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Law in terms of the challenges of the present times

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Abstract

The democratic state of law, despite being formed as an exemplary model of liberal democracy, has been facing challenges in recent years that prompt reflection on the formation of the state system through the prism of the theory and philosophy of law. This work asks to what extent the formation of the legal order from the point of view of the theory and philosophy of law may influence the durability of democracy or its lack, especially in countries where the democratic system was introduced only after 1989. The author concludes that the current point in the development of the democratic system defining it is a turning point at which the current balance of legal structures of the democratic system should be redefined. The proposed solution is to implement the modified legal concept of the social contract by John Rawls into post-war liberalism. The combination of trends currently present in liberal democracies and the theory of John Rawls, according to the author, should lead to the strengthening of the democratic system in the European Union countries and weaken authoritarian systems by preventing the use of the weaknesses of democracy to pursue their particular interests.

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I. Introduction

As far back as ancient times, prophet Zarathustra taught that every human had free will and, therefore, could choose between goodness and evilness. In the 21st century, humanity is not better than at the beginning of civilisation. That choice, available for everyone, forces society to set rules to maintain order. It is impossible to avoid chaos without establishing the law. Unfortunately, one true and ideal law does not exist because every era and generation has a slightly different, subjective view on questions of morality and conscience. The modern era and our part of the era – the contemporaneity – is also part of that rule.

People consider many events to be the beginning of a modern era. The most recognised option, however, is that the fall of the totalitarian regime of the Third Reich in 1945 was its beginning – the era of triumphant Western-style democracy, liberalism and the decline of other totalitarian regimes like Stalinism or Maoism... or so was thought. Main ideology of Western civilisation has always been liberalism, which included wide freedom of entity and fully implemented the idea of the rule of law. Progressive legislation or judicial decisions, such as the British Sexual Offences Act from 1967 or the American Roe vs Wade case from 1973 (an iconic example of both the development and current problems that liberal democracy is facing), cemented the liberal destination of Western law in the modern era.

The overthrow of the Maoistic system in China in 1976, their transition to a ‚socialist/capitalist system', and the fall of the USSR in 1991 marked the beginning of the present times. Unfortunately, they are not as favourable for democracy and the Western legal system based on liberal values and the rule of law as was the Cold War period. Western order, challenged by internal populists and external enemies, is wavering, and neo-authoritarian regimes, like modern China, are waiting for an opportunity to take over the hegemony over the world. Therefore, in such hard times, the biggest legal problem is the status of law in the context of democracy and human rights. Almost the entire achievements of the modern democratic system were built on the trauma caused by authoritarian and fascist systems in the 1940s and the struggle with the Russian communist regime. Despite the fall of communism, the main assumptions of liberal democracy, aimed at opposing all the „principles" of autocratic regimes, both in terms of individual freedom and market economy, have not been redefined. Regardless of previous successes and usefulness, even the best political and legal systems should be subject to the judgement of time and social reality. The reality in that more and more governments in Europe can be described as authoritarian; the United States is leaning towards autocracy and oligarchy and is no longer a reliable ally of the free world, and non-democratic countries, led by China and

Russia, are fueling internal and external unrest in Western society,[1] clearly shows that the current social, political and legal systems lack durability and are irresilient. The analysis of how to remedy this state of affairs should be comprehensive, based on the historical success of liberal democracy and current problems. It should consider the internal conditions of society and external pressures, growing disinformation and attempts to sow discontent and chaos. Finally, by summarising, from a legal point of view, it should answer a specific question – which law system can reverse the decline of Western values - ideas of legal positivism or common idea of natural law connected with an internal sense of morality?

II. History repeats itself

In pre-war Europe, legal positivism was the dominant doctrine. Even the Western legal system stated that every standard issued by an appropriate legislative body is a part of the legal system and takes absolute effect.[2] After the Second World War, that way of thinking was abandoned. The defeat of statutory law based only on state authority seemed irreversible. Even during the withdrawal and reconstruction of natural law ideas, e.g., just after the Second World War, liberal thought was visible in law statutes by legislative bodies. The source of authority, vested in parliaments or supreme courts, were the elections, made by and for people who mostly believed in liberal, democratic ideas and chose people who shared their beliefs.

However, in the new democracies created after the fall of the USSR, that solution was never fully embraced. Moreover, the concept of natural law gained a surprisingly big amount of unpopularity because, after years of subjective, authoritarian decisions, people wanted well-defined, efficient laws which would protect them from abuse of power by the state. This drift towards strong, statutory, positivist views (supported by liberal values at the moment of transition from a communist state to democracy, but not in further perspective) and reinforcement of the influence of the state (treated like a fair institution, not the ruling group) in political and economical regulations, is visible in many of the post-communist constitutions.[3]

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1 A. Applebaum, *Zmierzch demokracji. Zwodniczy powab autorytaryzmu*, (Wydawnictwo Agora 2020)

2 K. Białas-Zielińska, 'Koncepcje pozytywizmu prawniczego i iusnaturalizmu w ujęciu Gustawa Radbrucha', (Prawna i Ekonomiczna Biblioteka Cyfrowa 2010), pp. 66-70.

3 W. Hołubko, 'Transformacja administracji państw postradzieckich, od totalitaryzmu ku standardom europejskim', (2010) <.https://www.humanitas.edu.pl/resources/upload/dokumenty/Wydawnictwo/Roczniki%20AiP%20-%20pliki/Podzielone/Roczniki%20AiP%202010/holubko.pdf>, accessed: 13 May 2024.

Unfortunately, due to their former dependency, those states had no chance to form a truly civil society that could elect governments and legislative bodies guided by liberal values and oppose arbitrary, abusive laws. The young, post-communist democracies, in which legal positivism in authoritarian understanding became dominant over the Western theory of natural law, have slowly gone from some Western, liberal ideas. In extreme examples, their systems of government and law have become neither liberal nor stable.[4] Gustav Radbruch, a German lawyer, wrote in his famous article about the legal system of the Third Reich *Positivism, with its principle that 'a law is a law,' has in fact rendered the German legal profession defenceless against statutes that are arbitrary and criminal (...) It claims to have proved the validity of a statute simply by showing that the statute had sufficient power behind it to prevail. (...) But legal certainty is not the only value that law must effectuate, nor is it the decisive value. Alongside legal certainty, there are two other values: purposiveness and justice.* In those flawed democracies, the situation is not that bad; values and pieces of natural law are not forgotten, but the drift towards reality described by the German lawyer is visible[5].

III. Falling values of the Western world

The most powerful Western democracies, like the USA, United Kingdom and Germany, have been loyal to the system of natural law for the last 75 years. The natural law could be defined as a rudimentary, clear sense of rightness, which defines the moral value of actions based on realities of social existence. Conventional, statutory ideas of judgment are denounced in favour of communal reality, which balances a human, subjective view of natural law. Therefore, the main source of the natural law should be the precept of reason, directed by the internal sense of justice. If the sense of justice is disturbed, one should act in a way society does not forbid or see as unnatural. Differences in understanding of natural law should be imperceptible in the circle of the common civilisation. Sadly, the Western democratic civilisation, due to internal problems, has no authority to help or encourage flawed democracies to return to the rule of law. The West did not implement the system of natural law, which could be used more universally than in the boundary of one state. European Union is the most interesting example of implementing common, international, natural law, *ius gentium*, based on liberal, universal values. Despite having titular authority over flawed democracies, European complaints, injunctions and exhortations are

4 T. G. Ash, *Obrona liberalizmu. Eseje o wolności, wojnie i Europie*, (Biblioteka Kultury Liberalnej 2020), pp. 93-108

5 G. Radbruch, 'Statutory Lawlessness and Supra-Statutory Law', (Oxford Journal of Legal Studies, Vol. 26, No. 1 1946) pp. 1–11.

mostly ignored. The EU's actions often help maintain the ‚flawed' *status quo* but cannot restore the rule of law.

Based on the legal philosophy, progress made by humanity is doubtless. To be ready to face the new challenges, however, Western legal philosophy must face some old problems that are still up-to-date. One of the examples of such problems could be a view on the question of the natural law made by German professor Rudolf Sammler. He was a follower of neofascist doctrine and a theoretic of the natural law. In his works, he was convinced that there were always clear forms of thinking in the human brain, which allowed one to understand the idea of law independently of specific letters of law, which are always charged by the historical and social circumstances of its creation.[6] He thought that natural law reflects society's free will, directed to a common goal, defined by law, which should be objectively just, good, right and appropriate. The weak spot of his theory was that he defined those four adjectives as perfect criteria to rate the value of statutory law but not to dispute it, whatever the rating was. On the level of the state, the Western civilisation dealt with that statement by implementing the theories of Finnis and Rawls. However, regarding international relations, the West is still at Sammler's times. European Union rates the statutory law established by the flawed democracies almost unanimously negative but has neither power nor will to change the situation. After the extension of the European Union (so second the most important sphere of democracy) in 2004, due to economic and social crises, the EU lost many of its liberal allies in newly connected territories and became reduced to the most lawful states of ‚the Old Union'.

IV. Return of the participatory democracy?

It is obvious that statutory law, based only on the authority of the legislative body, even in constitutional systems, may be, combined with other social, historical and psychological circumstances, considered a straight way to establish an authoritarian regime. Fate of Hungary[7] (and Poland between 2015-2023)[8] is the best example of such a situation. It should be diverted from legal positivism implemented in a truly civil society, which used to work in the past but is hard to adopt due to the geopolitical instabilities of present times. Statutory law with no

6 R. Tokarczyk, *Historia filozofii prawa w retrospektywie prawa natury,* (Wydawnictwo Temida 2 1999), p. 289.

7 M. Csanádi et al., *Dynamics of an Authoritarian System: Hungary, 2010–2021*. (Central European University Press 2022).

8 A. Kustra-Rogatka, 'The Hypocrisy of Authoritarian Populism in Poland: Between the Facade Rhetoric of Political Constitutionalism and the Actual Abuse of Apex Courts.' (European Constitutional Law Review 2023).

appeals to values is not an answer, but is it the natural law and statutory law based on it? Well, not in the pre-war attitude of Stammler. However, the idea of natural law, described by John Finnis, is well enough to be successfully applied in Western democracies. Finnis wrote that natural law is a series of basic practical regulations present in the mind of every sane and conscientious human. He undoubtedly accepted the universal character of natural law, which, as something eternal, cannot change. Human views are subjective, but understanding the natural law through the ages was not so different in principles. By accepting this way of thinking, he could define natural law as not a system of standards that should be an example of statutory law. Instead, he viewed it as requirements based on common sense, which should always be included in statutory law. Moreover, the statutory law, which is correctly passed by the legislative body but breaks the natural law, is not law and should be treated as an illegal act. Extension of the ideas of Radbruch, who wrote: *A judge can never administer justice by appealing to a statute that is not merely unjust but criminal. We appeal to human rights that surpass all written laws, and we appeal to the inalienable, immemorial law that denies validity to the criminal dictates of inhuman tyrants*[9] is perfectly visible. In Finnis's concept, natural law is not a system of norms that should be an example of statutory law but rather a set of requirements based on ideas like the rule of law or human rights.[10] At the same time, Finnis's ideas remain so current that they are criticised by some natural law theorists as insufficiently grounded in the original assumptions of natural law, particularly those of St. Thomas Aquinas.[11] Nevertheless, the construction and interpretation are at best only partially inconsistent with Aquinas, and Finnis's original and innovative views on natural law, embedded in the teachings of Aquinas,[12] can be interpreted as a development of natural law ideas precisely on the historical and social grounds. This remains an important indicator of, on the one hand, anchoring in established thought channels, which could have led liberal democracy to its current state, and, on the other hand, the pursuit of innovation, which can be read as a new idea for the effective implementation of the idea of liberal democracy.

That attitude means ‚fighting'; participatory democracy can prevail and repel external or internal threats to liberal principles, like the rule of law and

9 G. Radbruch, *Statutory Lawlessness and Supra-Statutory Law,* (Oxford Journal of Legal Studies, Vol. 26, No. 1 1946) pp. 1–11.

10 J. Finnis, *Natural Law and Natural Rights,* 2nd ed., (Oxford University Press 2011), p. 23-25

11 Ibidem, p. VI-VII 415-417

12 S. Coyle, 'Natural Law Theory, „New" and Old,' (The American Journal of Jurisprudence 2023), p. 61-62

human rights.[13],[14] What is more, due to the values of humanity, means such as lobbying, money aid, credits, embargos, etc., can influence flawed democracies and strengthen the supporters of the rule of law. So, the natural law in Finnis' theory is a way of effective (secured by compulsion) defence of civilised values, compared to statutory law, which is a lower-ranking act.[15] Finnis' theory of natural law is the best solution to maintain stability and liberal ideas in traditionally democratic countries, but it does not answer this important question: How to restore values and a democratic system defined by modern law in flawed democracies or save the natural law system in current democracies, which are not yet well established?

V. Welfare state of law

People who now choose populists in many post-communist or backward countries were often disappointed by the incorporation of liberal democracy and law based on Western ideas. Fast westernisation, especially in terms of law and economy, became unacceptable for many low- and middle-class citizens, who profited mainly from the social help of the state. Young democracies did not have enough resources to continue supporting them financially. Ideas of Finnis could improve this situation. On the other hand, even the best law will fall when most citizens denounce liberal ideas of natural law (because of the deterioration of their living conditions, possibly brought on them by westernisation). That is why the status of law in the context of democracy cannot be limited to Finnis' theory of natural law. It needs something that could convince simple citizens to build a civil society in which both the criminal impulse from outside and internal, abusive projects of statutory law or irresponsible persons in the office would be denounced and condemned. It is similar to the modern social contract theory, as American professor John Rawls described in his work *A Theory of Justice.*

Justice as fairness – these are some of the most important words of that theory. The state, even if it is based on liberal values, can not enforce democracy. If the majority of people do not believe in a democratic system, it will not work, and quickly, it will succumb to the darkness of authoritarian tyranny. But if the citizens were convinced that success is achievable for everyone, and even if their

[13] T. T. Koncewicz, 'Demokracja walcząca w obronie Konstytucji', (2019) <https://archiwumosiatynskiego.pl/wpis-w-debacie/demokracja-walczaca-w-obronie-konstytucji/>, accessed: 5.02.2025

[14] A. Migen, 'Liberalizm strachu', in R. Fücks, R. Mainthe *Detoks po populizmie. Jak odbudować zaufanie do liberalizmu*, Biblioteka Kultury Liberalnej 2023

[15] Ł. Szymański, 'Granice omnipotencji państwa. Prawo naturalne w ujęciu Johna Finnisa', (Prawna i Ekonomiczna Biblioteka Cyfrowa 2010), pp. 47-55

efforts were unsuccessful, the state would not abandon them, and the democracy in the state would flourish. Rawls defines his concept of the modern social contract in two principles. The first sounds: Each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which is compatible with the same scheme of liberties for all.[16] That is the main principle of the liberal democracy. But people who are disappointed and eager to sell their political liberty in favour of well-being (so those people who are the biggest problem for the young democracies) receive the second principle: Social and economic inequalities are to satisfy two conditions: first, they are to be attached to positions and offices open to all under conditions of fair equality of opportunity. Second, they are to be to the greatest benefit of the least advantaged members of society.[17] It ensures people's right to help and care on the part of the state. A plurality of views – in boundaries of democracy – is maintained, but Rawls assumes that people who feel like a part of the state would not give their freedom to gain further benefits. They would know either that this is impossible to achieve, or they would be assured that they can achieve prosperity by working honestly. Based on education and the idea of the welfare state, that concept is the most important in the context of post-communist countries, where living conditions deteriorated significantly during the early democratic period. Rawls strictly forbids increasing social inequity in favour of the rich. The state, to ensure stability and maintain liberal values attractive to society, has to control a part of public resources and give the citizens unrestricted rights to benefit from it because the free market is highly unuseful in such situations. Moreover, it can only make the divisions deeper.[18,19]

VI. Conclusion: Revolution or evolution?

Nowadays, the crisis of natural law and liberal democracy, based on the ideas of Finnis, is perfectly visible. In the current level of human advancement, it is possible either to strengthen the current status of liberal democracies by reinventing their very foundations within boundaries of checked solutions or succumb to rebirthed tyrannies. Therefore, there is no alternative for law other

16 J. Rawls, *A theory of justice. Revised edition.,* (The Belknap Press of Harvard University Press 1999), p. 53.

17 Ibidem.

18 Stanford Encyclopedia of Philosophy, (2021) < https://plato.stanford.edu/entries/rawls/#JusFaiJusWitLibSoc>, accessed: 13.05.2024.

19 H. Przybyła, 'John Rawls i kategoria sprawiedliwości', (Studia Ekonomiczne AE w Katowicach 2006) p. 9-29.

than progressive stabilisation. Moreover – further liberalisation, so tempting on idealistic grounds, will always be named by the populist's so-called liberal revolution, which could put the entire Western model democracy in danger. The populists, present in every democratic country, are rallying the masses because liberalisation of law is crossing another legal, religious or social border, a border which they are not prepared to cross. To prevail in progressive legislation, liberal democracies must offer the masses something in return.[20] There is no need to invent further legal constructions to repair the law, and it's accepted in popular opinion, where democracy is based. Finnis' natural law, which controls the statutory one in courts and human minds, is connected with social solidarity, and the new social contract of Rawls is the best medicine for Western values wounded by extremists. The existence of many solid democracies, like Denmark, proves that a democratic, participatory, ‚fighting' system based on Finnis' theories, with implemented Rawls' social justice, is effective. It shows that if democracy could be saved, the legal defence of democracy and values should be extended to fairness and well-being of the citizens, which inevitably will turn into high social support for the democratic system – as was done in the mentioned Denmark. Therefore, in troublesome present days, the agenda of liberalism without social compensation to the citizens shall be denounced. Stabilisation of law for prosperity, transparency and justice shall be the key agenda of the USA and lawful parts of the EU. People who would come to a truly democratic, lawful country from abroad should be able to see a rich, liberal, lawful welfare state and compare that view to their reality. The ideas of social justice and solutions based on Finnis' and Rawls' papers should be spread internally and externally. And, when the time comes, and oppressed people rise again against the authoritarian system of abuse, the West should be ready for final liberalisation, which will bring the nation's ideas of law and stability not only for years but for much longer foreseeable future, and set the idea of natural law in the international level, as a seed for eternal *foedus pacificum.*[21]

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20 Ibidem.

21 A. Plichta, 'Johna Rawlsa koncepcja pokoju międzynarodowego', (Acta Erasmiana IX 2015), pp. 73-75

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