Modernism and Postmodernism in Philosophy of Law

(The Globalization Era Challenges: Technological vs. Dialogical Theories)

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ABSTRACT: This paper is an attempt to outline characteristic features and claims of modernist and postmodernist trends in the contemporary philosophy of law and to show the importance of their present-day debate in the Globalization Era. The theories presenting a postmodernist view of law have developed a huge number of different, even contradictory, decisions. They can be divided into dialogical and critical theories. The first ones consider law as a self-developing system, and they put an emphasis on its internal communicative aspects. The critical theories are oriented to a rethinking of the most important modernist values.

KEYWORDS: philosophy of law, postmodernsim, technological and dialogical theories of law

This paper is an attempt to outline characteristic features and claims of modernist and postmodernist trends in the contemporary philosophy of law and to show the importance of their present-day debate. Postmodernism can be considered as a new philosophical project with radical critical spearheadedness and as a new stage in the development of industrial societies in the Globalization Era. The „modernist project" is a product and ideology of the intellectual revolution in Europe in the 17th century. It has its roots in a concept of universal values and in the unified rational order of nature, society and the human race. Science and technologies are perceived of by it as tools of rationalization, of social relationships. Postmodernist criticism orientates the contemporary philosophy, and culture as a whole, to a rejection of the absolute commitment to great rational ideas and principles inherited from the Enlighten. It stands for and advocates a return to local, qualitative differences and conformity with the fragmentation of subject and society - to replace the pursuit of global human control of nature and

adherence to the cosmopolitan values of the instrumental Reason[1]. This criticism has a strong impact on philosophy, but it does not succeed in shaking the authority of science and technology, which has been one of its main objectives[2]. One can acknowledge as justified the postmodernist rejection of methodological naturalism in the modern philosophy of science – the belief that mathematical natural science is a universal pattern of scientific method and rationality of knowledge. Postmodernism attributes this role to humanitarian knowledge and proclaims its originality in a very sophisticated manner.

For some prominent social thinkers of today the transition from industrial to post-industrial society is an evolution, a cumulative transformation of social structures. The postmodern society of our day is described in the theory of N. Luhman as a complex system with increasing functional differentiation of its subsystems. Politics, science and education, economics, army, law, culture etc. expand their autonomy and individual independence of each other[3]. This process also affects particular religious, ethnic, social, cultural and communities, organizations as well as groups defined per gender. The individual members of society become more self-governing. They increasingly lose the means of available control over government and politics[4]; societies today have become multi centered and more complex[5]. Fragmentation and difference, clash and pluralism of interests dominate in the postmodern societies. According to N. Luhman the functional differentiation of social systems is the main vehicle of social evolution[6]. The increasing cultural and ethnic differentiation of the present existing global society, due to the growth of new means of communication

[1] Vihren Bouzov, "V zashtita na modernostta [In Defence of Modernity]", *Travaux de L'Universite „St. St. Cirille et Methodie" De Veliko Turnovo, Faculte D'Philosophie*, 3 (4), 1998.

[2] Vihren Bouzov, "Postmodernistkata kritika na racionalizma i naukata – granici na validnost [The Postmodernist Critique of Rationalism and Science – Limits of Validity]", in *Osmislenost, smisal, oposredstvanost [Meaningfulness, Meaning, Mediation]*, Essays in honour of Prof. D. Ginev, Critique&Humanism, Sofia, 1998.

[3] Niklas Luhman, *Vavedenie v sistemnata teoria [Introduction to the System Theory]*, Critique&Humanism, Sofia, 2008.

[4] Charles Taylor, *Bezpokoistvoto na modernostta [The Malaise of Modernity]*,(Critique&Humanism, Sofia, 2008, pp. 17-19

[5] V. Bouzov, "The Postmodernist Critique", p. 129

[6] Luhman, *Vavedenie v sistemnata teoria [Introduction to the System Theory]*

and the free movement of people, could be added to these circumstances. The objective necessity of reexamination of the traditional modernist concept of law and its social role in the past two centuries is confirmed by all of these conclusions.

Law, perceived of as a technique of social problem-solving, makes up the main context of „the modernist project". It is identified with its normative mode of existence – it is a system of norms, deduced from law texts or normative acts. They form a hierarchic coherent system. Their application to a particular case can be realized through logical arguments. The validity of law stems from legal texts. Law regulation is effected in the sphere of the obligatory and compulsory. One cannot expect that it could measure up to moral claims and arguments; they relate to the real world, which must be transformed according to the rules of law. The legislative power enacts and derogates legal norms. In principle, complete regulation of social relationships is considered as possible and admissible. The legal positivism of J. Austin, H. Kelsen and H. Hart is the most typical representative of this concept of law. It dominated the legal philosophical thought until the middle of the 20th century; it has had an effect on the European legislative systems and their doctrines today. Legal Realism upheld by some schools with sociological or psychological orientation is also a part of this trend – the projects of Sociological Jurisprudence (R. Pound[7]) and in Politics of Law (L. Petrazycki[8]) with their technological point of view.

According to postmodernist thinkers, law „cannot be seen any longer as a coherent, closed ensemble of rules of values"[9]. The positivist paradigm of law has become an anachronism - it could not solve the main problems of society at the end of the 20th century; it is but an instrument of preservation of a social, economic and political *status quo*. Postmodernists criticize modernist scientism and naturalism. They question the formalist understanding of law and the submission of a judge's decisions to texts of law only and consider that they must be conformed to moral reasons and political correctness.

[7] Roscoe Pound, *An Introduction to the Philosophy of Law*, Yale University Press, New-Haven-London, 1982.

[8] Leon Petrazycki, *Teoria prawa i panstwa w zwiazku z teorii moralnosci [Theory of Law and State Related to the Moral Theory]*, PWN, Warszawa, 1959.

[9] Costas Douzinas, Ronnie Warrington, *Postmodern Jurisprudence: The Law of Text in the Texts of Law*, Routledge, London & New York, 1990, p. 27.

The theories presenting a postmodernist view of law have developed a huge number of different, even contradictory, decisions. They can be divided into dialogical and critical theories. The first ones consider law as a self-developing system, and they put an emphasis on its internal communicative aspects. The critical theories are oriented to rethinking the most important modernist values.

Language ceases to be a neutral medium of communication; it proves to be an active force, making up the content of verbal expressions. This fact justifies the deconstruction of the following divisions: language-reality, truth-fiction, truth-opinion, rational-irrational. We are doomed to uncertainty[10]. This line of thinking is upheld in some informal theories of legal argumentation (H. Perelman and his school, the humanist branch of the Legal Hermeneutics) and in other postmodernsit schools (The Critical Studies of Law, The Feminist Jurisprudence). Objective truth cannot be an attainable aim of court proceedings. The application of law is interpreted as a play, in which there exists „a tension between order and disorder, freedom and constraint as well as determinacy and indeterminacy". It is played „both within and with rules", constituting it. Indeterminacy and decision are two aspects of this law's language game – it comprises „a vast practice of infinitely possible moves in which each player must come to a decision". The correctness, or legitimacy, of any particular move does not depend on proof or demonstration – it arises out of „the rhetorical force of judgment made"[11]. The Law and Economic School develops a congenial version of a game-theoretic vision of law, but it is oriented towards its social consequences. It is observed among certain schools with postmodern orientation[12]. The postmodern jurisprudence only reveals „just rhetoric", beyond the rationality of law[13].

Individualism, formal justice and negative formulation of the fundamental human rights („freedom from…") make up the foundations of modernism in legal philosophy. It leads to violation of the interests of minorities and marginal groups and neglects the requirements of material justice. The democratic state of law does not resolve „the social problem".

[10] Henryk Leszczyna, *Hermeneutyka prawnicza [Legal Hermeneutics]*, Oficina naukowa, Warszawa, 1996, pp. 108-109.

[11] Allan Hutchinson, „The Reasoning Game: Some Pragmatic Suggestions", in *Modern Law Review*, 61, 1998.

[12] Jerzy Stelmach, Roamn Sarkowicz*, Filozofia prawa XIX i XX wieku* [Philosophy of Law in 19 and 20th Centuries], Jagiellonian University, Krakow, 1998.

[13] Jack Balkin, "Just Rhetoric?", in *Modern Law Review*, 55 (5), 1992, pp. 746-753

Global capitalism brings further division into the distribution of wealth. Postmodernists stand for communitarian values – solidarity, mutual aid, social integration and survival. One can say that they offer a very topical social and ethical criticism of modern law. The influence of postmodernist schools with such types of orientation has been growing in past years[14]. They call for a radical reform of contemporary legal normative systems. The present-day confrontation of modernism and postmodernism in the philosophy of law is even more topical than the debate between legal positivists and natural law theorists.

Postmodernism, in the contemporary philosophy of law, interprets the latter as a dialogue, a social medium in the multi centered global society, the main task of which is the solution of problems via consensus. As A. Hutchinson writes: „the limits of the game and the validity of acceptable moves within any particular performance of the game are not established" once-and-for-all, but are provisional markers that are constantly being negotiated and re-negotiated as the games plays on"[15]. Legislators only define the common framework and principles of law problem-solving in statutes, but its application is a matter of creative attitude of judges and parties to a particular case. Law is treated as a dialogue and an instrument for achievement of consensus in the discursive theories of J. Habermas and N. Luhman[16]. They can be considered as an expression of the spirit of postmodern philosophy, but in a political aspect they are closer to modernism.

Some postmodernist critical arguments against modernism in legal philosophy and social theory can be assessed out as grounded and feasible. But they neglect the objective duality of the institution of judicial evidence and legal decision-making. The search for material truth is its main task according to the rules of procedure. It relies on established empirical facts, not only on interpretation and language context. The results of court proceedings come as arguments in a reasoning game. The more grounded they are, the greater their rhetoric force will be. Objective truth and creativity are indispensable in the court game. It is impermissible to go

[14] Lech Morawski, *Glowne problemy wspolczesnej filozofii prawa [Main Problems of the Contemporary Philosophy of Law*], PWN, Warszawa, 1992.

[15] Hutchinson, „The Reasoning Game", p. 275

[16] Vihren Bouzov, *Filosofia na pravoto i pravna logika v globalnata epoha [Philosophy of Law and Logic of Legal Reasoning in the Globalization Era]*, Abagar, V. Turnovo, 2010, pp. 65-70

beyond its rules: they are enacted in the texts of law. The activity of courts is not identical with a game in all aspects. One must be most cautious when it comes to dealing with claims on a postmodernist revision of contemporary legal systems and doctrines.

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