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The Twilight of European Philosophy of Law

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ABSTRACT

The question about the European values is the question about the *differentia specifica* of our legal self-understanding. These values, for example, can best be recognized at the geographical borders, where a set of specific values tends to get more obvious. This way, however, it is only the more general western values that become transparent. The thesis of this paper is that the *differentia specifica* of European legal self-understanding can be described only in its distinction from the American legal identity. The differentiating issue here is the metaphysics of 19th and 20th centuries, which has had its foremost influence only in the European cultural environment, and introduces the project of constructing an entirely new world and destroying the existing one. Even the traumatic experience of various totalitarianisms has not spelt the end to the fixation on utopian ideals. Its destructive effects can be recognized at three levels:1) The sentiment of *mistrust* affects the judiciary, in that the respect for jurisdiction is low; judges are stripped of authority, and expected to be just vi*va vox legis*. 2) The sentiment of *waiting* is typical for legislative; the appearance of "just, equal, far" etc. world is still to come; which in turn necessities a voting system that allows for as many "ideas" as possible (i.e. parties) are allowed to get into the parliament. And finally 3) the sentiment of *guilt* affects the executive power. It is reflected in the destruction of the penal system which consequently becomes progressively more ineffective.

Keywords: legal philosophy, enlightenment, values, EU

Somrak evropske filozofije prava

POVZETEK

Vprašanje glede evropskih vrednot je vprašanje po tem, kaj je *differentia specifica* našega pravnega samorazumevanja. To specifiko lahko prepoznamo, denimo, na geografskih mejah EU, kjer postane viden niz značilnih vrednot. Toda na ta način je težko dobiti odgovor na vprašanje, saj se tam razkrijejo v prvi vrsti zahodne vrednote na sploh. Teza pričujočega članka je, da je mogoče *differentio specifico* evropskega pravnega samorazumevanja opisati zgolj skozi razliko z ameriško pravno identiteto. To razliko predstavlja metafizika 19. in 20. stoletja, ki je imela vpliv le v evropskem kulturnem okolju in vsebuje projekt kreiranja povsem novega sveta, ter destrukcije starega. Navkljub travmatskim izkušnjam s totalitarizmi je fiksacija na utopične ideale dandanes še vedno živa. Destruktivne posledice tega lahko opišemo na treh ravneh. Razpoloženje 1) *nezaupanja* načne sodno vejo oblasti. Zaupanje v sodstvo je nizko, sodniki ne uživajo avtoritete, od njih se pričakuje da bodo zgolj *viva vox legis*. Razpoloženje 2) *pričakovanja* je značilno za zakonodajno vejo oblasti. Še vedno čakamo vznik »pravičnega, enakopravnega itd.« sveta, kar narekuje tak volilni sistem, ki bo odprl vrata za čim večje število »idej« (tj. strank) v parlamentu. In naposled, razpoloženje 3) *krivde* hromi izvršilno vejo oblasti. To se zrcali v destrukciji kazenskega sistema, ki postaja vse bolj neučinkovit.

Ključne besede: filozofija prava, razsvetljenstvo, vrednote, EU

The title of the conference „In Search of Basic European Values“ suggests the need to isolate specific European values which determine our understanding of the law and the state. To isolate something at a conceptual level, however, always implies choosing a *specific* point of view which would open up the horizon where the investigated phenomena will then be interpreted. This decision is vital since the result will automatically depend on it. According to the basic ontological principle, *omnis determinatio est negatio*, the chosen point of view will determine the *distinction* between itself and the phenomena under investigation. To

paraphrase Dworkin, we should employ the perspective which shows a given phenomenon "in its best light".

By searching for basic European values, two strategies can be imagined. The first one is suggested by the empirical fact that the EU has geographical borders that enclose its legal system. According to S. Huntington,[1] Europe is in contact with two "civilizations", the Islamic and the orthodox one. Consequently, European values could be isolated by describing the distinction that exists between a European account of law (and state) on the one hand and the Islamic and orthodox ones on the other. This strategy is legitimate and is often employed to define the European spiritual world. However, given such an approach, high-definition contrasts are bound to emerge. For this reason, this point of view has only limited value as far as isolating European values is concerned: the results would in the first place expose western values as such. To put it differently, due to big differences that would thus emerge between "civilizations", the finesse of European culture would be obscured, with only the most general western characteristics dominating. This is not the perspective that would show the characteristic of European values "in its best light".

1. America and Enlightenment

Thus, this article will adopt another possible strategy: European values will be described in comparison to the legal culture of the United States of America. This approach will provide much less contrast, since we are investigating the distinction between two essentially *western* legal cultures. They both share a common historical trajectory, from the ancient Greek philosophy to the Enlightenment. The only difference in their spiritual background is the metaphysics of the 19th and 20th centuries. What I argue in this paper is the following: *differentia specifica* of European values is the spiritual development in the wake of the Enlightenment. This development is to some extent also directed against the Enlightenment, since it dissolves the secular picture of man and the world introduced at the end of 18th century.

American legal culture, one could argue, is a fixation of the enlightenment-paradigm in actual history. United States of America

[1] *Samuel Huntington, The Clash of Civilization?, Foreign affairs, Vol. 73, No. 3., 1993.*

emerge as the state without history and the enlightenment, so that the notion of pure practical reason (I. Kant), whose truth is beyond the spatial-temporal world (i.e. history), became the most suitable paradigm to build a new legal culture upon. The *Virginia Bill of Right* (1776) was promulgated five years prior to *The Declaration of the rights of Man and of the Citizen* (1789). Contemporary culture of human rights, reintroduced after Second World War, has its background more in the American legal culture than in the French codification from the end of 18th century. The Enlightenment remains, however, treated as the foundation of European legal culture as well. By the same token, another heritage is at play here, acting as a "burden" or "twilight" of our history, demanding *mistrust* in law and the state. The heritage I have in mind here refers to the already mentioned metaphysical thinking of 19th and 20th centuries. Its destructive tendencies for the legal culture *per se* will be analyzed in separate chapters.[2]

This metaphysical burden could be summarized by two key characteristics. Firstly, it reintroduced the former picture of a man as a sinful being. Secondly, the link between the individual and the state is broken again. The state is comprehended as the independent entity which is hostile to its citizens. Precisely these two accounts of man and the state were abandoned by the Enlightenment.

2. From contractual theories to the Enlightenment

The Enlightenment can be interpreted as a culmination of the theory of social contract. In 1651, Thomas Hobbes introduced an entirely new philosophical anthropology. A human being is no longer understood as *zoon logon echon* and *zoon politikon* as defined by ancient Greek philosophy. Furthermore, human being is no longer *imago dei* and a sinful creature as Christianity would have it. For Hobbes a human being is nothing but a machine: matter in movement. It was the influence of the Renaissance and nat-

[2] Before we enter the topic described, one remark is in order. Although the European value-platform will be exposed to some measure of criticism, this article should not be understood as a plain advocacy for American legal values and system. As G.W.F Hegel stresses, a specific culture is bound to its spirit, which can never be chosen arbitrarily. We are Europeans and cannot become something else. But it is the feature of the spirit itself that enables the criticism of its own concepts. This is its essential characteristic that keeps the spirit alive and vital. This paper can be taken as a part of this process of self-understanding of the spirit.

ural sciences – Hobbes has even personally met G. Galilei in Florence – that helped to introduce an entirely new picture of man. It took enormous courage, however, to apply the blind scientific perspective directly onto society, the realm traditionally understood as the emanation of highest values and goals. With this shift society became just a senseless mechanism in movement.

This radicalism was able to break with a thousand-year-old picture of man. In the first place, it was able to break with the idea of human defectiveness, inherited from Christianity. Although the idea of one's sinful nature is now abandoned, this does not imply that Hobbes's new world is now heaven. On the contrary, it is hell: *Bellum omnium contra omnes*. The individuals – from the first moment of coexistence onwards – are unavoidably sucked into the vortex of self-destruction and exhaustion. However, this problem is now, following the logic of the mechanical paradigm, just a *technical* one. This implies that it is solvable. *Bellum omnium contra omnes* is nothing but the condition of an untuned (social) machine. Clinching thesocial contract, however, means that the destructive forces in society are harmonized and the machine can run on smoothly. But this condition is still, as we well know, no heaven on earth. The outcome of the social contract, according to Hobbes, is poor. What is needed is an absolutist order, since this offers the only means of preventing a re-emergence of the natural condition.

Hobbes's view that only absolutism is capable of keeping the natural condition under control must be understood as a part of his world shaped by the experience of the thirty-year war. However, the main idea of contractualism has by now entered history: the idea that the state and law are nothing but the *product* of – drawing on Kant's jargon – pure practical reason. There is no metaphysical burden in the background that would hinder the free creation of our future coexistence. To put it differently, henceforth there are no obstacles that our world could not become the best world possible. It took a hundred years for this thought to become politicaly active as the Enlightenment. It is precisely the sentiment of longing – an unlimited optimism – that has driven the political movement that became one of the most characteristic features of the West.

J. Locke is often seen as the main reference for contemporary democratic culture. In his work *Two Treaties on Government* the

whole idea of democratic coexistence is condensed in one major thought: man is not a sinful creature, he is good, and his inalienable rights are yet in a natural state. Civil government does have not an independent entity, it is only an instrument for inconveniencies: »*I easily grant that civil government is the proper remedy for the inconveniencies of the state of nature, which must certainly be great, where men may be judges in their own case.*« [3]

Furthermore, human beings are capable of managing their rights. The laws they find within their reason suggest the creation of the state that will protect them: »*If man in the state of nature be so free, as has been said; if he be absolute lord of his own person and possessions, equal to the greatest, and subject to no body, why will he part with his freedom? (...) To which it is obvious to answer that though in the state of nature he hath such a right, yet the enjoyment of it is very uncertain, and constantly exposed to the invasion of others: for all being kings as much as he, every man his equal, and the greater part no strict observers of equity and justice, the enjoyment of the property he has in this state is very unsafe, very insecure.*« [4]

To put it bluntly: the state is nothing but the result of our will. It has no ontological independence; the only goal of its existence is to serve the interests of its creators. Against such a horizon, it can victoriously be said that such a state is *our* state and on that ground there is no reason in advance to condemn it. This is about to change, however.

3. Point of division

On this point Europe and America share a common history. At the end of 18th century, the United States of America was founded, and its account of law and the state separates from the development of western philosophy. Europe goes further and reaches the point when the dialectic of the spirit demands very important shifts in comprehension of the law (and the state). The most influential among them was the reintroduction of the primacy of the state to the individual and the idea of the deficiency of the state (yet on a conceptual level). Three authors need discussing in this respect: J.J. Rousseau, K. Marx and F. Nietzsche. It is obvious that

[3] *John Locke, Two Trities of Gowerment, London, 1824, II., §13.*
[4] *John Locke, Two Trities of Gowerment, London, 1824, II., §123.*

they belong to different periods and philosophical currents. What they have in common, however, is the explicit reservation to the state (and the law). Their thinking constitutes the pillar of the twilight-sentiment when it comes to the comprehension of the law and state, typical for European (legal) culture.

J. J. Rousseau is an ambivalent author. On one hand his work *Social contract* is one of the most important texts of the French Enlightenment. On the other he is also the author of the work *Discourse on the Origin and Basis of Inequality among Men.* This book can be read as a secular theory of the fall of mankind. As a starting-point of discussion, he introduces the human being in the condition when he has not entered coexistence yet and, consequently, has no characteristic that the society would impose on him. This is the "noble savage" who has two capabilities, reason and compassion. He is portrayed as a symbol of health of life.

But once man enters coexistence, his path of decline begins. The social experience causes him to (progressively) to use more reason and less compassion. He turns into an egoistic creature, and riots and upheavals are inevitable. At this point the darkest day in the history of mankind emerges, for the rich suggest the creation of the state: "*Destitute of valid reasons to justify and sufficient strength to defend himself, (...) the rich man, thus urged by necessity, conceived at length the profoundest plan that ever entered the mind of man: this was to employ in his favour the forces of those who attacked him, to make allies of his adversaries, to inspire them with different maxims, and to give them other institutions as favourable to himself as the law of nature was unfavourable.*"

What seemed at first glance a solution is actually a curse: by constituting the state, the inequalities (which are a consequence of immoral acts or even of chance events) are transformed into *rights* — once and for all. Rousseau: "*Such was, or may well have been, the origin of society and law, which bound new fetters on the poor, and gave new powers to the rich; which irretrievably destroyed natural liberty, eternally fixed the law of property and inequality, converted clever usurpation into unalterable right, and, for the advantage of a few ambitious individuals, subjected all mankind to perpetual labour, slavery and wretchedness.*"[5]

[5] *J. J. Rousseau, Discourse on the Origin of Inequality, in Rousseau, The Social ontracts and Discourses, London, 1982, p. 88-89.*

The law (and the state), in Rousseau's view, is the result of a fraud or even a scam. It was suggested by one segment of the society – i.e. the rich – as the measure interpreted as being beneficial for the whole of society. But only *raison de etre* of the state is to protect and legitimate inequalities. Even today this account of the state is very influential within European intellectual circles.

K. Marx's philosophy is tuned into Rousseau's sentiments. His concept of the state, however, is developed further on the horizon of dialectical materialism. The fall of the mankind represents phenomena of the division of a work what – on material level – enables the emergence of ideology. From this point of view whole human history is history of Evil, and the state (and the law) is nothing but the manifestation of partial interests of dominating class: »*Your very ideas are but the outgrowth of the conditions of your bourgeois production and bourgeois property, just as your jurisprudence is but the will of your class made into a law for all, a will whose essential character and direction are determined by the economical conditions of existence of your class*.«[6]

Marx does not criticize any *specific* form of the state. He attacks the very *existence* of the state, which is *eo ipso* proof of a systematic pathology in coexistence. Contrary to Rousseau, Marx introduces the perspective of salvation, the end of history. The Proletarian revolution will have a material mandate and will unavoidably end the history of alienation in the act of labour. But up until that point, the understanding of the state and law – speaking generally – is similar to that of Rousseau's.

It cannot be emphasized enough what difference there is between F. Nietzsche's account of the human being and the traditional one that (also) Rousseau and Marx share. If they see the fulfilment of an individual's existence in his coexistence with equal individuals, this ideal is for Nietzsche the most dangerous poison in human history. Morality (and lawfulness) has produced gregarious animals, castrated creatures, who are basically repressed and have destroyed the capability to become great beings. The law and the state are nothing but the manifestation of "resentment" that drives the weak to join forces in a flock. The entire western tradition is, according to Nietzsche, a history of training, deformation and castration. Despite the approach being entirely different,

[6] *K. Marx, F. Engels, The Communist Manifesto, Global Grey, 2014, p. 19.*

Nietzsche's account of law (and the state) ultimately leads to the same attitude: disregard for the state.

4. Implications for the attitude to the state

This was a brief sketch of the metaphysical burden that I suggest in this article is a *differentia specifica* of European (legal) values. I concede that the description was superficial and did not demonstrate the internal logic of western philosophy which demanded the development. It must be emphasized, however, that the accounts of the state and law just described were not the result of irresponsibility, misfortune or a (philosophical) mistake. It was the ontological necessity that dictated the formation of the spirit over the 19th and 20th centuries. And it is in this period that the difference between the European and American value-systems was formed. In our attitude towards law (and the state) we can identify a general discomfort, suspicion and reservation.

We must not misinterpret this attitude as a culture of criticism and control of power. State and law in this scenario do not even have a chance; we are speaking about a dogmatic, a-priori and (often) unfair attitude. Its mirror-side is the sentiment of waiting: an expectation of structural and fundamental solutions. The law and the state are treated as temporal phenomena that in the eschatological perspective have no independent value. That is why Europe is a continent of totalitarianisms, of a search for "final solutions", either in the form of the Bolshevik or national-socialist radical politics. Due to different spiritual backgrounds these ideas in America did not have significant resonance. If America is the land of realized longing, Europe still waits for an opportunity to long.

Below I will analyze the impact of the metaphysical burden on every branch of power respectively, exposing at the same time the specific sentiment, typical for each one of them, and the deformation in its functioning.

a) Legislation. The sentiment characteristic for this branch of power is *waiting*. It is precisely the waiting for "new ideas", "different paradigms", "advanced solution" (that should enter the procedure of legislation) which has shaped our attitude to this branch of power. New statutes are expected to lead to a kind of

salvation, or at least, to a radical and abrupt improvement of our society. On the horizon of this sentiment it is difficult to accept that – metaphorically speaking – 99% of ideas in the Enlightenment tradition that should be materialized already exist. Is it possible to imagine a *radically* better solution to civil law, penal law, human rights, etc.? Of course, improvements are always possible and this is the process that never stops, for if it did, the legal system would cease to remain alive. But presupposing a democratic framework, radical changes in the legal system are difficult to envisage.

b) The sentiment of waiting also determines the voting system: parliament must be open to the multitude of parties in order to grasp as much as possible "ideas" and transfer them into practice. This presents a great naiveté, which leads to the erosion of the core of democracy: the commitment of politics to voters is replaced by the commitment of the politician to another politician. To form the government after elections (in most cases, a coalition-contract is necessary. Here a place opens for the extortion of minor parties without an (articulated) political agenda, which suddenly become a decisive element in the whole process. Consequently, democracy becomes captured by political clowns that get proportionally high power on the bases of the prevailing voting system.

c) Judiciary. The sentiment that determines this branch of power is *mistrust*. Authority of the courts in the EU is low in comparison to that in America. Concerning the mistrust of the judiciary, Slovenia presents an extreme case at the level of the whole EU: the ratings put our country always to the bottom of the lists. It is also unique that in Slovenia, immediately after every decision taken by constitutional court, journalists run to the politicians, public personalities, NGOs to get their comments. If the decision is not in accordance to their expectations, destructive and vulgar language is common praxis.

d) This sentiment also causes the prevalence of legal positivism as spiritual background of the judges because it offers the possibility of an approach that "exculpates" the decision-making process. The ideal of *viva vox legis* – although its naiveté (?) is widely known – is the most suitable attitude to keep the person who decides as far as possible from the decision. For the same reason the argumentation behind the verdicts has grown

enormously (even to few hundred pages), since this is the way the judges try to defend themselves against the mistrust.

Executive. The sentiment that dominates in this branch of power is that of *guilt*. The power in EU is automatically treated as suppression, the difference between *violentia* and *potestas* is very difficult to grasp. Very illustrative in this respect is Foucault's perspective, which is popular among European intellectuals: »*We must conceive the discourse as a violence which we do to things, or in any case as the practice which we impose on them; and it is in this practice that the events of discourse find the principle of their regularity*«.[7] These regularities are what power needs in order to function. As a result, »*Power is essentially that which represses. Power is that which represses nature, instincts, a class, or individuals*«.[8] Although Foucault mentions the naiveté of expectations that behind power there lays the realm of uncontaminated freedom, the power, however, remains something that always represses. The executive can in no case avoid conflict with freedom.

The place where executive branch of power is the most concentrated is the penal system.[9] For that reason the most severe defects of this sentiment are present there. Penal systems have in many European countries become impotent, even partly dissolved. In Slovenia the share of conditional convictions is already 80%. The rest of sentences are now under attack by the program of "alternative" sanctions that intend to convert the years in prison into months of public useful work. A good illustration for this degeneration is the epic penal process against the former prime-minister of Italy which has reached its peak in few of his visits at retirement homes. The implications for the common trust in the legal system need no further commentary.

[7] *M. Foucault, The Order of Discourse, in: R, Young (ed.): Untying the Text: The Post-Structuralist Reader, Rutledge & Kegan Paul, Boston, 1981, p. 67.*
[8] *M. Foucault, »Society Must Be Defended, New York, 1997, p. 10.*
[9] The difference between American and European penal system can be illustrated by a single word. In the last decade numerous programs on cable-TV investigating complex criminal cases have become popular. It is often the case that the investigator interviewed in his concluding words describes the act of the offender as "evil". In Europe this is the word that can be never uttered! The sentiment of guilt inhibits the distinction between offender and the others. We are simply forced to look for "deeper" reasons of the criminal act that are located in unjust society, unfair economical system, discrimination, etc. And this system is perpetuated by all of us, representing our complicity. This comprehension is in contradiction with the Enlightenment's maxim of the autonomous subject: if somebody commits a crime, nobody but he himself is the author of this act.

5. Conclusion

We concluded the path which was started as an attempt to grasp "Basic European Values". We started by questioning the point of view that would best provide us with a viable approach. Dworkin states that the interpreted phenomena must be shown in their "best light". That is why the strategy that describes European values affording minimal contrast was chosen as though we were undertaking an immediate comparison with a neighbour (civilizations). American values are part of our common history but at the same time they are different. For that reason they were used as a reference to describe the *differentia specifica* of European (legal) values.

The result of this approach underlines the metaphysics of the 19th and 20th centuries as the moment that determines – at least partly – European legal values. This period of western tradition has smuggled back into our consciousness the concepts that during the Enlightenment were eliminated from our comprehension of the world: the idea of fallen man and pathologic society; the idea of the state (and the law) that is previous to the individual and hostile to him. In this sense, European values are caught in a contradictory situation: both within the Enlightenment tradition and its partial negation. The law (and state) within European legal values are treated at the same time as an affirmation and as a negation of free man.

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