nature itself.

On the other hand, a proposal of juridical argumentation that can fulfill this function of instrumental character (directed to the practices of the law and to the cultivators of juridical dogma) will have to be equally capable of also offering a control method of rationality or reasonability of the interpretation and application procedure of the law, and a set of criteria or guidelines suitable to judge the moral and methodological correction in the formulation and conception on its the "best decision" .

After all, only in man, in his individual, separate and autonomous existence, with his intriguing evolutionary history and an innate cognitive architecture (homogeneously structured and functionally integrated, regimented in modules or specific dominions), can the true rationality

of the Law always be found. Hermeneutics and juridical argumentation are not a toy for an elite of logics, analysts or privileged jusnaturalists, but construct a useful methodological tool to operationalize the necessarily "based" pragmatic-normative measuring of the concrete exercising of the law.

Similar to every cultural artifact or social adaptive strategy, the law is "there" because of man´s will (and not the contrary) and to solve adaptive problems concerning (fundamentally) our complicated life in society. Thus the juridical operators, in the task of the historical and social exercise of the law, should be active and permanently committed to the question of to where they serve mankind, and very especially, to where the law serves to prevent the individual from arbitrary interferences from the other social agents in his life plans.

Afterwards, the hermeneutic activity itself is formulated precisely from an anthropological position and puts in play a phenomenonology of human action; that from the point of view of man and his nature would it be possible for the juridical discourse operator to represent the sense and function of the law as a unit of a vital, ethical and cultural context: man, who lives from representations and significances that are processed in his brain structures, designed for corporation, dialog and argumentation and that, in his "exist with" is situated on a certain historical-existential horizon, continually asks other people, whose emotions he internalizes, that justify the legitimacy of their choices using the reasons that underlie and motivate them.

Cultivating this better side of the law should mean today, more than an ever, not only taking responsibility in the face of man in the sense in ensuring his individual, free, separate and autonomous existence, but also legitimizing the right from the determination of, and respect for, his human nature.

REFERENCES

Aiello, L. C., & Wheeler, P. (1995). The expensive tissue hypothesis: The brain and the digestive system in human and primate evolution. *Current Anthropology, 36*, 199-221.
Atienza, M. (2003). *El sentido del Derecho,*Barcelona: Editorial Ariel.
Boyd, R. & Richerson, P.J. (1985). *Culture and the Evolutionary Process,* Chicago, The University of Chicago Press.
Brodie, R. (1996). *Virus of the Mind:The New Science of the Meme,* Seattle, WA, Integral Press.
Cela Conde, C. J., & Marty, G. (1998). El cerebro y el órgano del lenguaje. En Noam
Chomsky, *Una aproximación naturalista a la mente y al lenguaje* (pp. 11-65). Barcelona: Prensa Ibérica.
Damasio, A. R. (1994). *Descartes' Error. Emotion, Reason, and the Human Brain*. New York, NY: G.P. Putnam's Sons.
___, (2001).Compreender os fundamentos naturais das convençoes sociais e da ética,dados neuronais. In Jean-Pierre Changeux (Ed.), *Fundamentos Naturais da Ética* (pp. 113-129). Lisboa: Instituto Piaget.
Domènech, A. (1988). Ocho desiderata metodológicos de las teorías sociales normativas. *Isegoría, 18*, 115-141.
de Waal, F. (1996). *Good natured. The Origins of right and wrong in humnans and other animals*. Cambridge, MA: Harvard University Press.
Deacon, T. (1997). *The Symbolic Species*. New York, NY: W.W. Norton & Company.
Deacon, T. W. (1996). Prefrontal cortex and symbol learning: Why a brain capable of language evolved only once. In B. M. Velichkovsky & D. M. Rumbaugh (Eds.), *Communicating Meaning: The Evolution and Development of Language* (pp. 103-138). Mahwah, NJ: Lawrence Erlbaum.
Dennett, D. (1995). *Darwin´s Dangerous Idea: Evolution and the Menaning of Life* , New York, Simon and Schuster.
Fernandez, A. (2002). *Direito, evolução, racionalidade e discurso jurídico,* Porto Alegre :Ed. Fabris.
Fiske, A. P.(1991). *Structures of Social Life. The Four Elementary Forms of Human Relations*, New York: The Free Press.
Gruter, M. (1991). *Law and the Mind*, London : Sage.
Humphrey, N. K. (1976). The social function of intellect. In P. P. G. Bateson & R. A. Hinde (Eds.), *Growing Points in Ethology* (En R. Byrne & A. Whiten (eds.) (1988), *Machiavellian Intelligence*, pp. 13-26 ed., pp. 303-317). Cambridge: Cambridge University Press.

Jones, O. & Goldsmith, T. H. (2004). “Law and Behavioral Biology”: *Columbia Law Review***,** vol. 105: 405-502 .

Kaufmann, A. (1997). *Rechtspholosophie*, München: C.H. Beck Verlagsbuch-handlung.

Leakey, L. S. B., Tobias, P. V., & Napier, J. R. (1964). A New Species of the Genus *Homo* from Olduvai. *Nature, 202*, 7-9.
Lumsden, C. J., & Wilson, E. O. (1981). *Genes, Mind and Culture: The Coevolutionary Process*. Cambridge, MA: Harvard University Press.
Lumsden, C. J., & Wilson, E. O. (1983). *Promethean Fire. Reflections on the Origin of Mind*. (Ed. castellana, *El fuego de Prometeo*, México, F.C.E., 1985 ed.). Harvard, MA: Harvard University Press.
Maturana, H.(2002). *Emoçoes e linguagem na educaçao e na* política, Belo Horizonte: Ed. UFMG.
Nowak, M. A., & Sigmund, K. (1998). Evolution of indirect reciprocity by image scoring. *Nature, 393*, 573-577.
Pinker, S.(1998). *How the Mind Works*, New York, NY, W.W. Norton
Rayner, R. J., Moon, B. P., & Masters, J. C. (1993). The Makapansgat australopithecine environment. *Journal of Human Evolution, 24*, 219-231.
Ricoeur, P.(1995). *Le Juste,* Paris, Esprit.
Ridley, Matt (1996). *The Origins of Virtue*, London, Viking.

Rose, M. (2000). *Darwin's Spectre: Evolutionary Biology in the Modern World*. Priceton University Press.

Sober, E. & Wilson, D. S.(1998). *Unto Others*. *The evolution and psichology of unselfish behavior*. Harvard University Press.

Sanfey, A. G., Rilling, J. K., Aronson, J. A., Nystrom, L. E., & Cohen, J. D. (2003). The Neural Basis of Economic Decision-Making in the Ultimatum Game. *Science, 300*, 1755-1758.

Stone, V. E., Cosmides, L., Tooby, J., Kroll, N., & Knight, R. T. (2002). Selective impairment of reasoning about social exchange in a patient with bilateral limbic system damage. *Proceedings of the National Academy of Sciences, USA, 99*, 11531-11536.

Sugiyama, L. S., Tooby, J., & Cosmides, L. (2002). Cross-cultural evidence of cognitive adaptations for social exchange among the Shiwiar of Ecuadorian Amazonia. *Proceedings of the National Academy of Sciences, 99*, 11537-11542.

Tobias, P. V. (1987a). The Brain of *Homo habilis*: A New Level of Organization in Cerebral Evolution. *Journal of Human Evolution, 6*, 741-761.

Tobias, P. V. (1987b). The Emergence of Spoken Language in Hominid Evolution. In J. D. Clark (Ed.), *Cultural Begginings. Approach to Understanding Early Hominid Life-Ways in the African Savanna* (pp. 67-78). Bonn: Dr. Rudolf Habelt GMBH.

Tugendhat, E. (1979). La pretensión absoluta de la moral y la experiencia histórica. In U. N. d. E. a. Distancia (Ed.), *Actas de las 1as. jornadas de Etica e Historia de la Ciencia* . Madrid: UNED.

Wedekind, C. (1998). Give and Ye Shall Be Recognized. *Science, 280*, 2070-2071.

WoldeGabriel, G., White, T. D., Suwa, G., Renne, P., Heinzelin, J., Hart, W. K., & Heiken, G. (1994). Ecological and temporal placement of early Pliocene hominids at Aramis, Ethiopia. *Nature, 371*, 330-333.