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Sophocles-Balashevic (via Hegel): A Grand Error or an Ariadne Type of Nexus?

*-law **as/and** literature-*

1. *Lawyers would do well to study literary and other forms of artistic interpretation*

This was said, once upon a time, by a legal mind as famous as Ronald Dworkin (A Matter of Principle, 148). Really, is putting in the title of the article the names – Sophocles, Balashevic, Hegel - together a grand error smelling of academic eccentricity or an Ariadne type of nexus, capable of better illuminating the essence of the law (as shabby as the later phrase had become) and thereby aiding in better legal practice? We shall assume that three decades old movement called law and literature is an intellectual development least heard of outside narrow academic circles in U.S.A. and Western Europe and we will attempt to take the gist of the idea a bit further. Our modest aim is twofold: start a deconstruction of the deconstructionists, extrapolating several subdivisions within the LAL[1] movement and, then, deal with some of the entrenched dogmas about legal interpretation, most notably the one of the "precise, needless to interpret, objective and ready-to-use" law. The latter had served well not only autocratic regimes but many democracies at some stages of history, as well. Analysis of the omnipresence of interpretation and arguably common methods to be used in areas as distinct as law and literature may indeed contribute to demystification of widespread political beliefs about the role of the judges, lawmaking, values, the role of law in society.

Philosophy is about our search for meaning through reason, law and politics represent searching for order through reason, literature is about searching for meaning through the interplay of reason and imagination (Wiliams, xxi). All the three involve reason, but literature presupposing imagination as well, an endeavor unimaginable of in "serious" businesses such as philosophy, law and politics, at least the mainstream ones. Philosophy, law and literature could be clearly and intensely (although not too systematically, a controlled level of creative chaos is a trademark of postmodernism) merged only within an intellectually rebellious movement – the postmodernism.

2. *LAL - one among the many offspring of postmodernism*

Modernism used to be a simultaneous process of individualization, secularization, industrialization, cultural differentiation, urbanization, bureaucratization and rationalization

[1] LAL is an abbreviation that can stand both for **law and literature** and **law as literature**, the ambiguity is intentional.

(Best and Kellner, p.7). It reigned for more than four centuries[2] and shaped the western world, in order to be, at some stage, exported to other parts of the world as well. One of the mantras of modernism have been the one about objectivity, impartiality, neutrality of law, possibility of construction of a monolithic and universal notion of the law and last but not least, sharp difference between law making and law application.

Postmodernism represents a mode of thought and action in philosophy, science, art and culture in the second half of the XX century, the latter simultaneously being a period of information society and, a bit later, of globalization. Nietzsche (theory of moral inversion or inversion of values) and Heidegger are frequently pointed out as intellectual forefathers of postmodernism. Postmodernists reject claims and ambitions of encyclopedia type of knowledge and of universality. Key facets of postmodernism are contextualism, antiessentialism, the moderate gnoseological skepticism, anthropological pluralism and relativism, deconstruction, demythologization, orientation towards culture (culture as opposed to nature), pluralism of ideas and hybridization of disciplines, identification of influential but insufficiently explored factors that shape the law, such as race, gender, language, ethnicity, power, capital, religion etc…

In law, postmodernism is basically an umbrella concept within which a myriad of streams of thought develop and flow, all of them having one common trait - all of them being one issue theories i.e. an effort to capture the law, clarify its nature (although without claims for eternity, fullness and exclusivity) via important, but neglected or previously unnoticed traits, factors, aspects. One can discern three types of postmodernist writings relevant to law: general philosophy, social issues and legal philosophy *stricto sensu*. Some famous authors belong to the postmodern discourse in the most general sense of the word and deal with general philosophical questions, political power, cultural issues etc., while their work is indirectly relevant for legal philosophy as well. In our view, Samuel Huntington, Noam Chomsky, Michel Foucault, Jacques Derrida belong to this category of XX century thinkers. The representatives of the postmodern legal philosophy itself are too well known.

The passage from an information to post-information society, as well as (mildly put!) the transformation of the globalization process (named in many different ways – de-globalization, post-globalization, new tribalism, particularization etc., but always accompanied with anti-globalization movements and speeches) marked the beginning of postmodernism being slowly, not always clearly, superseded by a novel global theoretical and cultural discourse in science, art and politics. These are ongoing tendencies, not older than just a decade and therefore we identify them simply as **contemporary approaches**.

[2] There are many diverging views on the characteristics and duration of modernism, especially since latter is a tool of periodization in art, law and science in general. For example, it may link the beginning of postmodernism to the Enlightenment and the XVIII century. Lawrence Cahoone, *From Modernism to Postmodernism: An Anthology,* Blackwell Publishing Co, 2003.

Postmodernism, *inter alia*, makes visible a key problem – possibility for a construction of a monolithic concept of law, due to the historic and contemporaneous differences in the legal reality in various parts of the world. Universality and particularity of both legal reality and legal philosophy (issues situated on the intersection of comparative law and legal philosophy), as well as their historical and cultural predetermination, shall make, in our view, central themes in the upcoming decades. Since the very first phase of human history until nowadays, there had always been, simultaneously and parallely, several (three or four) civilizations.

Each of them is being characterized by a coherent life style which transcends vast geographic areas and develops during long periods of time. We can designate this state of affairs as civilizational pluralism. For each of these civilizations we can identify one central principle of social life organization. Law is THE such principle, *sans aucune doute*, for the western civilization. However, it plays no such role in the other civilizations such as the Indian, the Chinese, the African or the Islamic. The reason for such an essential difference among civilizations can be found in their history; the specific conditions in which all of them were incepted and subsequently developed. The so called western legal tradition and western concept of law had been created as a result of three cultural and historic influences – Christianity, political philosophy of constitutional democracy and private ownership of property and free entrepreneurship on economic plan. The western concept of law is based on two key ideas – law as necessary and useful mechanism of social organization and control, as well as a monolithic concept of the system within which such rules operate is both plausible and possible. Nonwestern civilizations have for a long time been a bit more "postmodernist" than the western one, reflecting plurality, antistatism, cultural dimension and fluidity of cogent legal precepts, the later always being *ultima ratio* of social life, instead of a necessity thereof.

3. *Law and literature – a liaison pas si dangereux*

The fact that the second half of the XX century legal philosophy has largely been marked by the postmodernism in general and by legal postmodernism in particular is a matter of common knowledge. At the same time, philosophy of language and linguistics in general found their ways and means in legal science and legal philosophy. Once together under the common intellectual umbrella idea of postmodernism, linguistics and legal philosophy acquainted each other much better than they used to do in the past. As to these developments, a well known Croatian professor as early as in 1989 wrote:

> [Nevertheless], lawyers have, for a long time, nourished an illusion, one that nicely fitted with the "political mind" that their language is a simple and transparent instrument which, by itself, contains no major secrets and problems. This is the reason why till very recently they have mainly been preoccupied by the *lexical* and *stylistic* aspects of the language in the law – once again mainly in sense of *normative* care about "good style" and about the construction of methods of "the science of legislation" the later being in charge of

> clearly and succinctly express the allegedly ready made legislative thoughts. The other aspects of the language in the law have been largely neglected in legal science." (Viskovic, 8-9)

Law and literature is a giant step further than mere acquaintance and co-operation between law and linguistics. For laymen, a legal philosophy school of thought named law and literature or law as literature may sound a bit unusual, even eccentric. But, law and literature has been, for already a few decades, a significant and decently well argumented school of thought, one that simultaneously possesses all general characteristics of legal postmodernism, the latter being a broad theoretical framework covering a myriad of various schools/movements. "…Both law and literature can be regarded as cultural activities which both reflect prevailing values and *problematise* those values (Williams, xxiv). We see the basic tenets of this strand of postmodernism as follows:

•Both law and literature are intellectual and linguistic categories/products. Namely, the intention of the lawgiver and the content of legal propositions created there under represent intellectual products (thoughts) which are being exteriorized most frequently via language as the basic, although not the sole means of communication of meanings.

•Each and every linguistic item is susceptible to interpretation. Metaphorically, in literature the dilemma and the perpetual theme is about the "the author's intent". In the law, the dilemma is about the intent of the lawmaker or the meaning the lawmaker objectively attributed to the text, irrespectively of the original intention.

•Language is a complex and living phenomenon. The meaning of the words is many times unclear, insufficiently clear, multiple, dynamic (changeable over time) and finally, susceptible to different understanding by various agents, depending on their individual or group traits.

•A piece of literature always has an idea and a story within and behind. It is not a mere composition of its parts, it is a new and specific product, a whole transcedending the components. The dilemma is whether a legal text has an idea behind, who defines it and how to discover the latter in the process of application of the law? Can lawyers learn something from theory of literature?

•All the aforementioned indicates that the interpretation of the law is a central human activity as to it. A vast portion of the law actually has no single or solidly defined meaning. That state of affairs emphasizes the immensely important and creative role of law applying by the institutions, courts and other agents. The relativity of the content of legal propositions, inherent to the law in sense of a linguistic creation, **has to be seen as a starting point** in the process of developing the theories on the essence of the law.

•In the course of the study of the existing and the creation of new methods of legal interpretation, it is both allowed and desirable to use (always under the condition of the awareness of the differences among the analyzed phenomena) the achievements of the analytical methods designed for literary texts.

We argue that the principal goal of the intellectual advocates of LAL is to deconstruct (reveal, clarify, refute) many entrenched

dogmas about the law, its application, its objectivity and neutrality and to bring up to the fore a different paradigm – fluidity of legal content, subjectivity and liberty inherent in the processes of lawmaking and law application and, in general, the complexity of the legal phenomena. The second argument herein is on **ubiquity** of interpretation and not only the possibility, but necessity and usefulness of disciplines as distinct as literary theory and legal philosophy "hanging around together" from time to time. The third argument is quite novel – it is about an attempt to deconstruct the deconstruction itself and to create a more comprehensive analytical framework for the law-literature nexus.

4. *Deconstruct the deconstruction I: LAL is "neither novel nor dangerous"*[3]

Ancient Greece knew well about the very tight connection between law and literature – as a matter of fact art, philosophy (as a repository of the entire then human knowledge), religion and politics were all the four intertwined to an extent that it is not an exaggeration to say that any separation effort would be tantamount to untying a Gordian knot.

As long back in history as V century B.C., Sophocles preceded, not only in time but also in quality of definition, natural law theories by writing an eternal piece, *Antigone*, wherein the plot relates to her duty to disobey the king's order (the law) since the duty to respect her brother's natural right to a proper burial is a stronger one. In her known-by-all response to Kreont, Antigone bluntly spells out to the tyrant that his order, since he is only a mortal, cannot be stronger than the divine, unwritten, permanent laws which are not from today or yesterday but of an eternal validity that nobody can define or ignore. Antigone, the very first, but one of the strongest instances of both *law in literature* and *legal philosophy in literature* was both recognized as such and praised in terms of a sort of a literary critique by an antijusnaturalism crusader – Hegel. Thus, 2500 years later, only few hundred kilometers north of ancient Thebes, the locus of Antigone, the conflict between state law and natural law, also within family values context was a theme of a quite different *genre* (music) by a Serbian poet and singer Djordje Balashevic[4]. Our selection herein for a comparison and for illustration of law/philosophy/literature nexus is intentionally unusual, but not capricious or accidental – all of the three, in their own ways and within their own worlds dealt with the same issue – a law higher than the law of the State, the perennial and

[3] Paraphrasing the title of an article on proportionality, Jowell and Lester, *Proportionality: Neither Novel nor Dangerous*, in Jowell and Oliver 9eds), New Directions in Judicial Review, London, 1988.

[4] In a lyric song, inspired by a true event - the expulsion of Kosovo Serbs, *Do not break my locusts* (rather used and abused for purposes of daily politics), the author wrote, *inter alia*, "Following the letter of the law, I am the first to support that, this blood would not have been shed if the letter of the law had been followed".

favorite theme of legal philosophy, taken up throughout history by various forms of art as well[5].

5. *Deconstruct the deconstruction II: the many different meanings of the A[6] in LAL*

The standard phrase law and literature says a lot and little at the same time; the conjuncture should be further researched and the many possible different meanings of the A in the abbreviation should be clearly spelled out. The law - literature (art) nexus can be, for analytical purposes, broken down into several sub links:

•law as an art/literary subject. It is law *in* literature (art). The history of the world art and, correspondingly, of world literature[7] abounds with legal issues of all sorts as a principal topic of an artistic work or intertwined with other issues, composing the main plot. This symbiosis varies, in historical and cultural terms, from Sophocles to the lately ultrafashionable and omnipresent American-originated flood of what we may call "legal thrillers" and its subspecies, "judicial thrillers".[8] We will call this sub link illuminating and popularizing effect of literature on law. This sublevel is, as a matter of fact, law **and** literature in the strict sense.

•Art and, especially and foremost, literature as an instrument in the process of creation, study and application of the law. This is the most delicate and, we would argue, the most important one. Law **as** literature relates solely to those theories and reviews which see literature as an instrumental aide in the process of creation and application the law, not any analysis that researches on the relationship between the law and literature. The central part of the philosophy of one (maybe not only one of but THE ONE) of key post-

[5] Theorists have explored the link between the music itself, not, as in the present case, the lyrics of a song only, and law: Desmond Manderson, *Songs Without Music- Aesthetic Dimensions of Law and Justice*, University of Berkley, Berkley/Los Angeles/London, 2000. The author introduces the notion of legal aesthetic which, according to him suggests that the discourse of law is fundamentally governed by rhetoric, metaphor, form, images and symbols.

[6] It is very different (and or as) and the conceptual difference embodied in one simple conjunction demonstrates the importance of language.

[7] A recent brief reference to law and literature, covering the aspect of literary treatment of legal and political issues is the list of famous writers made by professor Mitrovic, starting with Sophocles, continuing with Shakespeare, Balzac, Dickens, Dostoevsky, Flaubert and rounding up with Camus, Kafka, Zamyatin, Huxley and Orwell. Dragan M. Mitrovic, *Teorija drzave i prava,* Beograd, 2010, p.141.

The Macedonian legal science in the past had offered, quite unlike the present situation, if not a regular practice then at least famous instances of brilliant use of literature in scientific and pedagogical purposes. *Нужда ради, закон измењава* (a quote from Marko Cepenkov) in 'Macedonian Criminal Law – General Part' by Gjorgji Marjanovic, whereby the author explains the institutes of самоодбрана and крајна нужда.

[8] Since the beginning of the 1990's, the U.S.A. has experienced a real flood of thrillers, having as a context of the story the way the legal system operates, full of legal subtleties and making the law closer to the general public. Many of them have later on been filmed as well; some becoming real blockbusters (let us mention the first one, "The Firm").

World War world legal philosophers – Ronald Dworkin is the idea of law as interpretation and therefore, inevitably, law as literature. This brilliant legal mind subsumed the following three subheadings: Is There Really No Right Answer in Hard Cases? How Law is Like Literature? and On Interpretation and Objectivity under the general heading LAW AS INTERPRETATION (Dworkin, 139-205). Law is deeply political, not in sense of personal or partisan politics, but in broad sense of political theory. The sense to be given to the propositions of law is the central issue of analytical jurisprudence, since the propositions can be very concrete or very abstract. Dworkin thought he solved the problem by introducing two novelties – the difference between policy based arguments and rights based arguments on one and by stressing out the role the legal principles play in the system, on the other hand.

•Ideas developed in literature as a potential or effective social and legal change agents i.e.as *fontes iuris* or at least public opinion makers, the later being prone to lead subsequently to legal and political developments. A recent interesting analysis coming from Belgrade – a political science professor devotes an article on the Islamic theory of state and law in the works of the Nobel prize winner, Ivo Andric and, especially, on the possibility of at least mitigating if not avoiding the horrors of the civil war in Bosnia in the 1990"s if the lucid literary predictions of Andric were timely noticed by politicians and public opinion in general.[9]

•Philosophers as writers (including legal philosophers as writers) and lawyers as writers, whereat law is, understandably, a key part of the story. Soren Kierkegord's Seducer's Diary,[10] stemming out of personal life of the spiritual father of existentialism (he broke off his engagement with Regina Olsen and wrote the book as a means of explaining and apologizing) is a brilliant piece of literature, but also an important source on the life and teaching of Kierkegord. The philosopher gave the legendary excuse for the abandonment – he loved her too much, she was too worthy in order for him to be with her (!). We learn a lot about Kierkegorord"s ideas on Christianity, ethics and aesthetics there from and, above all, get acquainted with a specific literary *genre* which is a form of indirect communication as well. Kierkegord remains faithful to his use of Socrates inspired irony and clearly plays with the text by creating a subtle, but discernible discrepancy between real thoughts and words uttered. The Diary is a must in studying the philosophy of the legendary Danish philosopher. The second bestselling book (after the Bible) of all times – the tiny *Prophet*[11] of the Lebanese philosopher Kalil Gibran is, besides the beauty of the discourse and the strength of the life philosophy within it, interesting in terms of political philosophy – are the cultural crossroads such as Lebanon where Islam, Christianity and Judaism tough upon each other, also a fertile contexts for insightful writing?

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[9] Jevtić, Miroljub, *Islamsko shvatanje države i prava u delu Ive Andrića,* Strani pravni život, Institut za uporedno pravo, Beograd, 2-2012, p. 252-270.

[10] In Macedonian, Сорен Кјеркегор, *Дневникот на заводникот,* Скопје, Ѓурѓа, 2011.

[11] In Macedonian, various editions and translations – one of them is Калил Џибран, *Пророкот*, Култура, Скопје, 1989.

Prominent lawyers writing on the law, but via non-traditional *genres*, thereby make the issues more comprehensive and attractive to general public – here the list is a long one, indeed. The Macedonian public had the opportunity to read the excellent novel of the French constitutional lawyer and *l''ancient juge du Conseil Constitutionnel*, Robert Badinter, titled *Death Penalty.*[12]

•Philosophers about art, legal philosophers about art. Aristotle devoted an entire treatise on art – *Poetics*. Poetics served, for centuries, as a guide to artistic critic.

•The exciting realm of interdisciplinary and, especially, multidisciplinary works and their scientific, teaching and practical usefulness. Western philosophy through a mysterious storytelling to a 14 year old Norwegian girl, brilliantly interwoven with a plot of its own, *The World of Sophia*[13] made philosophy, together with mathematics, the most afraid of disciplines for teenagers, a breath taking bed time reading both for parents and children. As of recently, Macedonia also has authors combining disciplines and *genres* – philosophy and a novel.[14]

•Law in and by itself not solely as an ethical, but an aesthetic experience. Besides life, knowledge, game (activities with an end in themselves), sociability (friendship), practical reasonableness and religion, *aesthetic experience* is the seventh value the natural law should aim at.[15] Finis is original on this, but not quite alone as to the idea itself in the most general sense. Law, ethics and aesthetics as inseparable categories has been a favorite ancient Greece philosophy topic, most notably of Aristotle and his *kalos meros*[16].

•Theory of language and legal philosophy. As long ago as 1961 and by a prominent, although moderate and balanced legal formalist, a famous book entitled Concept of Law[17] surprisingly contained no definition of the law or the legal system, exactly under the influence of the theory of language. Hart instead argued that specific legal concept should be analyzed through the lenses of a concrete meaning ascribed to them in a particular context. Obviously, the legal formalist advocated more attention to interpretation and co-operation between linguistics and legal science.

6. *Lessons for Legal Interpretation*

Interpretation, in the most general sense, means any clarification and discovery of the meaning(s), sense, content of a notion, phenomenon, message, event. Interpretation is present and significant not only for the legal science and practice, but in all other sciences and areas of life. In the contemporary world, the

[12] Робер Бадентер, *Смртна казна*, Скопје, Правен факултет, 1996 (превод Наум Гризо).
[13] In Macedonian, Јустејн Гордер, *Светот на Софија – роман за историјата на филозофијата,* Скопје, Три, 2011.
[14] Гоце Смилевски, *Разговор со Спиноза*, Дневник/Утрински весник, 2005.
[15] John Finnis, *Natural Law and Natural Rights,* Oxford, 1986.
[16] Dobrinka Taskovska, The Principle of Proportionality as a General Principle of Law in Legal Theory and Comparative Law, doctoral thesis (unpublished), Ljubljana, 2000.
[17] H. Hart, *The Concept of Law*, Oxford University Press, 1961.

interpretation as a process and a necessity continuously acquires in importance and complexity. Namely, the increase in number and variety of forms of communication (communication in the most general sense) among people, necessarily presupposes a need for interpretation of this communication, ascription of a certain meaning and the discovery thereof.

Each interhuman communication consists of a sender of the message, the message itself, a transmitting means of the message and a recipient of the message. Contemporary science operates with the category "sign", in sense of each and every phenomenon (word, gesture, sound, event, picture and other visual performance etc.) that contains, carries a certain meaning. Since the creator of the sign is a subject having certain specific characteristics which influence and shape the formation of the communicated meaning, then the meaning itself is being transmitted via a means and, finally, the former is being received by a subject which always possesses specific characteristics - it happens very often that the recipient of the sign ascribes to it a meaning different from the meaning ascribed to it by the creator of the message (the sender). Therefore, impediments and problems in communication are being created, leading to the necessity of interpretation. Interpretation, methods of interpretation and procedures of interpretation are of tremendous importance in all sciences, especially in social sciences, having regard to the phenomena they deal with.

In legal sciences, interpretation is one of, maybe the most important one among the phases of law application and, beyond any doubt, the most complex and demanding human activity related to the law. In Macedonian language, *толкување* is an autochthonous term and designates clarification, determination of the possible, the true, the most probable, the most likely meaning(s), understanding the sense of a text, event, phenomenon, behavior etc. Interpretation in law is a complicated intellectual operation of determining, discovering of possible and then, later on the next stage, the true, the most correct and the right meaning legal rules and other propositions the legal system consists of. *La question essentielle est alors de savoir s'il faut les interpreter "à la lettre" ou selon "leur esprit", s'il faut ne s'attacher qu'au sense strict des mots qui composent les texts ou en rechercher le sens profond, notamment à travers la pensée de leur auteur* (Bergel, 239)[18]. In the past, legal science used to explain the interpretation process as a determination of ratio legis i.e. the sense, the reason of the law.

Western legal science almost unequivocally uses the term methods of interpretation or methods of construction, the latter being more typical for the U.S.A. and rather telling about the way of comprehension and practicing of interpretation – construction clearly implies a very creative role on the part of the agent who does the interpretation. Researching throughout various legal cultures,

[18] "The essential issue is, therefore, to know whether one should interpret [legal texts] according to their "letter" or to their "spirit". Whether one should attach only the strict sense to the words composing the text or one should investigate the deeper meaning of the text, obviously exploring throughout the thought of the author".

contemporary legal science more or less knows about classifications of interpretation according to the interpretation agent, the binding force of the interpretation, means employed in the process of interpretation and the reason for interpretation of the legal rules.

The key disputed issue and the one most relevant to our topic, law and literature, is whether interpretation is intrinsically linked to any legal precept or the need for interpretation arises in some cases only. To put it differently, is interpretation (a) always; (b) sometimes or (c) rarely an indispensable instrument of law applying agents, institutions or individuals. In terms of another via language and communication performed *métier*, interpretation - who, when, what, why and how?

7. *Debut du siècle: prior and posterior to postmodernism*

Twelve years into the XXI century, some are simultaneously in a situation prior and posterior to postmodernism. Part of the world already thinks in categories unknown to postmodernism, due to the post - information society and related changes, some have not yet even heard of the term postmodernism in law and its analytical tools.

We doubt any lawyer had or will ever pay tribute to Dworkin and study literary, even less artistic interpretation in general. But, legal theory certainly has to. The first step is definitely to become aware of the potential nexus.

Law and literature actually has to serve as an incentive to an even more important co-operation endeavor – law and theory of language.

The deconstruction process, via identifying not two (and or as) but eight (*supra*, p. 10) results, may open provoking new fields of further research.

Interpretation in law must be demystified, as well as better acquainted with canons of interpretation in other types of interhuman communication.

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