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ЗАГАЛЬНА ТЕОРІЯ ДЕРЖАВИ І ПРАВА

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ON THE SENSE OF JUSTICE: SPOUDAIOS VS. LEGAL FORMALISTS

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The article deals with socio-philosophical comprehension of the sense of justice in the area of judicial decision-making. The author suggests the notion of the metaphysical 'reasonable man'. It concerns Aristotle's conception of *spoudaios (σπουδαῖος)*. It is a dialectical metamorphosis of the supreme subjectivity turned objective. But then, how may this subjectivity not be an arbitrariness repulsive to the notion of justice? The answer is being sought in the theory of argumentation. It is *prima facie* obvious that what lawyers do is 'reasoning'. In the adversary process the lawyers for plaintiff 'reason', the lawyers for the defence also 'reason' and in the end the judges, too –, 'reason'. The life of the law has not been logic; it has been experience (Justice Holmes). What did Justice Holmes have in mind? When he speaks of experience, it is not the 'subjective' experience of and individual legal reasoner. What he has in mind is the 'story of a nation'. The issue can be further examined in the light of Lawrence Kohlberg's theory who devised a moral growth scale based on the autonomy of the personality.

Keywords: reasoning, moral autonomy, decision-making.

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Inroduction. I do not wish here to be misconstrued as being too 'subjective'. In the field of justice, that so strives for a formalist 'objectivity', we shall suggest the notion of the metaphysical 'reasonable man'. It concerns Aristotle's notion of *spoudaios* (σπουδαῖος). It is a dialectical metamorphosis of the supreme subjectivity turned objective.

Supreme subjectivity? In law? This subjectivity, how may it not be an arbitrariness repulsiveto the notion of justice? Yet, is not the international jurisdiction of last resort that '*floats on highs over wales and hills*' – to paraphrase Wordsworth –, also *par excellence* the milieu, the context, the place and the occasion to put forward this precise question?

To prove the point is exceedingly easy. Wherefrom did in fact come the whole *acquis* of the now *surabondante*case-law and the doctrinal jurisprudence of the ECtHR? In the last 60 years, *ex nihilo*, or rather, which is practically the same, from the meagre text of the *then* Convention on Human Rights?

When we refer back to our own case-law are we, for the sake of it, capable of neglecting justice in the name of it? And stare, to make things even more ridiculous, into mirror of*stare decisis*? This is a system so preoccupied with its own cognitive consonance that it tends to forget Aldous Huxley's '*Here and now!*'.

The Preliminary question of autonomous legal reasoning. It is *prima facie* obvious that what lawyers do is 'reasoning'.In the adversary process the lawyers for plaintiff 'reason', the lawyers for the defence also 'reason' and in the end the judges, too –, 'reason'. (We shall leave the jury, for the moment, aside.) Or in other words, '*A lawyer's*

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time and advice are his stock in trade.' (Abraham Lincoln) – and the advice here, too, has to do with 'reasoning': one 'reasons' with the client, etc.

However, as Justice Holmes put it:*The life of the law has not been logic; it has been experience... The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics* [4, p. 1].

What did Justice Holmes have in mind?When he speaks of experience, it is not the 'subjective' experience of and individual legal reasoner. What he has in mind is the 'story of a nation'. His phrase is not a repudiation of the use of logic in the context of legal reasoning –, as it is sometimes misunderstood.

On the other hand, we already know that there is no computer algorithm, although it can play chess better than any human –, that could wholly mimic fuzzy and open textured legal reasoning. This is not due to the complexity of legal reasoning. Still, legal reasoning by analogy – also attempted to be imitated – is in computer science superior to the formal logic based on syllogism. Pedro Domingos has shown that composing a complex argument must deal with all kinds of different reasoning, not only syllogistic or analogical, but also Bayesian, etc.[1]

Picture 1 Piaget, Kohlberg [5]. Lawrence Kohlberg devised a moral growth scale based on the autonomy of the personality. According to him, there are three post-conventional stages of moral development [5].

KOHLBERG'S MORAL STAGES

Level and Age	Stage	What determines right wrong
Preconventional:Up to the Age of 9	Punishment & Obedience	Right and wrong defined by what they get punished for. If you get told off for stealing then obviously stealing is wrong.
	Instrumental – Relativist	Similar, but right and wrong is now determined by what we are rewarded for, and by doing what others want. Any concern for others is motivated by selfishness.
Conventional:Most adolescents and adults	Interpersonal concordance	Being good is whatever pleases others. The child adopts a conformist attitude to morality. Right and wrong are determined by the majority.
	Law and order	Being good now means doing your duty to society. To this end we obey laws without question and show a respect for authority. Most adults do not progress past this stage.
Postconventionahl 0 to 15% of the over 20 s.	Social contract	Right and wrong now determined by personal values, although these can be over-ridden by democratically agreed laws. When laws infringe our own sense of justice we can choose to ignore them.
	Universal ethical principle	We now live in accordance with deeply held moral principles which are seen as more important than the laws of the land.

[1] See *supra* note 59.

On the *lowest* conventional level (interpersonal concordance), the distinction between what is right and what is wrong is based on what other people think and say, is right or wrong. The level of moral autonomy is here at its lowest. The person doesn't even have his own point of view, he simply follows what other people are thinking or doing. Thus, if most people in the village think one way, it is likely that he will uncritically follow their attitude.

Up on the *second* stage of the moral autonomy scale, we have what lawyers are being taught in their respective law schools. Here the distinction between right or wrong is based on logic, *i.e.*, on learned reasoning. For example, if it is a question of defending one's home against an intruder, the person in question does not have the right to kill or wound the intruder, given that the value of life is higher than the value of property. All students are taught these kinds of doctrines in law schools. They absorb the logical implications of these kinds of balancing the competing values. Obviously, this kind of ponderation must be articulated for the students, they must learn it. Then, they are able to engage in this still pretty mechanical mode of legal reasoning. Still, ninety percent of the system is run on this kind of logic. This is what we have been calling 'formalism'.

In the *third* stage – the highest stage of moral autonomy – Kohlberg calls as professing 'universal values'. This is the real moral autonomy, but according to Kohlberg it is exceedingly rare. Justice William Douglas on the United States Supreme Court was one such rare example. For those of us who have dealt with the American case law and his separate opinions, mostly dissenting, it is clear why. In the very texts of the opinions, it is clear that Douglas was thinking with his own head and had not been influenced by the opinions of other justices. Anecdotes abound about Douglas sitting on the bench during the hearing already writing his dissenting opinion. He knew full well that he is not going to be able to persuade his fellow judges in the deliberations room, after the hearing. Kohlberg doesn't explain what was the *differentia specifica* of Douglas's mode of legal reasoning. But it is clear that it was 'autonomous'. However, for anyone familiar with his dissents it is clear that his was not a matter of sheer thinking (cognition). He had an independent stance and was not to be influenced by what others were thinking. In reading these opinions, which I have taught for 10 years, one gains the impression of an intellectual superiority, perhaps –, but also of something else, which had guided William Douglas to his autonomous outlook.

Attitude towards authority. As an aside to this narrative, we should point out that when it comes to their attitude vis-à-vis authority, there are two kinds of judges.

Douglas's separate opinions were mostly in the constitutional criminal procedure cases, *i.e.*, concerning the relationship between police and the defendant. The majority of judges tended to side with the policing power of the State, typically Chief Justices such as Burger and Rehnquist.

In the ECtHR it is paradoxical that most of the judges, too, would side with authority. But the Court was set up precisely to offer the applicant the access to court vis-à-vis his own state and its power of authority. Again and again, it was obvious that a certain number of judges would side with power, *i.e.*, with the domestic authorities of signatory state in question.

This is not to say that the repudiating attitude vis-à-vis authority is what autonomous reasoning is all about. It is certainly not true that an anti-authoritarian attitude alone represents, in itself, the autonomous moral judgment.

There is an antinomy between the logic of force (authority) and the force of logic (rule of law, human rights etc.) [17, p. 33, 35, 385, 395].There is no rule of law without prior and firm establishment of the sovereign state within which (and only within which) the rule of law may then be exercised.

The organization of the state and its cluster of power, also as per Hobbes's *Leviathan*, King's peace in other words, may not be the beginning of the rule of law, but it is its necessary precondition.

And because, if the essential rights of sovereignty (specified before in the eighteenth Chapter) *«be taken away, the Commonwealth is thereby dissolved, and every man returneth into the condition and calamity of a war with every other man, which is the greatest evil that can happen in this life; it is the office of the sovereign to maintain those rights entire, and consequently against his duty, first, to transfer to another or to lay from himself any of them. For he that deserteth the means deserteth the ends; and he deserteth the means that, being the sovereign, acknowledgeth himself subject to the civil laws, and renounceth the power of supreme judicature; or of making war or peace by his own authority; or of judging of the necessities of the Commonwealth; or of levying money and soldiers when and as much as in his own conscience he shall judge necessary; or of making officers and ministers both of war and peace; or of appointing teachers, and examining what doctrines are conformable or contrary to the defence, peace, and good of the people. Secondly, it is against his duty to let the people be ignorant or misinformed of the grounds and reasons of those his essential rights, because thereby men are easy to be seduced and drawn to resist him when the Commonwealth shall require their use and exercise ...»* [3].

It is thus not surprising that the members of the judiciary are constitutionally ambivalent about authority. On the one hand they exercise the state power on the basis of raw force without which their judgments would remain unenforced. On the other hand, in human rights cases especially, they rule against the logic of power –, in the name of the power of logic.

However, in the ECtHR this question is in the forefront, as pointed out, because the Court is only dealing with anti-state cases. Being 'anti-authority' is its basic function. Of course, the cynical politicians in the states concerned are striving to staff the Court with pliant judges that are not going to be working against their government. They should be bendable in their pro–state attitudes. These attitudes are then of course covered with layers and layers of legal formalism. Formalistically, often, they try to present persuasive arguments in order to condone the violation of human rights in as much as committed by the state. In this sense, precisely, legal formalism is much more than mere formalism. It is a whitewash of the authoritarian attitudes of certain judges [12].

But what we are dealing with here is the negation of the sense of justice and of the autonomous legal reasoning. The above examples do not inform us positively about the substance of the *positive* sense of justice and in this sense the positive origins of the autonomous legal reasoning.

Spoudaios (σπουδαῖος). The Greek notion of *spoudaioss* (σπουδαῖος)– in Plato, Aristotle and later in Plotinus – is largely misunderstood [10]. The concept is metaphysical or philosophical, going back to Plato and his famous '*Allegory of the Cave'*. Philosophers, including Heidegger and Arendt, both of them blocked in the antechamber of Being [11] (according to Jacques Maritain) are mostly off the mark. Maritain, on the other hand, had had in 1933 a direct intuition of Being [7].

Or as Hegel put it:*»Pure Being makes the beginning: because it is on the one hand pure thought, and on the other hand immediacy itself, simple and indeterminate; and the first beginning cannot be mediated by anything, or be further determined.»*

Spoudaios is simply a person who fathoms what Hegel's quote is all about. This is emphatically *not* a cognitive issue. Plato's *'Allegory of the Cave'* is the allegorical rendering of the distinction between those who are able to see – because they have had the experience – and those of the vast majority who have not and do not.

It follows logically, that the premise cannot be proved. It is out of scope of the ordinary (non-metaphysical) experience. But this is not so extraordinary because even in Kohlberg's (Piaget's) stages of moral development do not presuppose that those on the lower levels could comprehend those on the higher levels of moral development.

This is what we suggest by saying that the issue is decidedly not cognitive. Hegel's statement does not presuppose philosophical knowledge. It is instead totally obvious to the one equipped with the straightforward and immediate *experience* of Being. The first-hand experience was originally described by Parmenides and has occasionally been poetically phrased, for example by William Blake and Henry Vaughan [9].

William Blake:
To see a World in a Grain of Sand
And a Heaven in a Wild Flower
Hold Infinity in the palm of your hand
And Eternity in an hour… [15]

Henry Vaughan:
I saw Eternity the other night,
Like a great ring of pure and endless light,
All calm, as it was bright;
And round beneath it, Time in hours, days, years,
Driv'n by the spheres
Like a vast shadow mov'd; in which the world
And all her train werehurl'd.

This a statement about a distinct metaphysical experience. Only those who had been There will know – not understand! – what these two stanzas describe.

We shall sketch the above,unimaginatively, in terms of Unger's antinomy between the particular and the Universal.

The *particular* (facts, desires, values) exists only through the universal (theory, reason, rules), but must be separate from it. The *universal* exists only through the particular, but must be separate from it [13, p. 138].

The antinomy is a situation in which two entities – here the universal and the particular – simultaneously presuppose one another, while they also exclude one another. For example, in the antinomy of theory and facts the apperception of the facts presupposes the theory, while theory by definition should be apart and different from the facts. Theory as separate, literally generates (the apperception of) new facts, whereas these facts then generate a new theory. The usual metaphor used by metaphysicians is the 'antinomy' of the wave and the sea. The existence of a wave is inseparable from the sea. Yet the wave is separate from the ocean. This is a contradiction, an antinomy.

Yet, such contradictions cannot be logically resolved. Such is the inherent meaning of the 'antinomy'. According to Hegel, such paradoxes – themselves the motors of progress – can only be 'transcended'. It is maybe difficult to believe, but the above two poetical statements, typical of *spoudaios*, represent this transcendence.

Translated into psychological language, the metaphor of the wave and the ocean is pertinent. The wave lives in the illusion of being a separate entity (*in-dividuum*), which it is decidedly not, independent from the 'underlying' sea. In his academic lectures at Harvard (1972–1973), Unger illustrated this by drawing a circle on the blackboard. He then explained that all the points on the circle are connected to all the other points. In John Donne's language, this means that '*no man is an island*'. No point in the circle exists

independently from any other points. This is an objective fact. Yet each 'wave' entertains the illusion that it existsindependently of the ocean. Each point in the circle lives in the delusion of leading an independent existence. Hence the contradiction, the antinomy.

Let us call this misapprehension 'primary narcissism', *i.e.*, something normal in the establishment of a well-integrated ego. Leaving aside all psychoanalytical jargon, a person is stable in the above illusion of his being the 'man as an island'. He*is* this well-integrated ego. But the unconscious inner conflict (internalized antinomy) saps the mental energy necessary to sustain the illusion. Vaughan's *'moriendorevixi'* (only when dying, will I begin to live), to extend the metaphor, is the merging of the wave back into the ocean.

The individual shell in which my personality is so solidly encased, explodes at the moment of a Zen-Budhist satori. Not, necessarily, that I get unified with a being greater than myself or absorbed in it, but that my individuality, which I found rigidly held together and definitely kept separate from other individual existences, becomes loosened somehow from its tightening grip. It melts away into something indescribable, something which is of quite a different order from what I am accustomed to. The feeling that follows is that of complete release or a complete reset–, the feeling that one has finallyarrived at one's destination... [16].

This means that here the primary narcissism, the illusion of individuality, is transcended. The question is therefore how to get rid of one's ego. If one succeeds, one releases all the energy bound by the inner conflict. From Parmenides to Vaughan, the story is the same. There is nothing particularly spectacular about it.

How, then is this connected with the Kohlberg's highest stage of moral development and the heightened sense of justice?

Zhenren. *Nothing serious has ever has been written about satori's impact on the sense of justice. Since there are very few people who have ever had access to this mode of autonomous reasoning, this is explicable.*

The common translations of *zhenren* – 'True Man' or 'Real Man' – belies the fact that etymologically *zhen* implies both 'authenticity' and 'transformation'. That is, whatever the human exemplar might be, he or she is one who is able to live personal integrity and uniqueness in the context of a transforming world. The choice of the word 'authentic' to translate *zhen* is calculated. With the same root as 'author', it captures the primacy given to the creative contribution of a particular person. It further registers this contribution as what is most fundamentally 'real' and 'true'. It is because of the primacy of the 'authorship' of the 'authentic person' in creating human order, that *«there must be the Authentic Person before there can be authentic knowledge»* [14, p. 2].

Zhenren is a person of high moral standing and integrity. In French translation he is designated as '*hommevéritable*' [11].

The descriptions of *spoudaios* and *zhenren* are centred upon psychological (metaphysical) implications of the transcendence of primary narcissism. The sense of justice, as a side product, is not in the forefront. Still, the same testimony comes from completely different cultural outlooks (Greek, Chinese and others). It is therefore evident that this is the otherwise mysterious '*universal ethical principle*' of Kohlberg.

But since the experience and its consequences are so exceedingly rare, and while *spoudaios* and *zhenren* persons are incomparable, it is clear why Kohlberg had difficulty finding such people. His highest stage of moral autonomy, while logical, remains an empty box. But in virtually the same language the Convention provides:

1) The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence.

2) The judges shall sit on the Court in their individual capacity. (Emphasis added.) [2].

The provision is abstract and the Fathers of the Convention most certainly were not aware of what we spoke of above. At the time the *spoudaios* (*zhenren*) model of personality practically did not exist. It was described only indirectly by Jacques Maritain in 1943 [7]. Still, Maritain was involved in drafting the Universal Declaration of Human Rights. It is thus possible that the above formulation in the Convention is not without connection with his metaphysical discoveries.

Back to Reality. While it is obvious that the 'universal ethical principle' should be the *spiritusagens* of the ECtHR, it is clear that it cannot be so. The *spoudaios* ideal is unattainable. This goes for the Court, as it goes for everything else in the Western civilization. As André Malraux put it: *'The 21st century will be spiritual or will not be.'*

Still the ideology of the 'universality of human rights' itself appears in the historical and philosophical context. This context is taken for granted; rare are those who dare criticize it:

Universalism is a corruption of objectivity. While objectivity is achieved on the basis of particular things, universalism claims to define particularity on the basis of an arbitrarily posed abstract notion. Instead of a notion of the duty to be, it proceeds in the opposite direction. Universalism does not consist in treating things objectively, but starting from an overhanging abstraction from which a knowledge about the nature of things would follow. It represents the symmetrical inverse error of the metaphysics of subjectivity, which brings the good back to the good-for-me or the good-for-us, the true, back to the inner self or to each other. The European tradition has always affirmed the need for man to fight against his subjectivity alone. Conversely, the whole story of modernity, says Heidegger, is a story of unfolding the metaphysics of subjectivity [1, p. 9–10].

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ПРО СЕНС ПРАВОСУДДЯ: SPOUDAIOS ПРОТИ ЮРИДИЧНИХ ФОРМАЛІСТІВ

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Розглянуто філософсько-правові питання значення справедливості у здійсненні правосуддя. Застерігаючи про ризики «суб'єктивістського» підходу у сфері справедливості, яка так прагне до формалістичної «об'єктивності», автор звернувся до поняття метафізичної

«розумної людини». Це поняття має зв'язок із *spoudaios (σπουδαῖος)*, яке свого часу запропонував ще Аристотель. Тобто йдеться про діалектичну метаморфозу найвищої суб'єктивності, що стала об'єктивною. Але виникає питання: як же може ця суб'єктивність не бути свавіллям, що немає нічого спільного із поняттям справедливості? Відповідь потрібно шукати у правовій аргументації.

На перший погляд очевидно, що те, що роблять юристи, є «аргументацією». У змагальному процесі адвокати позивача «аргументують», адвокати захисту також «аргументують» і, врешті-решт, судді теж «аргументують». Або, іншими словами, «час та поради юриста – це складові його професії» (Авраам Лінкольн) – і «порада» тут теж пов'язана з «аргументацією»: потрібно давати «аргументи» клієнтам і т. д. Адже «життя права – це не логіка, це – досвід (О. Холмс). Але коли О. Холмс говорить про досвід, це не «суб'єктивний» досвід аргументів індивідуального юриста. Що він має на увазі, то це «історія нації». Його думка не є запереченням використання логіки в контексті правової аргументації, як це іноді неправильно розуміється. З іншого боку, ми вже знаємо, що не існує комп'ютерного алгоритму, який міг би повністю імітувати закручену і рельєфну правову аргументацію. І це не пов'язано зі складністю правової аргументації.

Проблему відчуття справедливості в контексті правової аргументації доцільно розглянути з позиції теорії Л. Кольберга, який розробив шкалу морального розвитку, засновану на автономії особистості. За його словами, існують три умовні етапи морального розвитку. На найнижчому традиційному рівні (міжособистісна погодженість), відмінність між тим, що правильно, і тим, що неправильно, заснована на тому, що інші люди думають і говорять, правильно чи неправильно. Рівень моральної автономії перебуває тут на найнижчому рівні. У людини навіть немає власної думки, вона просто слідує за тим, що думають чи роблять інші люди. Отже, якщо більшість жителів села думають в одному напрямку, то цілком імовірно, що людина з некритичним ставленням обере таку ж позицію. На другому етапі моральної автономії у нас є те, що викладають юристам у їх відповідних юридичних навчальних закладах. Тут відмінність між добром і злом заснована на логіці, тобто на науковій аргументації. Всім студентам юридичних факультетів викладають доктрини такого плану. Вони поглинають логічні наслідки такого роду балансування цінностей. Очевидно, що цей вид аргументації повинен бути роз'яснений для студентів, вони мають його вивчити. Тоді вони зможуть зайнятися цим досить механічним способом правового обґрунтування. Проте 90 % системи працює саме на такій логіці. Це те, що ми називаємо «формалізмом». Третій етап – це найвищий ступінь моральної автономії – Л. Кольберг називав втіленням «універсальних цінностей». Це реальна моральна автономія, але, за словами Л. Кольберга, вона вкрай рідкісна.

Ключові слова: справедливість, аргументація, моральна автономія.

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