Narrating the Natural Legitimation of the State of Europe

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Abstract
For understanding the phenomenon of "Europe"" as the object of a performative political theology, an analysis of the conception of law is indispensable. In this regard, there are two different main currents: Legal positivism and natural law. While the first perspective presupposes the sovereignty of the state and therefore argues only within the framework of its legislation, the different natural law perspectives are oriented towards extra-legal sources, such as "morality" or "nature". Despite their fundamental incompatibility, in many discourses on Europe these two legal-philosophical perspectives are certainly mixed together, giving the impression that a European civilization can justify itself beyond itself both juridically and morally. By means of the concepts of communitas and immunitas developed by Roberto Esposito, we will try in this paper to explain how this self-legitimization is shaped and what the consequences are, in order to be better able to make visible the blind spots of this thinking instead of accepting them as without alternative.

Key-Words
Europe, Law, Society

1. Introduction

To understand the abstract phenomenon of "Europe" in the context of the question of developing a performative political-theological account, one area which could be of immense importance is the conception of law. How is law being understood as defining the meaning of "Europe"?

A quick historical account of the development of jurisprudence shows a clear division into two opposing sides, whose basic legal concepts have always been in conflict. One side (legal positivism and its various branches) considers that the sole resource of the entire law, which is not a "mystery but a well-known profession" (Holmes 1993: 45), lies in the will of the state and its power beyond which there is nothing greater and which refers to its "own mind" as the ultimate judge and the only authority. An example of this perspective is offered by Holmes, who moves between the concept that law is the "King of Kings" and the concept that it is "enforced by a sovereign political authority" (ibid: 36). This leads him towards the following definition: "Until the State is formed there can be no law, in the strict sense of the term" (ibid: 46). However, he still admits that "law is something more than police" (ibid: 65). Such a view leads to a conclusion

that there is no substantive bond between law and primordial moral values and that the so-called conceptual union of law and morality is exclusively post-hoc and thus performative. Carl Schmitt's (1973) political theological concept of sovereignty is then not amoral, but understands morality to be performatively instantiated at the same time as the inauguration of the rule of law (Barbour 2010) and thus ultimately derived from arbitrary violence.

A more sophisticated version of this type of legal normativism has been developed by Hans Kelsen (1911). For Kelsen, the separation of the sociological narrative of law from the normative narrative of law inaugurates the division between law, as something that can be labeled as *Sollen*, something that should be, and nature as *Sein*, i.e. something that is. Thus, law is made of norms that constitute obligations, which implies that they express the will of the state (Kelsen 1911: 4-6 and 87-188). According to such legal normativism, the will of the state is more indirectly involved in the process of the gradual construction (*Stufenbau*) of any legal system with a *Grundnorm* at its base which is superior to *everything that follows from it.* Here, there is a far greater reliance on the performativity of hermeneutics und much less on the acts of decision-making. Because the grounding of law is considered to be beyond the political, and therefore beyond the arbitrary self-proclamation of sovereignty by a state, this leads to the postulate that law is a dynamic and strictly hierarchical system of norms and a single norm will be legal only if it belongs to such a system of norms and is created in the manner prescribed by the higher norm. In this way, the validity of norms is neither conditioned by the content of social relations, nor derived from the actual behavior of people (normality), nor by the values that are supposedly implied within these norms (normativity).

However, this leads to a potentially very dangerous conclusion that *any kind of content might be a law*. Thus, the recognition of what is considered to be just and socially beneficial does not make the law, unless they are already contained in the legal norm itself. Therefore, whatever a legal norm touches is turned into law. In that manner, jurisprudence is completely reduced to the dogmatics of law.

Within normative-formalistic conceptions, the rejection of a substantive value-based criterion of law is extended to the rejection of value-based legal experience as a subject of scientific legal inquiry. The presence and importance of value principles, judgments and aims of legal life are not denied, but it is claimed that the task of legal science is not to encompass, explain, evaluate and propose them, nor is it empowered to do so. In legal positivism, it is widely understood that value-based attitudes have an inherently subjective-irrational (i.e. arbitrary) character and can therefore not be scientifically deduced let alone defined. Such a view, in its most radical

version, is taken by Posner (1996), who believes that ethics has nothing to offer to educated lawyers or judges in the process of adjudication or in relation to the creation of legal doctrines.

However, it remains clear that neither traditional jurisprudence nor Kelsen's theory explain the content of specific social relations that are condition for normativity and necessarily and independently affect the legitimation of legality. It is not wrong to talk about the relationship between normativity and legality, but it is wrong not to investigate the real social relations that are specific and essential to the content of a legal order. The assertion that the foundations of law are outside of the political is therefore indeed deeply problematic and naively idealistic (Langford 2016: 201).

Against the self-referential doctrines of legal positivism and legal normativism, substantialist legal philosophy points towards origins of law beyond that of the (self-proclaimed) sovereign authority of state in, for example, God, Universal Humanity or Nature (Trajkovic 2012). Here the idea is that law can only justify itself in terms of something that lies beyond it. Although the pitfalls of idealism are equally noticeable – as critical explorations for example into the works of Kant and Hegel have demonstrated – there is at least the recognition of a historicity of justifications, that can also have a critical function of re-attuning and re-positioning law according to extra-legal principles.

It seems impossible to settle the dispute between these two sides, at least within the realm of legal philosophy itself. As parties hostile to each other cannot be reconciled (Stahl 1883), there is no midpoint, for there is no alliance between belief and unbelief, between truth and delusion. For example, on each occasion where a state justifies its rule of law with reference to an exterior ground (God, Nature, Universal Humanity or whatever), it reclaims the latter as an extension of its own sovereignty, thereby annihilating the exteriority of the latter.

A good example for this is asylum law, as for example described in the Geneva Convention and Protocol related to the Status of Refugees of 28 July 1951. The twenty countries that had signed this protocol at that historical moment explicitly recognized the right of every person to be considered a refugee and entitled to protection. That is, a refugee is entitled to claim a right that both stems from the sovereign authority of the state *and* its appeal to something that remains beyond that.[1] That appeal is to something that "we" (as Europeans) have as the basis of "our"

1 We are very grateful to Peter Zeillinger for sharing his insights into this matter.

conception of justice that at the same time cannot be contained by the territorialized sovereign law of the state.

Although it is still very much the dominant perspective in legal theory, "the past forty years have not been kind to legal positivism" (Sebok 1998: 1). At least since the defeat of the Third Reich, legal positivism has been criticized for its role in both the development and the justification of totalitarian states. Even under the rule of the NSDAP, Germany would generally be conceived by legal positivists as being "within the limits of law", thus suggesting that substantive values have no place in the normative world of law, and thereby forced to accept that law cannot be the subject of examination, but remains a matter of deductive obedience in terms of a hierarchical structure of rules.

It is not difficult to see that a rule of law itself comes into being via a political act (cf. Carl Schmitt 1973) and that the very concept of sovereign authority still requires the capacity to wield violence, which – at least according to Hannah Arendt (1970) – also marks the limit of the power of authority. At the heart if this concept of the political is therefore arbitrariness, which contradicts any substantive, normative appeal to justify itself by means of (a threat of) violence. The late Alan Hunt stressed that whereas philosophers such as Michel Foucault were wrong to exclusively focus on law in terms of state power and sovereignty, it is clear that their conceptions of governance also involve law, highlighting other aspects of regulation such as establishing "normativity" and thereby invoking a more sociological conception of the grounding of law, alongside a political one.

Sociological concepts of the "cradle of law" are very diverse and numerous, and yet all of them are unified in perceiving law as the unity of social relationships and norms that define those relations coercively or more or less effectively. This conception of a sociological grounding for explaining the origins of law offers a confrontation to legalistic voluntarism and normativism. Thus, the focus moves from the world of law, which represents a world unto itself, to the efficiency of those legal norms that make the world of law (Bobbio 1958: 61). Asylum is exactly based on the boundary between conceptions of legality and that which are conceived as their ground: an inclusive exclusion that cannot be substantiated. Following Derrida's (1995) interpretation of Plato's *Timeaus*, the place of this boundary is the *khora*: a place that cannot be claimed or named and thus remains the place of (possible) hospitality for refugees.

The option of "overcoming" difficulties while defining a legal norm can be found in the integration of law, society and values. Whereas, for example, Foucault (1977) did not really pay much attention to this in his analysis of discipline, he started to become more attentive to it in his later

works. That is, by focusing on the issue of derivation, norms always imply values and values are themselves derived from valuations. The acceptance of social moment of a legal norm itself is born from the bosom *(khora)* of society. Because "the terms ´natural law´ and ´legal positivism´ are only rough categories that enable us to begin thinking about the concept of law" (Johnson 1992), any practical definition of law, apart from its descriptive functions, has a task to convey values as well.

2. *Communitas/Immunitas*

In this contribution, we propose to develop a sociological concept of "the embedding of law" as a means to shift the debate towards an understanding of law in terms of its performativity. We are interested in practices of cultivation of legal settings that are very diverse and numerous, and yet all of them are unified in perceiving law as the unity of social relationships and norms that define those relations coercively, seducatively or persuasively and thereby more or less effectively.

A useful point of departure for this could be Roberto Esposito's triad of the Unpolitical, Communitas and Immunitas (Langford 2015): The Unpolitical (l'Impolitique) emerges from the separation of "the Political" from "Politics", which he conceptualizes as a "non-place" or "originary void" (very similar to Plato's *khora*). Rather than placing all of our faith on the belief in a substantive correlative of this void as some kind of a-historical, infinite being (and following Weil and Bataille), Esposito insists on the inevitability of anchoring the Unpolitical in "the being-in-common of human finitude" (ibid: 2), i.e. Communitas, which Esposito retains as a negative notion, namely as simply "the experience of human finitude" (ibid: 3). However, rather than opposing community to nihilism, which would still imply a circularity that merely expresses arbitrariness, Esposito shifts our attention to a third concept, Immunitas: the exemption from being-in-common as the absolute obligation which precedes the individual. It is in Immunitas that the condition of individuality is to be found as an "exclusionary inclusion". "The antinomy between violence and law emerges through immunizing the community from the violence in the immunitary procedures of law" (ibid: 4). It is only through Immunitas that judgment can be exercised.

Without Immunitas, it could be believed that legal norms are merely derived from a collective will. The value-base of law is the restricted general will of "the people". This, however, can also be deployed to justify fascism, as the establishment of any community presupposes the establish-

ment of boundaries, as for example implied in territoriality or merely "place". How can that, which has been excluded from Communitas, then be recognized as legal subject, for example in terms of asylum? Immunitas (e.g. sanctuary as a place of asylum) is therefore a necessary safeguard against and limit of arbitrary violence. The bounding of "the people" that enables this positive substantiation of the void at the heart of the Political thus enables the possibility of Universal Law. Immunitas is the necessary prerequisite of Communitas, or, as Deleuze and Guattari (1977) wrote in the *Anti-Oedipus*, dividuation precedes subjection. The exclusionary inclusion is then the constitution of sovereignty, property and liberty.

This inherently also sociological conception of law opposes both legalistic voluntarism and normativism. Thus, the focus moves from the world of law as if it represented a world unto itself, to the practical efficacy of cultivating legal norms that make the world of law. The law is connected to collectives which are social and political and cannot be reduced to "the state", since the state is itself only an abstraction, and there is always a part of law that stays out of reach of the state regulation.

The state functions as an exclusionary inclusion, the bounding of community by postponing the question of its origin. Society goes beyond community, however, in that it recognizes the unbounding-binding of the primacy of being-in-common in relation to the necessity of communication. In society – as the expression of being-with without being-in-common, i.e. an association of strangers – communication precedes community (cf. Luhmann 1990). That is, legal subjectivity is not exclusively derived from being-in-common, but also involves "being-without". In this sense, society is not a collective expression of substantive morality, but an emptying out of valuation: the formation of pure normativity and *therefore* enables the possibility of a universal appeal, even if it is indeed only through negation.

The risk is clear; the shift from Communitas to Immunitas could imply a return to a notion of the political that seems completely devoid of politics. The interplay between norms and values remains inevitable if we do not want to fall prey to a most barbaric regression into the unpolitical. Whereas it remains important to be mindful of death, the horror vacui must neither be sacrificed nor sanctified. A sociological reconception of law is what Donna Haraway (2016) referred to as "staying with the trouble" and it entails a simple imperative that "decisions must be made in the presence of those affected by it".

3. *Lebendes Recht: Law as part of Functional Societies*

According to Roscoe Pound (1922), jurisprudence is to be understood as a branch of the social sciences, because law represents a means of social control in its entirety. Indeed, here society applies the biggest and most important part of law, either through their various state organizations or without any organization, that is: spontaneously. For these reasons, Pound asserts that law is a social institution that serves social needs. Based on this, he proposes practical measures for the implementation of law based on *a science of social engineering*. These include, in particular, the study of the actual consequences of legal institutions and legal doctrine, the study of resources that ensure the effectiveness of legal norms, sociological study in preparation of law making, the study of legal methods, social legal history and the importance of the rational and equitable solution of individual cases. And here we agree with the postulate given by Pound that it is very important for philosophers of law to take account of the internal order of groups, and of their religious and philosophical ideals, which have a major role in the construction of social groups through the binding and bounding of place. That is to say, the appeal to law has to take (a) place. Whereas the *chora*, as the impossible place, is also the place of absolute hospitality and this the place for a universal legal subjectivity, its actualization always needs a particular place and occasion. Law does not create social interests, but rather "finds" them in that which is unrecognized and unprotected in a society. Therefore, it performatively establishes standards of valuation, not only to determine which interest will be recognized (Communitas), but also to determine the limits of the protection of the recognized legal interests (Immunitas).

From this perspective it may be clear that society is considered as the source of what Erlich (1922: 102) called "lebendes Recht". It becomes the expression of communal life, which also generates the binding force to law, by giving it content, because, according to him, „what man [sic] is, he owes to the alliance with others". According to this view, law is cultivated at the heart of a political community and through its development into constituting a society, it becomes relatively independent. As soon as it shifts to the "unpolitical" and establishes legal subjects, it not only invokes Communitas but also Immunitas. Therefore, the main task of sociological jurisprudence is to understand what law does and how it works in a society.

This question can be made in the form in which it was explained by Jhering (1904: 7), using the term goal (*Zweck*). Then he does not refer to goals of the legislature and legal regulations as an expression of the will

of a king or a group in power, but as an expression of something more comprehensive, as it is a goal that is immanent to the life of society. These vital goals are closely linked to the various needs that arise from life itself and a society will only function properly if they have been attained and are to be explored, not as abstract legal concepts, which are the product of logic, but as "representing" values (or, in a more performative turn: as practices of valuation). According to Jhering, they are above the formal elements of legal logic. What he perceives to stand above the legal logic are justice and morality, which ought to be realized and deepened in the legal institutions and regulations. As we have already criticized the inherent idealism in such a view, this is not of our main concern here. What matters instead is the performativity of substantiating the function of the *khora*.

Society and its life are more dynamic phenomena than law. On this basis, the sociology of law from Max Weber (1923) onwards has refuted the notion that law is applicable to all societies. At best, sociologists such as Talcott Parsons (1977) would accept that there are certain common principles in all laws that correspond to the basic immutable elements of any society. According to Parson's most famous student, Niklas Luhmann (1984), modern societies are like complex dynamic systems organized by functional differentiation into autonomous subsystems of science, economy, politics and law. Since these subsystems are operationally independent, there is the issue of managing a society as a complex social system. For Teubner (1989) law operates as an autonomous system that is primarily charged with ensuring that inter-systemic irritations can be expressed by a unified code (legal/illegal).

The weaknesses of sociological theories of law are already visible at first glance. One of the major pitfalls of a sociological understanding of law is sociologism, which is particularly prominent in functionalist sociology. For functionalism, the legal system serves the social system only in so far as it positively contributes to its stabilization and ordering. Legal practices are thus reduced to operationalizations of values; when legal norms and social norms are contradictory, the latter are expected to overrule the former. Accordingly, there are only real social relations; that is: the actual behavior of people in a society can only be recognized as rules, norms and values if these correspond to such behavior. The task of jurisprudence would then be to describe the factual manner of behavior, and not to investigate the norm. Whereas this might explain why most member-states of the EU do not treat refugees according to the principles of the Geneva Convention, it cannot explain why the EU itself still continues to appeal to adherence to

the Convention.[2] Apparently, this discrepancy between legal practices and legal norms still needs to be denied publicly.

The fundamental flaw of sociologism evolves around its conception of "norm". It fails to fully come to terms with the difference between those social norms applied by a state and commonly referred to as law on the one hand, and other norms such as those derived from traditions, informal arrangements, tacit expectations and rituals on the other hand. This is the difference between normativity and normality. In this sense, it repeats the same problems as those stemming from a failure to differentiate between legal norms and legal practices. Whereas sociologisms are able to distinguish between functional and dysfunctional norms, it would ultimately understand legality as compliance and thus not suffice as a critique of barbarism, for example in the form of the complete negation of normativity within the legalization of the erosion of human rights in the actual treatment of refugees within the EU. Whereas the latter may indeed serve the perceived (short sighted) needs of "society", it thereby completely negates the necessity of the former, which is not merely an ideological function, but instead the condition of the very possibility of Universal Human Rights – from which the very concept of society is derived – in the first place.

Denying the specificity and operational autonomy of law is thus not merely a sociological issue. Society cannot represent let alone substitute the *chora*, but will always remain indebted to it. There is no Communitas without Immunitas and Law cannot become the rule law without the latter.

Both legal positivism and sociologism share the same fate: the first by treating law as absolute foundation, the second by treating law as socially derivative. Both suffer from a misconception of the relationship between practices of valuation and their deployment of normativity and normality. Both would ultimately side with the barbarism of arbitrary violence. Both would feel threatened by Antigone's insistence on the primacy of a normativity that is beyond the political (Kaibel 1897, Corssen 1898, Della Valle

2 EU Charter of Fundamental Rights (https://fra.europa.eu/en/eu-charter/article/18-right-asylum): Article 18 - Right to asylum: The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties').

1935).[3] This "beyond", however, is not an infinite, a historical moral order (for who could speak in its name?), but an immanent-performative dis-placement of the grounding of law, i.e. as a practice of "situating". If we do not want to conceive law to justify an apology for barbarism, we have to understand the immanent-performative-situated practice of valuation.

A philosophy of law concerns the typical value relations of law. A legal hermeneutics that accompanies the operations of lawyers exposes the value judgments manifested in positive-legal state regulations. That is why St. Augustine (1610: 110) once asked: "Set justice aside then, and what are kingdoms but thievish purchases? Because what are thievies' purchases but little kingdoms?". Despite the fact that legal practices seem more often than not devoid of considerations of justice, the latter have left traces and these offer opportunities for critical engagements that are neither a predestined bow to the "terror of the sublime" that we call the state nor condemned to follow the "democratic despotism" of the lynch mob that we call society (cf. Lyotard 1988). The "value path of law" (Trajkovic 2012) should be the object of jurisprudence and the main focus of legal hermeneutics. Only then can we understand that the "right to asylum" is not something "we" grant, but is constitutive of what we claim to be. Especially in the case of the legal practices of asylum, the values that underpin the very possibility of law are often violated in such a refined manner that such injuries cannot be sanctioned by law, which itself often violates values. Again we are then reminded of St. Augustine (1610: 110) when he stated that *where true justice is wanting, there can be no law*.

4. Conclusion

Not denying the significance of society and the significance of positive law, we consider it is appropriate to point to the possibilities of an integral view of law, with emphasis on the integration between sociological, positive le-

3 However, whereas most have interpreted Sophocles' account of this beyond as the realm of the gods and by default the realm of divine truth, we should perhaps resist the temptation to shift to an abstraction of absolute values and understand the role of the gods as not exclusively concerning the eternal realm of values, but perhaps as itself also rooted in the earth, in a maternal rather than paternal conception of life (cf. Irigaray 1974). Failing to do so would replace a philosophy of law with a simplistic theosophy of law. A performative *political* theology would then become impossible.

gal and value based narrative. This represents another step on the looking which narratives shape pillars of law for Europe.

So, in order to define law, it is necessary to look into its normative, social and value narratives. The definition of law, as the system of norms which define human behavior, points to the necessity of study of the normative dimension of law. From the sociological standpoint, law is considered a system of norms which are applied in society. Thus, law is, at the same time, defined by its social function. However, law is the concept of reality connected to value, or it is reality with the aim to serve some value. This means that positive law has to be accurate in its contents, and vice versa, that accurate law has to be positive. The relation between normative and social elements of law points to the indispensability of the integral study of law as a social (and political) practice. Law cannot and should not be studied and defined in a unilateral way. Nowadays, there is the integral law, that is to say, there is the eagerness to examine not only the normative dimension of law, but also the value and social dimension. Thus, according to the integral conceptions, law is the special social process within which behaviors, attitudes and normative awareness are so interrelated and interdependent that none of them can be understood without being associated with other constituent parts.

In the final analysis, understanding the social-political embedding of law is achieved as an attempt at integrating faith (which is not necessarily religious, but always points towards an unnamable origin, a *chora*, that defies substantiation and cannot be claimed) and (deductive) reason. A sociology of law that focuses on the interplay between faith and reason – as that which enables a legal setting that works for or a society as opposed to one that works against it – is not just a description of happenings, but a performative contributor to the collective cultivation of a world most of us would prefer to live in. In discussions about the future of Europe, in particular with reference to the universality of human rights as well as the foundations of democracy, legal settings are at a crossroads. Those that adhere to political theologies of decisionism or moral absolutism perform unilateralities that are directly related to the reduction of faith and reason. According to Pope Benedict XVI, "not to act reasonably, not to act with *logos*, is contrary to the nature of God".[4] This is the reason

4 From: Apostolic journey of His Holiness Benedict XVI to Munich, Altötting and Regensburg (September 9-14, 2006), a meeting with the representatives of science *lecture of the Holy Father Aula Magna of the University of Regensburg, Tuesday, 12 September 2006: Faith, Reason and the University - Memories and Reflections*.

why St. Thomas Aquinas posed a question: "Is the law made only for the evil and the wicked?". This is why narrative analyses should play a key role in understanding the social and political embedding of law; how legal acts are discursively performed matter, because they reveal what is being invoked: a Will to Power, a Moral Absolute or Faith-in-Reason?

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