

BABES-BOLYAI UNIVERSITY OF CLUJ-NAPOCA  
FACULTY OF HISTORY AND PHILOSOPHY  
PHILOSOPHY DEPARTMENT

# **A Psychoanalytic Interpretation of the Legal System**

**Doctoral Thesis**

**Summary**

Academic Coordinator,

Univ. Prof. Dr. Aurel Codoban

Post-graduate,

Mihai Giurgea

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## Abstract

The present thesis concerns a critical analysis of the legal system from a psychoanalytic perspective. Its purpose is the rationalization of the juridical discourse through the psychoanalytic deconstruction of the juridical subject(s). This critique of the legal system analyses the juridical unconscious which manifests itself: 1) at the formulation of law through repetitions, abnegations, etc. as collective processes; 2) at the sentence pronouncement by the judge as a form of unconscious saying; 3) at the closing and settlement of legal contracts, which imposes an unconscious connection to *The Other One*; 4) and, in conclusion, on the level of legal structures as ideological structures. It is for these reasons that we adopt a separation from the contemporary hermeneutical and epistemological visions that would focus upon law, pleading for a psychoanalytic vision. “Critical juridical studies include as stake the rewriting of juridical *arts*, a different type of writing, thus to think the difference of law<sup>1</sup>.” A psychoanalytic research upon the legal system has, thus, an explicatory function and a demystification function of the internal yet visible mechanisms of law production and prosecution. We will interpret the law as a psychoanalytic process in which the interpretation is the unconscious tributary.

The first chapter of the following paper is focused upon the analysis of the origins of law, from a psychoanalytic perspective. In this manner, we will analyze the founding Freudian texts, with a focus upon *Totem and taboo* and *Moses and monotheism*, which speak of law establishment on the basis of Freud’s proposition of the *primitive horde myth*. This myth re-codifies, on a social level, the myth of Oedip. The Freudian critique of law begins with the deconstruction of the law rationality myth, by highlighting the role that desires and pulsions play in the establishment and perpetual production of law. For this tactic to be accomplished, Freud returns, by means of a law genealogy, to the incipient stages of organizing social relations, analyzing the ways in which taboos function in totemic societies. Here it is clearly perceived the manner in which pulsions, desires and interdictions are projected and codified in the shape of a legal proto-system, the taboo being in itself the first juridical system<sup>2</sup>. Starting with this identification, Freud

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<sup>1</sup> Goodrich, Peter, *Oedipus Lex. Psychoanalysis, History, Law*. University of California Press, 1995, p. 13.

<sup>2</sup> „The precepts of taboo constituted the first Right”, Freud, Sigmund.. „Cultural discomfort”, in Freud, Sigmund, *Opere 4. Studies upon society and religion*, Ed. Trei, 2000, pp. 172.

analyses the similarities between taboo and obsessional neurosis, demonstrating, in a purely psychoanalytic approach, how society functions in connection to the individual, law becoming, in this case, the social equivalent of the individual super-ego, a spring of interdictions and suppressing. The taboo, as a proto-law, in psychoanalytic readings, unravels, on one side, the manner of law establishment as an instancing of the primordial patriarch's interdictions, and, on the other side, the primordial contents of these interdictions, incest and fratricide. The law settles, on one hand, the way in which women and tribes estates can be divided and contracted, and on the other hand, it codifies and regulates violence between members of the tribe. In addition, by analyzing archaic societies, Freud draws attention upon the impossibility of discovering the primary form of interdiction, yet offers, at the same time, the psychoanalytic means of analysis of the evolution of law codification through processes of transgression, repression, projection, fixation, abnegation, etc. of the ancestral repressed, the killing done by the sons of the patriarch's clan with the purpose of primary desires satisfaction.

Freud's analysis over law establishment through primordial killing shows us the fact that law is, right from the start, ambivalent, being born altogether from love and hate and from love and respect towards the patriarch. In addition, law has a structural character, being a transcendental reality, the social equivalent of the individual super-ego.

Starting with this Freudian structure, Jerome Franck makes an analysis of the legal unconscious, demonstrating how the infantile desire for order and the individual super-ego dominate in the case of law affirmation by judges, who on one side claim that law is immutable and that their role is only to apply it, while, on the other side, they change it, through excessive rationalizations, thus proving the mutability and the inherent unpredictability of any law. Also, in the same Freudian mode, Frank analyses the way in which facts are established within a juridical trial, as a consequence of the unconscious "play". In this manner, testimonies are taken into consideration on the basis of unconscious preferences towards witnesses, who describe the facts the way they have already been processed by the unconscious, and the judge's decision is based upon a hermeneutical circle built upon the setting of certain facts and their framing in certain pre-established legal demarcations.

By the ending of the final chapter, we analyze the conclusions that postmodern philosophers such as Lyotard, Derrida, Deleuze and Guattari have reached, on the basis of psychoanalytic premises regarding the law. Starting from the Freudian and Lacanian

theories, we intend to demonstrate the operating mode of symbolical law as a law that regards the symbolical domain and that generates and regulates the entire juridical domain, regarded from an empirical perspective. The postmodern juridical studies try to break down the premises and ideologies of the Enlightenment present in the system of justice, meant to restructure it, to make it more democratic and liberated from its historical drawbacks. The main disagreement points regarding the Enlightenment tradition and the classic way of justice-making are the great legitimizing narrations, one of them being the Law, the notion of self-sufficient individual with its implications and consequences, the notion of single truth, universal and eternal, the foundationalism and neutrality of language. Lyotard promotes the dismissal of the idea of universal justice, based upon a universal righteousness, which, on its own turn, would be based upon everyone's agreement, or, at least, the majority of citizens, proposing, instead, a micronations justice and local consensus. Derrida makes a difference between righteousness, seen as a transcendental principal, and justice, as a practice of righteousness that would never lift to the former one's standards. The deconstruction of law made by Derrida starts from the same principles as those of Freud, the irrational, violent and passionate origin of law connected to the obscuring and perpetual reproduction of this originary violence. Real law is nothing more than a trace, as Derrida would say, a continuous interpretation, a perpetual rewriting of that originary violence that law has instituted. In conclusion, Deleuze and Guattari base their idea of justice upon the principle of desire. This form of justice derives from the opposition towards the Freudian-Lacanian structure, which regarded desire more as a reactive form.

Deleuze states that desire should become the engine of law. Otherwise, society would transform itself into an abstract subject-making machine and perfectly identical objects, which would make life disappear, leaving its place to a production mechanism. As Derrida also perceived, justice is infinite and undetermined, it exceeds formal connections, while justice, in every judgment, must be finite and determined.

In the second chapter, *Psychoanalytic tradition and juridical psychoanalysis*, we have identified the ways in which a juridical psychoanalysis is made possible, under the light of traditional psychoanalysis. The recovery of psychoanalysis as field of expertise in the justice system begins with a highly defined nucleus, altogether with Pierre Legendre, Peter Goodrich and David S. Caudill. The abovementioned represent the authorities around whom all other field figures have gathered. Legendre, French scholar, historian

and jurist, is being interpreted by Goodrich, British School professor, creating the European side of Freudian inspiration of the juridical psychoanalysis. A great part of Goodrich studies are, admittedly or not, due to Pierre Legendre, who became known to English language psychoanalysts only by Goodrich's translations. On this line of thought subscribe only those faithful to the idea that the contemporary unconscious juridical – that which was repressed, denied, exiled or forgotten – is unveiled in historical analyses of the texts of law. On the other side of the ocean, David Caudill represents the juridical psychoanalysis of Lacanian influence. Law teacher and also a lawyer, Caudill gathers around him American authors of psychoanalytic and juridical texts. However, the highest importance events in the evolution of juridical psychoanalysis were the “*Law and Post-Modern Mind*” conference at Cardozo School of Law from 1993 and the “*Legal Studies Forum*”, edited in 1996. Consequently, juridical psychoanalysis imposed itself as a central vector to the so-called legal critique. We have, thus, tried to closely follow the writings of Goodrich and Caudill, in order to position both Freudian and Lacanian psychoanalysis into what it is called legal studies.

We have followed, in the second part of the chapter, elements from the Lacanian tradition, as it is re-interpreted by Caudill. The central element under which psychoanalytic applied studies are made possible is, without a doubt, the concept of *The Other One* as it is theorized by Lacan. The ambivalence of the term (the large spheres through which it can be defined), along with its positioning within and around the subject give us, beyond the novelty of the Lacanian thesis against Freud, the possibility to understand law as “exteriorized internalization”. Law is not internalized by means of calling for the myth of Oedip and the myth of the primitive horde as found in the Freudian psychoanalysis, law is found in language (in the permanent conditionings and negotiations that it imposes). So it is language that gives us the law. The internalization of law is produced altogether with accumulation of language and not by appealing to a founding myth. So the externalization of law in the acts of conscious speech should always take into account the primary level under upon which it was built (from here deriving the necessity of a language psychoanalysis as perceived by Lacan). Law is nothing more than a network created under the direct effects of the three orders that constitute the subject (symbolic, imaginary and real). The permanent negotiations produced between the three spheres that represent the subject, through language, offer us also the possibility to understand how law is being created. The influences of the



symbolical layer (tradition and family), those of the imaginary layer (our “face” built in connection to others) and also the influences of the layer of real (brute reality), all of them play their role in shaping the law. However, if the subject is the one who talks and, at the same time, the one who is being talked of, we can understand much more effectively both the regulative and the descriptive role of law.

*Regulative*, as it is within the language that talks of the subject; *descriptive*, as its analysis and critique is the product of the subjects talk. So it is through Lacan that we have managed to position law as *law*, especially symbolical law, not law in connection to society, culture, subject’s tradition.

The third chapter analyses the way in which imaginary law functions. Starting from Freud’s and Lacan’s theoretical considerations connected to Goodrich’s applied analysis and that of jurisprudence, made from a psychoanalytical perspective, we will demonstrate the way in which law is written and re-written in a sinuous process, directed by the juridical unconscious. The first part of the third chapter concerns the genealogy of postal regulation, creating a historical hermeneutics of it. It begins with the nowadays practice of postal regulation, which holds responsible the letter recipient, once the letter has been mailed, passing through the contractual doctrine and historical rules of marriage, which are the former layers of this legal construction, in order to reach the myth of the primitive horde and the myth of originary sexual trade. Postal regulation is seen as an inadequate interpretation of the principle of parties consensus, because the sender is considered to continually making the offer from the moment of sending until the letter is accepted or declined by the other party. Psychoanalytically, postal regulation is the expression of the conformation of the principle of reality and the constant ego, in the way in which this must hand his own law and abide to it. “Postal regulation always ties the sender, at least potentially, to a contract of which he is ignorant. It ties parties in an objective manner and imposes the fiction of a consensus, despite of what is, potentially, a missed communication between parties”<sup>3</sup>. The contract will exist even in the case of a stolen letter. The possibility of theft and the possibility of arrival to destination, the problem of destination present in both is the stake of both postal regulations as well as of the theoretical debate between Lacan and Derrida. The letter can be subjected to a detour, yet that is unimportant as long as, as Lacan sustains in the ending of “The Seminary

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<sup>3</sup> Goodrich, Peter, *Oedipus Lex. Psychoanalysis, History, Law*. University of California Press, 1995, p. 208.

about *The Stolen Letter*”, ”the letter always reaches its destination”<sup>4</sup> (s.n.). The letter Lacan speaks of, the one that suffers misappropriation is situated in the symbolical order. Derrida will demonstrate, against Lacan’s concept, that in reality the letter never arrives. The reason for it is the fact that every letter is nothing more but a copy, a multiplicity which irreparably betrays the message it holds. The postal regulation is an important symptom and a prototype of the contract. The closing of the contract sets the closing of a contract in timeframe, which is why the analysis of postal regulation sets a new light upon the doctrine of contracts in general. Using Lacan’s tripartition symbolic-real-imaginary, we see that the system of justice has but an imaginary character of interpretation and so, of imagination. The contract is, on a final ground, a significant, a simple difference established on the level of symbolical. Its principle being of a symbolical level, the juridical existence and reality of the contract concerns strictly the imaginary. This means that any contract will ever be complete because it is a product of dissemination, of writing, of rewriting the symbolical. The insofar analysis upon postal regulation as a revelator of hidden stakes of contracts lies in misunderstanding and in the fact that free will, along with the autonomy of contractors are legal myths. This lead us to the necessity of historical origins of contracts analysis, contracts of any kind and to that of rules of marriage of sexual trade in the primitive horde, which represents the prototype and the origin of the contract. Postal regulation that privileges the one is being offered to, is the allegory and the *mise-en-scene* of archaic rules that conveyed a certain protection to women at the closing or breaking of marriage. Marriage was perfected at the moment in which the woman accepted the offer made by the man. According to the contract, partners were not equal because contracts reproduce this contract of marriage and so the inequality of the contractors is fundamented upon gender inequality. The situation of contract ending restages the originary drama of the woman whose only strength is that of accepting or refusing the masculine proposal. Contracts, by their means of functioning, assume a passive side, which has the sole right of accepting or refusing the contract and an active side that sets the rules of contracts and proposes the other party. Postal regulation, the contract or the rules of marriage sustain the fact that, in the end, the bidders, sons that have won their rights through killing, must assume their initial desire,

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<sup>4</sup> „c’est qu’une lettre arrive toujours à destination”, in Lacan, Jacques. „*Le Séminaire sur La lettre volée*”, 1957,ed.cit., p. 44.

their initial murder. They have no longer the right to draw back, because crime and law establishment, the offer, are not reversible.

This analysis of the postal regulation genealogy sets the psychoanalytic phenomena that give birth to the imaginary law and that are analyzed in the second part of the third chapter, melancholy, memory, absence and repetition. Melancholy is unveiled as the internal resort which continues the primordial process of law establishment through the endless prolonging of the regret towards the murder of the primordial patriarch. Melancholy is, in Lacanian terminology, the failure to symbolize this initial crime, a grieving that cannot be ended because it manifests only on an imaginary plan. Melancholy sets in motion the productive memory which maintains, reproduces, highlights but also creates and obscures certain memories. What psychoanalysis demonstrates is the fact that the object of memory, grieving and melancholy, is absence. Consequently, law is founded upon the originary lack of sources, order and initial images. Law is, thus, just an interpretation, a repression, a return to the repressed element and an endless repetition of the originary act of establishment.

The final part of the third chapter analyses the embodiment of law in persons, places and images. The psychoanalysis of these through the analysis of the causality presented in specialized literature unveil hidden resorts of production and application of law. The *Attia v British Gas Plc* case from 1988 depicts the way in which the imaginary constitutes itself as legal argument. Judges and the entire juridical institution, in this case, have admitted that pulsionary arguments have permitted the entry of the unconscious: “home burning as a material cause of suffering carry the unconscious meaning of an absolute violation: the destruction of a sacred space is a sacrilege for the ecclesiastic law”<sup>5</sup>. The house, in this case, was seen as a double image, that of material property but also as a sacred space. The power of symbol within the judicial system is what also makes the law impossible to overpower its King or Government. The crown, as it results from the analysis upon the *M. v Home Office* case, cannot be punished, being nothing more than fictional, non-personified, not having but a mystical consistence. The reason behind the Court’s decision was that the King stands for the Authority as such and for the transcendental origin of law. Consequently, the law has no power against the image of his origin, not having a juridical connection between the monarch and the law for which he

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<sup>5</sup> Goodrich, Peter, *Oedipus Lex. Psychoanalysis, History, Law*. University of California Press, 1995, p. 196.

ensures. The final two cases that are being analyzed refer to the impotence of the imaginary field over the symbolical one. In the case of corporal Lortie, we witness how the identification of Authority as such with the images of authority leads to murder and to the illusion of transcendental power of the symbolical structure. At the same time, through the adoption analysis by the transsexual mother of her own child, but now having the quality of father, we can see the failure of the law to pose as in transcendent instance, which can dislocate the symbolic structure by establishing the own imaginary. Finally we show the fact that the legal domain is circumscribed by violence, its origin, reason and effects are actually the reality of the violence, ancestral crime, real crime, which makes the object of the process and of the crime as punishment decided by law.

In the first part of chapter 4 called „*Law as ideological structure*” we are going to delimitate the elements which make possible the placing of the law in the ideology’s proximity. The constructive elements under which each ideology does function are “the faith” and “the social imaginary”. So, (1) we will try to see the similar structures between the elements typical for all juridical systems, as also (2) the possibility to critically question with recourse to Psychoanalysis the similar structures of the two discussed concepts.

The explicit purpose of this chapter is to show that the functioning scheme of the law is similar to the one of the ideology. Namely, the whole elements arsenal which the ideology discusses is similar to the one of the law and from this point forward begins the effort of the psychoanalysis to analyze the law as ideological fact. The ideologies are, generally speaking, a set of group beliefs, which the individuals assimilate through socialization processes; many people receive an ideology by identifying itself with a social group or, on the contrary, by distancing. These group beliefs must be highlighted in order to understand how a quite abstract concept will come to justify “the movements” which one group or another thinks is its right to make. To stay under the influence of any explanatory beliefs, namely of cohesion, represents the first aspect which a social group leans on and in this sense we can identify the ideology till the indistinction with the law. In the case of ideologies (as also of the law), the beliefs transform in arguments: they are meant to convince and to counteract the rival visions. The movement from faith to argument is realized exactly on the unifying logically operator which is given by the cohesion. The ideologies, and equally the law, totally influence some of the most important values of the life. The ideologies are normative, ethical, sapiencial in tone and

content. We find the same aspects when we refer to the law. The ideologies are, unavoidable, parts of a more extensive belief system and they share the structural and stylistic properties of this system. The ideologies have a body of holy documents (constitutions; declarations of the rights; manifests; programs) and heroes (foundation parents; unifiers; saviors; prophets and wise men; great interpreters and authors). We tried to identify all these elements in the law domain.

In the second part of the chapter, we will identify the three basic characteristics of the ideology (dissimulation, explanation and integration) as being a part of the law structure. So, first of all, we showed how (1) the distorting/dissimulation function typical to the pejorative understanding of the ideology can show its positive valences which it carries within the law. The argumentation is as follows: the body of law has an effective reality which we always can measure through praxis. So that, starting with the reality of the praxis we should imagine that the law also functions under the same auspices: namely it totally respects the praxis. But the things are never like this. There is always a filter, either of the judges, or of the lawyers, by which the law doesn't respond to the facts as such, but to the interpretations the legal representatives give to them. The dissimulation as a function of the law is an absolutely necessary element at the level of its pejorative valences and also at the level of its beneficial valences.

Secondly (2), the legitimacy (as a second element ideology-specific) functions under the same form as the cadre of the legal system. The legal system wants from its "actors" a plus of trust, "a plus of faith" without which it cannot function in good conditions. The legal system covers the reality, covers the actions of the individuals in a society, as far as they bring "a plus" of faith for its operation. The lack that must be filled from what the members of a social community voluntarily offer and the necessities a legal system carries is covered exactly by the function of legitimacy.

Thirdly (3), the law can function as long as it asks the help from its subjects within a foundation event. It doesn't matter if a group has an idealized image of the law, what it imports is the fact that without the appeal to a founder action (sometimes immemorial) of the community, the community doesn't exist. The law can function because of the idealization which is produced in the middle of the community. We will never know the beginning of the law, but we will always connect it to a founder event, which has exactly this indispensable function of integration.

Understanding the law on this block, based on the lacanian theory, as being something left from our inside, we tried in the last part of chapter 4 to understand the role which law has in the reality sphere as ideologically structure. The fact that the social groups legitimate by the law, that the law has a pronounced character of cohesion, that the law asks trust from its attendees, that the law receives the virtues of a panacea, that the law is full of “feelings and affections” offer us the grill we can read the law in view of ideology. This lecture has offered us the opportunity of applying a psychoanalysis-based critique of the law as ideologically structure. While we analyzed step by step the arguments Slavoj Zizek presents to us, we were allowed to arrive to some conclusions. The reality of the ideology, and as we are going to show – the reality of the law, doesn’t have a “hidden” character anymore. From Zizek point of view the ideology gives us suddenly all the elements by which we can identify the ideology as ideology. The only problem the Slovenian philosopher identifies is the one according to which our beliefs allow the working of the ideology aren’t hidden inside of a collective subconscious, but on the contrary, they are externalized and transformed exactly in the elements which explain and sustain the ideology. The movement of the faith from the inside of the subjects to the outside of the community implies a collective psychoanalysis, where the ideology and the law are the nearest elements of a subject (also in the case of a collective subject).

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