

## **LAW AND VIOLENCE**

### **Abstract**

The paper deals with the analysis of the ambivalence of the relations of the law with violence in terms of psychoanalytic jurisprudence. This corpus is covered by the subaspects of the law and its founding crime, the traces that such violence leaves in the division of the law into a text and an obscene, dark side in its interpretation and application. It aims to show how two different tendencies in contemporary development of law derive from such division and inherent lack of law: compulsive neurosis of its continuous expansion as a way of concealing the internal division and achieving the fantasy of completeness and coherence (which ends in a conservative choice of law in the maintenance of status quo and turning it into just another of the policies of power) on one hand; and emancipatory power of the law, which is inscribed in its division, reflecting its attempt to rest on the ethical basis of facing inherent limitations and attempt for constant transgression into "a law which is yet to come," on the other.

### **I. LAW, AS SUCH, WAS ESTABLISHED BY THE INITIAL VIOLENCE, WHICH ULTIMATELY WAS SUPPRESSED.**

Psychoanalytic jurisprudence is unpopular in law! Psychoanalytic jurisprudence has a nasty feature to take away law's halo of dominant symbolic order, which today tends to assume the position of the absolute Master (the Chief Master) Signifier - God, upon an enlightening operation (basically, a Nietzschean one) called "God is dead." To distort, dilapidate the pretension of law to assume allness, omneity, and the pretensions for completeness of application - to interpret law as "compulsive neurosis" of repetition and expansion, which should cover division and the inherent gap, i.e. incompleteness of law! Such psychoanalytic jurisprudence has acidulous trait to indicate divisions within the law as inherent to it and as basis (like the unconscious in the subject as well) to be durable traces in interpreting the law and its application.

Nevertheless, it is precisely such a methodology and ontology for critical review of the law that I consider most promising and most productive today. This creates a real ground for analysis of the structure of law and its ideological dimensions and spreading. Hence, among other things, this article is related to a brief overview of the critical points identified by this methodology relating to law.<sup>1</sup>

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\* Ljubomir D. Frchkoski, PhD., Full Professor, Ss. Cyril and Methodius University in Skopje, Faculty of Law "Justinianus Primus", Republic of Macedonia.

<sup>1</sup> The following might be regarded a brief reference bibliography on the topic: Why Psychoanalysis, Alenka Zupancic, 2008; Prospects for Lacanian Psychoanalysis in Law, Richard E. Redding, Washington and Lee Review, 54, 3, 1997; Lacan and Subject of Law: Toward a Psychoanalytic Critical Theory, David S. Caudill, Humanities Press, Atlantic Highlands, 1997; Zizek on Law, Jodi Dean Birkbeck, College of Law, 2001 (workshop papers); Costas Douzinas, Psychoanalysis Becomes the Law, Legal Studies Forum, 1997; Peter Goodrich, Oedipus Lex: Psychoanalysis, History, Law, University of California Press, 1995; Slavoj Zizek, ..., Renata Salecl, Spoils of Freedom, Routledge, London, 1994; Pierre Legendre, Law and Unconscious, Macmillan, London, 1997. And of course the legacy of Sigmund Freud: Standard Edition of the Complete Psychological Works of Sigmund Freud, ed. James Strachey, Anna Freud, Alix Strachey, & Alan Tyson. [24] vols. London: Hogarth Press and The Institute of Psychoanalysis, 1954.

1. In the eyes of the psychoanalytic jurisprudence, law is part of the symbolic culture of the Big Other, according to "the Freudian story" about transferring. It is the institution through which the subject tends to find enjoyment by achieving a balance between the pleasure principle and the imposed duty and guilt - by such principle to be able to reach the object of own desires and so create culture.<sup>2</sup>

The law represents in a way an agent through which pleasure in society is distributed; the law is a media of sublimation through which the values of culture are imparted to the subject, while the subject accepts them, becomes subordinate, enjoys, and "creates." In this sense, the law is the first and most powerful tool of civilization in the role of transformer and limiter of the primal drives; the law sets bans on the desire for the ultimate, primal pleasure (merging with the symbol of the mother's body in the pre-subjective phase, which implies de-subjectivization of the individual and it could be dangerous to himself and the community), while directing the subject to compensate through acceptable/predictable pleasures in objects and relations in the field of culture.

The law is accordingly a culture; and according to Jacques Lacan, it is primarily a language.<sup>3</sup>

The discourse of the law is always **ideological**; it is never neutral and "scientific" and can never become a "pure law" free from politics. Certainly, the ideological matrix in developed legal systems is sophisticated and not as obvious as in politics, but always firmly present in the underlying law foundations. Hiding such matrix would be just another repressive ideology of power disguised as science. As such, being always ideological at the decisive level, it has only an option to be **conservative** (i.e., to raise the rights to the level of an ideology of power) **or emancipatory** (i.e., to treat the rights as a liberation of the oppressed and the poor, of those who are effectively without rights, who suffer); this means for the law to be utopianly positioned toward overcoming the status quo of politics, of the symbolic enslaving language order of a language (the symbolic of the Big Other) - namely the capitalism.<sup>4</sup>

Fragility and susceptibility of the law to ideology is directly derived also from the character of the political language and speech. That speech is speech of fantasies and metaphors. The definition of access to the reality by the individual in political language is known; it does not take place as forensic, rational debate or scientific experiment - but through the lens of desire, imagination, and metaphor of the subject. The narrative of the political speech is communicated as projected desire of the subject, while the subject chooses from the "screen of ideologies" - pursuant to the logic of the drive - desires/images (Agamben-esque images as body of such desires) of what he wants to see where he is watching. This fight for the vacant place of the Master Signifier is Laclau-esque struggle for hegemony in that signifier.<sup>5</sup> The language of the ideology and the metaphor that will conquer it seriously determine the law further on. If the Jacques Derrida's thesis about truth as discursive in the language/text and only in it is true, everything then is subject to interpretation. By a vicious twist of truth, history and law can be re-read and re-interpreted retroactively by the new hegemon.

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<sup>2</sup> For more details on this, see: Renata Salecl, *The Spoils of Freedom*, Routledge, London, 2002, pp. 103-104; Michael Silvestre, *Demain la Psychoanalyse*, Navarin, Paris, 1987, p. 93.

<sup>3</sup> Jacques Lacan, *Between Psychoanalysis and Politics*, Routledge, London, 2016; see also: Ellie Ragland-Sullivan, *The Materiality of Language According to Freud and Lacan*, in *Lacan and Human Senses*, A. Leupin ed., 1991, quoted in D. S. Caudill, p. 63.

<sup>4</sup> Mladen Dolar, *Freud and Political*, UNBOUND, Vol. 4, 15, 2008.

<sup>5</sup> Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy*, London, Verso, 1985.

We respect the law "because it is the very law," not because of its actual content! This is the answer offered by the psychoanalysis, while such answer is in line with H. L. A. Hart's definition that the law is determined by its FORM, not content.<sup>6</sup> The law is symbolic order; it is a master signifier and as such, it stands for itself and is confirmed by the rules of recognition, not by content of truth in it or moral principles. When an individual/office holder speaks in the name of the law, he is only a figure through which "the law speaks" (*dictum factum*), while drawing authority by this.

The law is a "heartless"; the law demands to be respected not because of the truthfulness or good in it but only because it is law. The law issues a command: Submit yourself (and find pleasure in it, but certainly submit yourself) regardless of individual characteristics, attitudes, and desires. This is a non-integrative, imposing character of the law, which the authors in this field consider its absolute requirement.<sup>7</sup>

As such, the law represents a symbolic system that has the ambition to fill the place of the absolute symbolic signifier-God, upon the proclamation of the Enlightenment that "God is dead!" On the other hand, the divided law always bearing a previous flaw in itself - as compensation or concealment of its incompleteness and as concealing the origin and relationship with the founding violence by which it has been created - tends to prove itself by compulsively expanding itself into new and emerging areas, new rights, prohibitions, divisions, and regulations.

Specifically, in order to fulfill the fantasy of completeness, wholeness as signifying system that offers coherence - the law has been constantly expanding itself; it has been spreading itself in the contemporary state. Power in contemporary society abandons political concepts and replaces them with legal ones that provide for more efficient maintenance of the status quo of such power. This process of "de-politicization" and expansion of the law (though naively considered to increase the freedom and the law-based state or the rule of law) is actually a prelude to super-regulation of the areas of life that have never been strictly regulated by law. This leads to a radical elimination of freedom although the law repeatedly refers to such freedom. The law regulates, restricts, prohibits, and constantly expands itself. The law can accept, absorb, and regulate each new area of particular, identity and emancipatory struggle, by granting it a place in the general balance (by this the law perhaps spreads tolerance and formal freedoms or some would say control over them; however, at the same time, it also pacifies the antagonisms of social struggles and even determines the forms of resistance against the order!).

What the law cannot accept in the process of expansion and absorption of antagonisms is the principle of transgression of its own symbolic order and the method of establishing divisions and prohibitions. In context of transgression into some other emancipatory politics or the right which does not fit, the law refuses to participate in such process of legal divisions and

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<sup>6</sup> H. L. A. Hart, *The Concept of Law*, Oxford University press, 1994, pp. 56, 57.

<sup>7</sup> Otherwise historically the law had been defined in several scientific discourses, as "theory of commands or command theory" by Jeremy Bentham and John Austin (the law that requires submission and threatens with punishment); Hart's discourse of the law regarded as a set of rules that are played like a game while accepting to be part of society, implies consent to respect its rules. Their "morality" is by definition established. In this approach, accepting to be bound by these rules means to be "civilized" people. See: H. L. A. Hart, *op. cit.*, p. 117, and by the same author: *Positivism and the Separation of Law and Morals*, *Harvard Law Review*, 71, 1958, pp. 593-629.

prohibitions of the existing status quo. This is what Giorgio Agamben calls "inoperativeness," non-participation and rejection of the rules.<sup>8</sup>

2. Our point at the outset of this text is to note that **the law as such is based on a trauma, on a founding violence**, which, in the effort to establish a new order, destroys the old order and its law. It is violence against the "old law" that must be destroyed to establish new law and new order. That violence at the beginning (in the metaphors of the social contract or patricide according to Freud) is against "the nature" that must be "split" to establish a culture (state, society).<sup>9</sup>

This is the paradox embedded in the foundation of the very law. The law is never released completely from this trauma. It somehow just pushes such trauma into its second, obscene part - the 'law of the night' (Hegel, Zizek). It is the trauma of the violent onset of the law, its relation to the committed founding crime. From this perspective, the establishment of an illegal act is fundamentally also an opportunity to create the law itself!

As Jacques Derrida relates to this topic that, creating the law always goes through the legal/symbolic violence, performative violence, which then determines the interpretation of the law... successful revolution or creating a new state is such performative violence always interpreted retroactively... (as necessary - author's note).<sup>10</sup>

On the same topic, Walter Benjamin says that the history of law is a history of violence... silence prevails about and around this, the silence about the roots on which law was created.<sup>11</sup> With regard to the same topic of initial violence on which the law was founded, Immanuel Kant says that it is suppressed to the level of prohibition to discuss it. According to Kant, this founding "crime" of the law is prohibited to be tested and analyzed, that such a claim would be absolutely evil because it would relativize and dilapidate the coherence of the established law.

## II. DIVIDING LAW INTO TEXT AND OBSCENITY

Each legal text in this respect has two levels: the level of specific meanings and the level of "true meaning," open and hidden part (Hegel calls the latter the "law of the night," while Zizek calls it: the obscene side of the law).<sup>12</sup> The written text creates form (i.e., rights and obligations), while the unwritten part creates a breeding ground/basis as to how the first part should be

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<sup>8</sup> "The Endless Crisis as an Instrument of Power", (interview with Giorgio Agamben), <http://www.versobooks.com/blogs/1318-the-endless-crisis-as-an-instrument-of-power-in-conversation-with-giorgio-agamben>, 2013;

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<sup>9</sup> Totem and Taboo, Minnesota, NY: Dover Publications, 1998, 123; Slavoj Zizek, The Ticklish Subject, London, Verso, 1999, p. 325; Sublime Object of Ideology, Peter Fitzpatrick, Modernism and the Grounds of Law, Cambridge University Press, 2001, ch. 1-2.

<sup>10</sup> Such examples include revolutions, bloody and violent coups against the old order while creating the new order; it is the very REFORM - a symbolical act of unjust, illegal action that establishes a new law (but is based on breaking the old), etc. More in: S. Zizek, The Fragile Absolute, London, Verso, 2000, p. 93; and especially in: Jacques Derrida, The Force of Law: The Mystical Foundation of Authority, Cardozo Law Review, 11, 1990, p. 919.

<sup>11</sup> Бенјамин Валтер, Критика на насилството, во: Илуминации, Или Или, Скопје, 2010 (Benjamin Walter, Critique of Violence, in: Illuminations, Ili Ili, Skopje, 2010, published in Macedonian).

<sup>12</sup> Richard E. Redding, op. cit. p. 1129 -1133; also in: Zizek and Law, Laurent De Sutter, Routledge, New York, 2015, pp. 21, 63, 82, 89, 203; Zizek on Law, Jodi Dean, Hobart and William Smith Colleges, New York, 2012, pp. 3, 5, 14, 19.

interpreted. Let us not forget the law is libidinal investment of the subject in relation to the Big Other, which is divided from within; likewise, the psychoanalytic view of the law also says that repression of founding violence is never forgotten but appears in its fundamental, constitutive division from within, between the public side (the explicit text) and the superego/the supplement (enjoying or rather the command to enjoy, 'jouissance'), which is its "night, obscene" side. The "night side" as a shadow stalks, fulfills the public side and interprets how such public side of the law should be applied.<sup>13</sup>

This division of the law from within is called by some authors the initial incompleteness thereof or constitutional void; a shortcoming that is concealed constantly.<sup>14</sup>

The second basis of division (incompleteness) of the law is also contained in the split between **the law and the rights**. The rights are an expression of the dialectic of the gap in the subject expressed by them - it addresses the Big Other (the symbolic) in quest of wholeness (the ultimate pleasure)... the rights divert the human desire, the drive of the subject from such primal, ultimately lost pleasure of union with (the mother) object of the desire toward the symbolic order... The rights subjectivize the subject by granting the subject the power of self-determination in some way (which the subject gets retroactively from the symbolic order: Who am I? What is required of me? What are my purpose and meaning?).<sup>15</sup>

**The rights** are powers of the subject relating to an action, usufruct or status, complemented with correlative obligations for all others to refrain from counteraction and obstruction (including natural persons and authorities, national and international); this would then mean effectively enabling the usufruct of such powers by the subject arising from the specific law (including the existence of a legal remedy in case of obstruction) - and that there is an ontological difference between them and **the law** as a system of signifying, as symbol order, as a social institution!<sup>16</sup> These differences reflect, also, crucially, on the division within the law, highlighting the tension between its conservative/normative and its emancipatory, subversive side or potential.

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<sup>13</sup> Often striking examples of this are cited: racism in the police; the night "law" of the Ku Klux Klan in the United States; sadism in the students clubs at British colleges and universities or in the military units against recruits; racism in multicultural environments that are filled with public political correctness; weekend adventures by young otherwise well-behaved university students involving setting fire on refugee camps and brutalization of local prostitutes, local Arabs and other migrants; hatred of the Albanians who are part of the government coalition that works so well in Macedonian politics on the one hand, and the 'night law' of competitions and public tenders of the same politics when the rules and regulations of the 'day law' become completely different, on the other; their transgression into the domain of the 'night law' of the political correctness by spreading hate speech and acts of hatred (unpunished); etc.

<sup>14</sup> M. A. Rothenberg, in: Žižek and Law, op. cit., p. 58; on the other hand, concerning the law Slavoj Žižek claims that it is incomplete and incoherent, as an internal division... see in: Jodi Dean, Žižek on Law, op. cit., p. 21, and in: S. Žižek, Looking Awry, Cambridge, MIT Press, 1992, p. 151.

<sup>15</sup> Jodi Dean says about this: there is a radical separation between the rights and the law as such... the law should be seen less as a means of implementing human rights because they are moment of the Real, something that cannot be symbolized to the very end and so expressed through the law... they transgress it constantly. Jodi Dean, op. cit., p. 31.

<sup>16</sup> Michael Foucault, The Courage of Truth: The Government of Self and Others, Palgrave MacMillan, New York, 2011.

### III. BASIS OF TRANSGRESSION (INTO) OF LAW

The basis of emancipatory line in the law means to see the limits in its nature as permanent and irreconcilable. That is when you reach for its transgression, thinking beyond the law; or as Maria Aristodemou says: You reach for **the atheist jurisprudence!**<sup>17</sup>

The psychoanalytic atheist jurisprudence shows that human rights cannot fulfill the promise given to the subject that they will attain wholeness, by transposing into a completed legal system. Namely, that they will absorb the antagonisms, will attain a level above politicization, and final justice - only if the whole of social life is based on them and they are consistently respected! It is a dangerous illusion; so the law, which spreads based on this illusion, becomes a law that is a victim of its own imagination before the altar of the very sovereign.

Alienation, or self-deception of the law, is when in contemporary times (as mentioned, dominated by the principles of liberalism, openness, and democracy that have become global) the law makes attempt to spread and become omnipotent, to cover everything, to replace politics and the political and their antagonisms, to be depoliticized, neutral, objective, etc. When a patient does not overcome his trauma, he tends to repeat obsessively the drive for compensation; hence the repression continues, while fraud and non-freedom establish themselves even harder.

It is not the point that democracy and liberalism as human rights-based systems are bad, or the least bad political systems; still their formal mummification or global imposition (through so-called humanitarianist intervention or humanitarization...) becomes an ideology of power (yet another one) and destroys the emancipatory transgression within itself.<sup>18</sup>

International Human Rights Law (IHRL) - as part of the law in general - will always be a law where something is missing; it will always contain a constitutive gap and it should not be trying to deny this. The international human rights law must learn to live with its limitations. Its ideological pretensions today can be: total legislation, high normativity, total control of the application (territory of the international community) and of course by this a total enjoyment. The illness and cry for totality are evident in the history of this law. To face the pain and try to establish universal rules and guarantees, but not to have agreement on definitive guarantees from the Big Other, finite limits established by anyone - means to be an ethical subject, resting on ethical grounds. The international Human Rights Law (IHRL) must make that choice or become mature enough with regard to it: in a state that Kant provides for the moral imperative, for the norm of behavior; a state of self-positioning of the norm of the moral law.

What does all this refer to? To the precise note by the psychoanalysis concerning the two sides of the international law: the text (the symbolic) and its dark side (the Real). The law should face such ethical dualism! It must not enter the drive of a compulsive neurotic by repeating the urge to become complete in the norm and scope - to attain perfection while transforming itself solely into conservative politics of power and repression at global level and at level of state of exception inside democratic countries.<sup>19</sup>

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<sup>17</sup> Maria Aristodemou, *A Constant Craving for Fresh Brains...*, EJIL, Vol. 25, 1, Oxford University Press, 2014, pp. 37, 38, 40.

<sup>18</sup> Although it is generally considered a political tool, humanitarianism presents itself as an anti-politics that we have talked about... See also in: Wendy Brown, *Human Rights as Politics of Fatalism*, *South Atlantic Quarterly* 2/3, 2004.

<sup>19</sup> Claude Lefort, *Democracy and Political Theory*, University of Minnesota Press, 1988.

The law must transgress, must cross such fantasy and release itself to preserve its emancipatory chances: To understand that there is no benign humanism! It is a fantasy that captures (perhaps initiated with good intentions). We must face the "monster in ourselves," i.e., the International Public Law and the International Human Rights Law in ourselves; it produces even more unequal world, even greater violence, while advocating globalism of human rights and promoting the fantasy of humanism!<sup>20</sup>

**Radical policy rights** should not be reduced to the exercise of the rights provided by and within the order or to the channel of resistance provided also by it - but it should always strive toward breaking, pushing its way out of the hegemony of democratic symbolic law **to its transgressing to the "right which is yet to come"** (to paraphrase J. Derrida and perhaps Walter Benjamin in context of the Divine Law).<sup>21</sup> The human rights will be taken over by the subjects who are "part that belongs nowhere" (Jacques Rancie), excluded subjects that are only human and nothing more while containing that "surplus humanity" (Lacan) required for the transgression.

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<sup>20</sup> Martti Koskenniemi, *From Apology to Utopia*, Cambridge University Press, 2005, pp. 189-197, 201-325, 513-527.

<sup>21</sup> Jurgen Habermas, let us recall, says in this context that no significant idea in the public discourse has been "invented" and pushed through by major organizations, parties, countries, and so on. On the contrary, such ideas have been always promoted by the so-called radical professionals. This is also probably true about the idea of ethical founding of IHRL.

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