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PLURALISM OF VALUES IN CONTEMPORARY LAW AND POSSIBILITY OF THEIR COGNITION

1.

In ideal conception it is natural that the norm creator articulates some values through the text of legal norms. Not only through norms but also through values does he follow the aim: for a public order to be established in society. It does not mean that the system of written law is full of values. Hopefully, legal norms are inseparably connected with values in the ideal conception, but such connection is less probable in the real legal system. However, legal philosophy is tireless in seeking the right relation between legal norms and social values. I think this seeking is very important for comprehensive understanding of a legal system.

American legal philosopher James Boyd White, who is especially known for relating law to art (or literature), supposes that law cannot be conceivable without values:

the law is not merely a system of rules (or rules and principles), or reducible to policy choices or class interests, but that it is rather what I call a language, by which I do not mean just a set of terms and locutions, but habits of mind and expectations — what might also be called a culture.¹

The legal system as such is inseparable from values. Regardless of whether the values are inserted in the law by the norm creator (e.g. parliament) or by the regulated subjects — addressees. The addressee through interpretation of a legal norm articulates some values. These interpreting subjects are limited mostly by the text of a legal norm. However, this limitation is not absolute — although the norm creator inserts in a legal norm some values, which can be identified without a problem, it does not mean that he is able to express all relevant values there.

The values presented by the norm creator and the ones developed through interpretation do not need to be the same because the norm does not contain all

¹ J.B. White, *The Legal Imagination*, London 1985, p. xiii.

the possible and actual values. It is similar to seeking the truth in the works of art — the law then represents values the same way as art represents the existing concept of reality.

In every century the way that artistic forms are structured reflects the way in which science or contemporary culture views reality. The closed, single conception in a work by a medieval artist reflected the conception of the cosmos as a hierarchy of fixed, preordained orders.²

The law is inseparable from values — values create the essential part of law, but, at the same time, the law is independent from the exact and stable content of these values. The values are connected with legal norm but they are still an external part of it. The consequence is that although the words of law remain the same, through changes in values its content (legal norm) can change. Further, it can be stated that because there is no direct and causal relation between legal norms and social values (value is a variable), there is no fixed system and hierarchy of values. Without values the legal system lacks sense and meaning but it does not mean that it determines which values are there.

Legal norm is not a simple result of reading a legal text (or a normative sentence). As mentioned above, the law necessarily contains values. It means that the law is not a simple code — it is rather a language. The distinction between a language (we presume that the law is a language) and a simple code was described by the Italian semiotician Umberto Eco:

If all codes were as simple and univocal as Morse code, there would be no problem. It is true that a great deal which the code cannot anticipate can be said with Morse code; it is equally true that one can transmit in Morse code instructions capable of modifying the code itself. This can occur because Morse code's signifiers take, as the signified, alphabetical signifiers which in turn refer us to that complex system of systems known as language — by language meaning, in this case, the total competence of a speaking subject and thus the system of semantic systems as well, that is, the total form of the content. Yet it is precisely this sort of competence, not entirely analyzable, which we have decided to call "code" as well, not for the sake of simple analogy but in order to broaden the scope of the term.³

The law is not a simple code where everything is directly connected with meaning (or with values), the law is rather a language:

Law is in a full sense a language, for it is a way of reading and writing and speaking and, in doing these things, it is a way of maintaining a culture, largely a culture of argument, which has a character of its own.⁴

We stated that on the one hand, the law is inseparably connected with values but on the other, values are external parts of legal norms. The law cannot exist without values but they can change regardless of the law and they can even have

² U. Eco, *The Role of the Reader: Explorations in the Semiotics of Texts*, Bloomington 1984, p. 57.

³ *Ibid.*, p. 67.

⁴ J.B. White, *Law as language: Reading law and reading literature*, "Texas Law Review" 60, 1982, issue 3, p. 415.

an impact on the interpretation of legal norms. Thus, social values establish the essential but external part of a legal norm. The proof that this external part of a legal norm is necessary is provided by the Constitutional Court of the Czech Republic. The Court, in decision no. Pl. ÚS 19/93 expressed the opinion of interconnectedness of the Constitution and some regulative ideas, i.e. ideas representing “fundamental, inviolable values of a democratic society.” The Court stated:

Our new Constitution is not founded on neutrality with regard to values, it is not simply a mere demarcation of institutions and processes, rather it incorporates into its text also certain governing ideas, expressing the fundamental, inviolable values of a democratic society. The Czech Constitution accepts and respects the principle of legality as a part of the overall basic outline of a law-based state; positive law does not, however, bind it merely to formal legality, rather the interpretation and application of legal norms are subordinated to their substantive purpose, law is qualified by respect for the basic enacted values of a democratic society and also measures the application of legal norms by these values. This means that even while there is continuity of “old laws” there is a discontinuity in values from the “old regime.”⁵

Here the White’s statement acquires its meaning: “We ought not to accept sharp distinctions between discourses of Fact, Value, and Reason.”⁶ This Constitutional Court’s decision can be used as an example of our assumption that even though there are some values expressed in law (e.g. norms protecting human life, etc.), this is not an absolute system of values and it does not mean that there is an objective and unchangeable system of values shared across the world (or even the society). Again, we presuppose the existence of social values in legal system and legal norms. Values are essential for every legal norm but legal norm cannot determine which particular value is in relation to it.

2.

As stated above, although particular values cannot be determined by the legal norm (or legal system itself), at the same time, the legal norm cannot exist without them. Without its essential part — values — the law can operate like a machine described by Franz Kafka in a story *In the Penal Colony*. The law is empty and can be thus described:

When the man lies down on the Bed and it begins to vibrate, the Harrow is lowered onto his body. It regulates itself automatically so that the needles barely touch his skin; once contact is made the steel ribbon stiffens immediately into a rigid band. And then the performance begins. An ignorant onlooker would see no difference between one punishment and another. The Harrow appears to do its work with uniform regularity. As it quivers, its points pierce the skin of the body which is itself quivering from the vibration of the Bed. So that the actual progress of the sentence can be watched, the Harrow is made of glass. Getting the needles fixed in the glass was a technical problem, but after many experiments we overcame the difficulty. No trouble was too great for us to take, you see. And

⁵ Pl. ÚS 19/93.

⁶ J.B. White, *When Words Lose Their Meanings*, Chicago 1985, p. 21.

now anyone can look through the glass and watch the inscription taking form on the body. Wouldn't you care to come a little nearer and have a look at the needles?⁷

Such law is operational but has no defense against abuse of the law, affected formalities, vexations, etc. Values can serve as a corrective of the non-human formality of law. When the law is without values it can change into a machine which has no aim to establish an order in society but only to protect the law itself: the law serves only to the law. Even if we share the instrumentalist point of view, still there is an aim the instrument is used for. For instance, Brian Z. Tamanaha stated that instrumentalist approach considers the law "an instrument of a particular social interest."⁸ In this approach the law is perceived as an instrument but this instrument is employed to some aims — it is meaningless to think about law that is without values. Otherwise — if the law loses its values — the whole system will be predisposed to abuse: "[...] when pressed to the limit, strips law down to the status of a tool, available for whatever use to which it is put."⁹ The law without values shared within society is empty — it is the law that works just like a machine without any moral fundament: "The morality that stands against the ineradicable human habit of judging instantly, ceaselessly, and everyone; of judging before, and in the absence of, understanding."¹⁰ It is the law that can operate within society but is not able to reach legitimacy. Such law stays outside the morality. The law needs some value-based fundament, otherwise it is incomprehensible.

Social values can operate as means of better understanding of the law. If we can imagine what the aim is and what the value shared by society and by legal norm is, then it is easy to understand and use the law in praxis. Beyond any doubt, law is a complicated system which is difficult to understand. In many cases it is important to have legal advice in legal proceedings — without an expert one can be totally lost in the world of law. According to Alasdair MacIntyre, lawyers (experts) are very important: "...so guiding you through processes whose complexity seems to have as a central function to make it impossible for plain persons to do without lawyers."¹¹ But the law has to be accessible to lay persons — if the law is lucidly connected to particular values its comprehensibility increases.

We mentioned above that morality and values are the necessary parts of law, even though they are outside the law. However, they form the relation of law and society, they work as an interface in the legitimization of law and then in situations where people should trust in law. In addition, values serve as a corrective when the law is too formal. The law without a corrective to it is dangerous. Terry Eagleton

⁷ F. Kafka, *Selected Short Stories of Franz Kafka*, trans. W. Muir, E. Muir, New York 1993, pp. 99–100.

⁸ B.Z. Tamanaha, *A General Jurisprudence of Law and Society*, New York 2005, p. 44.

⁹ *Ibid.*, p. 75.

¹⁰ M. Kundera, *Testaments Betrayed*, New York 1996, p. 7.

¹¹ A. MacIntyre, *Theories of natural law in the culture of advanced modernity*, [in:] E.B. McLean (ed.), *Common Truths: New Perspectives on Natural Law*, Wilmington 2000, p. 92.

describes it when discussing Franz Kafka's *The Trial*: "Franz Kafka's description of the law in *The Trial* has just the ambiguity of a necessity without justice. Like the Greek concept of *dikē*, the law is logical but not equitable."¹² The law without values is impossible.

3.

On the other hand, too many values can erode the law just as well as their non-existence. Above we asserted that particular values are not determined by the legal norm itself. Rather, social values appear in a legal system through the process of interpretation. Nevertheless, without values the legal system degrades to a simple tool that can be abused. The same situation takes place when there are too many values. Because there is no clear and fixed set of social values in case there are too many of them, it is impossible to decide which one should prevail. Too many values can lead to freezing of the law. The law is inoperable and becomes inapplicable. The law should not be like Ulrich in Robert Musil's novel *The Man without Qualities*¹³: just because law in this case — again — expresses no link to society. If there are no values or there are too many of them, it can lead to consequences described by Walter Benjamin in his essay *Critique of Violence*.¹⁴

Using some imagination we can say that contemporary situation resembles the problem of too many values. Changes in science (changes in technology), developments in communication, mobility of people, knowledge about cultures, etc. are some examples of factors influencing these changes. Such a situation is not new in society in general, but its degree is new.¹⁵ Until now, our society has not been willing to acknowledge that it is not homogenous.

The problem of too many values is not the same as pluralism of values. It is not a problem that values can be interpreted subjectively and that small communities share the same image of society. Everyone should interpret values in accordance with their individual moral system and values shared in a society where the law operates. Because society is complex and each member of it is connected with other members, the values in all communities are almost the same. Moreover, the society is too large and hard to understand — the result is that no one is able to comprehend values of the whole society: mainly because of their relative character and their changes in time. This does not mean that there exists an objective system

¹² T. Eagleton, *Sweet Violence. The Idea of the Tragic*, Oxford 2003, p. 130.

¹³ R. Musil, *Muž bez vlastností* [Man without Qualities], Praha 2010.

¹⁴ W. Benjamin, *Critique of violence*, [in:] P. Demetz, (ed.), *Reflections*, San Diego 1978, pp. 277–300.

¹⁵ See M. Večeřa, *Diversita a jednota práva* [Diversity and unity of law], [in:] J. Neckář et al. (eds.), *Dny práva* [Days of Law], Brno 2008, pp. 1329–1341.

of values better than other systems. No such hierarchy can be proved. However, such a view is not nihilistic. Owen Fiss perceives nihilism in this way:

The nihilist would argue that for any text — particularly such a comprehensive text as the Constitution — there are any number of possible meanings, that interpretation consists of choosing one of those meanings, and that in this selection process the judge will inevitably express his own values. All law is masked power.¹⁶

But this approach is possible only if we share the idea that there is an infinite number of values — above we stated that this is the same as the situation where there are no values in law at all. The result of the existence of many values (this is the case of pluralism not nihilism) in society and — consequently — in law must not be nihilism. It is rather an expression of respect to other and to the self.

The problem of understanding the values is very often to be solved in deciding the legal cases. It is the responsibility of everyone deciding legal cases to find a relevant system of values. The problem lies not in the judge's own values, it is important to define values objectively and transparently. The comparability of values of all communities (with some deflection) is a result of effect of the so-called moral communities:

At the heart of “thinking civil society” (that is, conceptualizing it) was the realization that in the commercial world of the eighteenth century the prospects for sustaining a “moral community” were becoming increasingly remote.¹⁷

Moral community here serves as a community which leads in determining the right values. It does not have to be an institution — it can be a group of people who are stating leading ideas in law (or in morals). The question is not whether they really determine the right values or not; this is just a sociological observation (or a sociological fact). Moral communities are very similar to interpretive community: „an interpretive community consisting of those who recognize the rules as authoritative.”¹⁸ In reality these communities will shade into each other.

Moral communities can be informal and can influence society without any intent. By contrast, there are moral entrepreneurs: “Rules are the products of someone's initiative and we can think of the people who exhibit such enterprise as moral entrepreneurs.”¹⁹ Moral entrepreneurs act deliberately and their impact is intentional — they want to influence the conception of values in society. In stating values and adopting them for a legal system (or legal reasoning or legal interpretation) both of the mentioned groups act.

The danger of these attempts to establish certain values lies in a relative character of values. Tomáš Sobek states that there is no problem to connect law

¹⁶ O. Fiss, *Objectivity and interpretation*, “Stanford Law Review” 1982, issue 4, pp. 739–764.

¹⁷ M.B. Becker, *An essay on the vicissitudes of civil society with special reference to Scotland in the eighteenth century*, “Indiana Law Journal” 72, 1997, issue 2, pp. 463–488.

¹⁸ O. Fiss, op. cit., p. 745.

¹⁹ H.S. Becker, *Outsiders. Studies in the Sociology of Deviance*, New York 1966, p. 147.

with values that we (today) consider wrong.²⁰ Here we face another problem — beyond problems with too many values or no value lies the problem of incorrect or even wrong values. It raises the question of who has the right to decide which set of values is correct. Possibly, the good and right values are known only *ex post*. Probably there is only one obstacle in setting bad values — transparency. It is incorrect to follow established values blindly and unquestioningly.

4.

In investigation of values in the law, we can pose a question: where is it possible to find values? Of course, it is very difficult to make a sociological research and find out which sorts of values are shared in society by a majority. Another question is — how can we recognize relevant values? Up until now we have dealt mostly with values in general and their influence on law (legal system). But these questions challenge the possibility of finding real and particular values.

It is undeniable that there can be plenty of approaches and methodologies to find values. Each doctrinal approach figures on specific values (It should be said that here we are considering textualism or strict formalism as a specific sort of values.) Legal science or praxis does not follow only one given methodology but rather applies methodological pluralism. Here I want to point out two possible approaches to investigating values in law. One approach is through literature — literature as a source of specific interpretive methodology and the source of inexhaustible means of expressing values. Another possible approach emphasizes the role of NGOs in law, legal doctrine and legal praxis. Both of these approaches promise new perspective in studying the law and offer useful methodology in studying values and their place in law. But they also pose a threat because they can include a unilateral yet persuasive set of ideas.

One possible approach to finding values can be found in literature. Literature can offer a broader picture of the understanding of values in society. Law just as literature also springs from society but it is not limited by a specific language used in law. Many theorists used Sophocles' *Antigone*, von Kleist's *Michael Kolhaas*, Dostoyevsky's *Karamazov Brothers*, etc. as examples of values shared by law and society. We can use ex-Czech writer (now living in Paris and expressing rather resistance to the Czech Republic) Milan Kundera. In his early novel, *The Joke*, he expressed some values people can face in treating responsibility or administrative features of law:

Perhaps it was cruel of me to submit the people I met to such merciless scrutiny when it was highly likely they would have led a more or less peaceful existence in my company and never set foot in that hall where hands are raised. There are those perhaps who will say I did it for one reason only:

²⁰ T. Sobek, *Právní myšlení* [Legal Thought], Plzeň 2012, p. 318.

to look down on others from the heights of my moral superiority. But to accuse me of pride would be quite unjust; if I have never voted for anyone's downfall, I am perfectly aware that my merit in the matter is hypothetical: I was deprived of the right to raise my hand quite early in the game.²¹

Literature also supports better imagination in law — and imagination can constitute a legal value itself. The imagination can be present in operations with values or descriptions and can frame many of the legal methodologies. For example Milan Kundera here reflects on Kafka's ability to express reality through absurdity:

I recall a conversation, by now twenty years back, with Gabriel García Márquez, who told me "It was Kafka who showed me that it's possible to write another way." "Another way" means: breaking through the plausibility barrier. Not in order to escape the real world (the way the Romantics did) but to apprehend it better.²²

Contrary to contributions mentioned above, literature can be a source of some evil as well. One example can be the problem of cultural industry. Then the literature — according to Theodor W. Adorno and Max Horkheimer — will either express only the values of publishers or other entrepreneurs in cultural industry: "[...] it turns all participants into listeners and authoritatively subjects them to broadcast programs which are all exactly the same."²³ Or, the literature can represent the extinction of imagination: "All the other films and products of the entertainment industry which they have seen have taught them what to expect; they react automatically."²⁴ Thus the literature can serve as a good manner of studying values in society and in law but we should be aware that the possibility of cultural industry can radically transform the literature into a useless means.

Another source of values is civil society or the praxis of non-governmental organizations (NGO). NGOs and the whole civic society can be perceived as bearers of social changes and new approaches in treating values in society:

movements take advantage of broad-based social, economic, or technological changes that unsettle conventional understandings about the jurisdiction of constitutional principles in order to make new claims about the proper application of constitutional principles. There is typically more than one way to do this. Groups with competing interests may avail themselves of the opportunity presented by social, economic, and technological change to try to push the law in their favored direction.²⁵

They express new opportunities and model situations — of course the members of society can decide whether they will follow or resist such values.

Civic society and the NGO sector are the bearers of many values representing part of society. This is also the reason why we should be careful. We should not start to believe that NGOs represent the whole society and that it is necessary to

²¹ M. Kundera, *The Joke*, London 1982, p. 66.

²² M. Kundera, *Testaments...*, pp. 52–53.

²³ T.W. Adorno, M. Horkheimer, *Dialectic of Enlightenment*, London 2008, p. 122.

²⁴ *Ibid.*, p. 127.

²⁵ J.M. Balkin, R.B. Siegel, *Principles, practices, and social movements*, "University of Pennsylvania Law Review" 154, 2006, issue 4, p. 929.

adopt these proposed values. It is still only one part of the mosaic of society and although it offers much good, it can also be the source of much evil.

To conclude, when studying values we should still be aware whether we are studying them really objectively or we are sinking into the opinion that our view should be generalized onto the whole society. No one can express values of the whole society (Constitutional Court included) and no objective science can help in this effort.²⁶ Although values are necessarily present in the law, their cognition can be a source of many problems.

PLURALIZM WARTOŚCI WE WSPÓŁCZESNYM PRAWIE ORAZ MOŻLIWOŚĆ ICH POZNANIA

Streszczenie

Przedmiotem rozważań autora jest pochodzenie wartości w różnych systemach prawnych oraz możliwość ich poznania. Systemów prawnych nie można oddzielić od wartości, które tworzą istotną część prawa. Prawo nie jest prostym kodem, w którym wszystko jest bezpośrednio związane ze znaczeniem lub wartościami, prawo jest raczej językiem. Jakkolwiek poszczególne wartości nie mogą być określone przez normy prawne, to normy te nie mogą istnieć bez wartości. Działanie prawa pozbawionego wartości autor porównuje do maszyny opisanej przez Franza Kafkę. Ani nauka prawa, ani praktyka nie podążają za jedną tylko metodologią poszukiwania wartości, lecz stosują raczej metodologiczny pluralizm.

²⁶ See A. Sulikowski, *Współczesny paradygmat sądownictwa konstytucyjnego wobec kryzysu nowoczesności*, Wrocław 2008, pp. 76–77.