Chapter 1. Apolitical Jurisprudence: Crisis of an Idea and the Phenomenon of Populism[1]

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1. An Outline of the Problem

Recent events in Poland and Hungary, but also in the United States, the global hegemon under President Trump's administration, have triggered great public interest in the problem of the interface between law and politics (broadly understood), especially in those spaces and dimensions that have not been analyzed within the framework of mainstream media discourses.

Thus far, the problem of politicised law (of course, apart from in the legislative process, wherein the logic of political struggle is inscribed) has rather been tackled within the framework of niche discourses – usually professionalised and specialised ones. This also applies to the politicisation of jurisprudence or the legal sciences. Of course, from the perspective of the critical theory of law, or, more broadly, critical study of the law (including poststructuralist and neopragmatic reflection), the issue of the political dimension within jurisprudence and even the political character of jurisprudence is obvious. However, even within the professionalised discourses of law researchers, this perspective has not been disseminated very extensively – to put it mildly.[2]

[1] This article is an attempt to recapitulate the research undertaken as part of the research project "The idea of the apolitical character of legal science towards the critique waged by modern philosophy of knowledge," National Science Centre (Poland) project No. 2016/21/B/HS5/00164.

[2] Exceptions include: Rafał Mańko, "Nauki prawne wobec problemu polityczności: zagadnienia wybrane z perspektywy jurysprudencji krytycznej," *Archiwum Filozofii Prawa i Filozofii Społecznej* 2018, No. 3; Rafał Mańko, "Orzekanie w polu polityczności," *FPiED* 2018, No. 7(1); Rafał Mańko, *W stronę krytycznej filozofii orzekania. Polityczność, etyka, legitymizacja* (Łódź: Wydawnictwo Uniwersytetu Łódzkiego, 2018).

As I have pointed out elsewhere, Poland and other former countries of so-called people's democracy suffer from a widespread condition that I have termed "affirmative amnesia."[3] The point here is that official Marxism, which used to be the theoretical basis for the mainstream study of law, posited that "bourgeois" Western jurisprudence was ignorant of its obvious politicisation, in contrast to Marxist science, which was fully aware of its entanglements and considered the cognizance of this fact to be its undeniable epistemological advantage. The views of two recognised constitutionalists from the period of so-called "real socialism" provide a prime example of this attitude when they state straightforwardly:

> The legal science of Polish People's Republic is a science that does not hide its class character; that is, it openly admits that it serves the interests of a particular social class [...] Bourgeois science [...] was and is also a class science – serving the interests of certain propertied classes. The only difference is that bourgeois science hides its character under the guise of "apolitical character, "objectivity," "supra-classism."[4]

After the fall of real socialism, such views were "forgotten" and Polish jurisprudence became "part of Western jurisprudence," adopting a rather unreflective approach to its supposed neutrality. Populist political practice changed this state of affairs.[5] As is well-known, the Italian Marxist Antonio Gramsci, an expert on populist strategy in modern conditions, recognised that the political success of any revolution depends on delegitimizing the dominance of the existing establishment and its products. Unlike traditional Marxism, Gramsci acknowledged that it is possible to bring about political change solely through influencing the superstructure.[6] In his view, the key to change is to undermine and break the confidence of the popular masses in the status quo maintained by intellectuals and their products. As Gramsci wrote:

> Thus, there are historically formed specialised categories for the exercise of the intellectual function. They are formed in connection with all social groups, but especially in connection with the more important, and they undergo more extensive and complex elaboration in connection with the dominant social group. One of the most important characteristics of any group that is

[3] Adam Sulikowski, "Afirmatywna amnezja i konserwatywni crits. Kilka uwag o kondycji krytycznej myśli prawniczej w Europie Środkowej i Wschodniej," *Archiwum Filozofii Prawa i Filozofii Społecznej* 2014, No. 1.

[4] Stanisław Gebethner and Krzysztof Gościniak, in *Prawo państwowe PRL*, ed. Janina Zakrzewska (Łódź-Warszawa: PWN, 1964), 14.

[5] For the purposes of this paper, populism is understood primarily as a political strategy based on a symbolic juxtaposition of the imagined figure of the "people" with the figure of the establishment as the enemy. In addition, populism assumes that the power of a populist leader or political movement is identified with that of a mythical people. In my opinion, such an understanding is general enough not to generate contradictions of meaning with the terminology used by the thinkers referred to in this work.

[6] Antonio Gramsci, *Pisma wybrane*, Vol. 1 (Warszawa: Książka i Wiedza, 1961), 110.

developing towards dominance is its struggle to assimilate and to conquer "ideologically" the traditional intellectuals, but this assimilation and conquest is made quicker and more efficacious the more the group in question succeeds in simultaneously elaborating its own organic intellectuals (...) [Their goal is:] to receive the "spontaneous" consent given by the great masses of the population to the general direction imposed on social life by the dominant fundamental group; this consent is "historically" caused by the prestige (and consequent confidence) which the dominant group enjoys because of its position and function in the world of production.[7]

In this state of affairs, it is necessary to remove the spell of the intellectual mainstream by showing, on the one hand, the mechanisms of its influence on popular emotions and beliefs and, on the other hand, the specific political genealogy of intellectuals as the creators of these beliefs. The chain of argumentation is quite simple here: that which was previously regarded as politically neutral is now viewed as the product of professionals strongly involved in power relations – they co-create a balance of power, the *ancien régime* which must be overthrown for the sake of a more just order.

It is populist politics, rather than subtle analyses of critical theorists from Horkheimer and Adorno to contemporary legal critics, that draw attention to the political nature of jurisprudence, reveal it as problematic, and determine the crisis of the idea of political neutrality. Jan-Werner Müller, the author of the famous monograph on populism, indicates at the beginning of the chapter devoted to "What Populists Say" that the central theme for populist "talk" is to emphasise the asymmetry of the establishment's relationship with the people and demand that this state of affairs be changed in the name of democratic morality.[8] Populism's march through institutions, according to Müller, goes under the slogans of rejecting the limits of democratic control by exposing the legitimacy deficit of institutional spheres under the control of allegedly politically neutral professional groups.[9] According to Chantal Mouffe, an extremely important thinker for the theory of populism, the distinguishing feature of populism is the desire to reveal and disseminate knowledge of "violence being unrecognised and hidden behind appeals to 'rationality,' as is often the case in liberal thinking which disguises the necessary frontiers and forms of exclusion behind pretences of 'neutrality'.."[10] As part of populist policy, identity is created through the use/

[7] Antonio Gramsci, "Intelektualiści i organizowanie kultury," available at http://marksizm.edu.pl/wydawnictwa/klasyka-mysli-marksistowskiej/antonio-gramsci/intelektualisci-i-organizowanie-kultury/ (accessed on 25 November 2019).

[8] Jan-Werner Müller, *What is Populism?* (Philadelphia: University of Pennsylvania Press, 2016), 2–3.

[9] Müller, *What is Populism?*, 72.

[10] Chantal Mouffe, "Demokracja, władza i 'to co polityczne'," in *Paradoks demokracji*, Chantal Mouffe (Wrocław: Wydawnictwo DSW, 2005), 42.

creation of difference (these connected processes are indistinguishable), i.e. antagonistic difference, and forging it into an axiological conflict along the lines of the dominant/dominated.[11] In other words, the idea is to construct the identity of a "people expropriated from democratic decision making" mainly by revealing (and social engineering at the same time) the differences between the "people's approach" to what the establishment created, and to what it served to them as apolitical and neutral.

Here, I treat the explosion of populism as a social fact, as something too convincingly described to be doubted. What is more, this explosion is a kind of unwanted "effect" of critical theories which are mostly of a leftist nature – ones aimed at emancipation and expanding the sphere of human freedom. One must agree with Müller that the liberationist-pluralistic expression of populist postulates most often leads to the strengthening of exclusionary and repressive practices. It is possible to put forward the thesis, without courting too much controversy, that the potential triumph of contemporary populism is the greatest threat to the idea of politically neutral jurisprudence since the interwar period.[12] However, in order to shed some light on the specific relationship between populist assumptions and legal ideology, some genealogical remarks are necessary.

2. The Genealogy and Evolution of the Idea of Politically Neutral Jurisprudence

The idea of politically neutral jurisprudence (generally understood as professional, scientific discourses on law) is, in my opinion, as much liberal as it is post-theological. It clearly derives from the conviction that law is a component of *logos*, the divine scheme of the construction of the World and its Order – a conviction which was subsequently subjected to secularisation. Following the earlier, religious-dominated episteme, the Enlightenment perpetuated the assumption that wisdom is rooted in systemic thinking, in a kind of fidelity to the existing logocentric heritage of Western culture, although without the central figure of God as the source of the meaning of the World. When viewed from the outside, the belief – which was widespread almost until the onset of modernity – that the Western reason-logos provides reliable criteria for the judgment of

[11] Chantal Mouffe, *The Return of the Political* (London-New York: Verso, 1993), 141.

[12] Interwar authoritarianisms, such as Italian fascism, German Nazism, Francoist Spain, Salazar's "Estado novo" doctrine and practice, and in some respects also other doctrinal-political systems correspond to the meaning of populism as adopted here.

various ideas and conceptual systems, including those emanating from other cultures and periods, seems to be obviously religious in nature.[13] As the sages of critical theory, Max Horkheimer and Theodor W. Adorno, convincingly argue in their *Dialectic of Enlightenment*, although in a somewhat vague way, that the contradiction in the way of thinking developed in the Age of Enlightenment consists mainly in the fact that the belief in the possibility of knowing all beings through science is accompanied by the suppressed conviction of more reflective thinkers that what science provides is not a knowledge of being, but rather para-religious belief.[14]

In jurisprudence, the above contradiction revealed itself early on, in the codification programs of the Enlightenment. Among the thinkers of the era, the prevailing view was that there was a need to objectify the law. The point was not to just provide a simple description of legal practice. When applied in practice, the law, being a mixture of customary norms, the decrees of rulers, Roman traditions and the established habits of judges, was perceived by Enlightenment critics as being contrary to the requirements of natural reason. Therefore, it was postulated that the law should be transformed into an "instrument for improving morals" in the spirit of universal norms and values.[15] In this process, a certain paradox became apparent. On the one hand, legal science was to be based on the study and description of the objective and rational order associated with the concept of natural law, largely inherited, obviously, from bygone times. On the other hand, codification efforts proved that order cannot be based on the objective "being" of natural law, because in the course of investigations this turns out to be at most a heterogeneous set of beliefs, strongly entangled in the place and time in which they arose. Consequently, the existing "natural law," rather than being a tool for potential change, turned out to be dangerously conservative. As Katarzyna Sójka-Zielińska wrote, natural law "changed from a weapon of progress into an instrument opening the gate through which former practitioners could return."[16] That is why positive law was "established" – a law consciously created by man who, speaking in Kantian terms, had reached maturity. However, this did not entail an anti-theological upheaval. The cult of positive law was also based on a religious approach to writing. As Leszek Nowak noted: "apart from theology, there seems to be only one area of thought

[13] Cf. Tomasz Zarębski, *Od paradygmatu do kosmopolis* (Wrocław: Atut, 2005), 81.

[14] Theodor W. Adorno and Max Horkheimer, *Dialektyka Oświecenia* (Warszawa: IFiS PAN, 1994), 39.

[15] Witold Wołodkiewicz, *Prawoznawstwo w poglądach i ujęciu encyklopedystów* (Warszawa: PWN, 1990), 31–33.

[16] Katarzyna Sójka-Zielińska, "Wykładnia w programach kodyfikacyjnych epoki Oświecenia," in *Teoria i praktyka wykładni prawa*, ed. Piotr Winczorek (Warszawa: Liber, 2005), 85.

that defines itself with the term 'dogmatics,' and not without certain – justified – pride. This is legal dogmatics, and thus the science of various areas of law: civil, criminal, administrative, constitutional – to mention just the basic ones."[17] The philosophical foundations of positivism clearly have a theological genealogy: from the thetic conception of binding norms, through the rules of textual exegesis, to the particular vision of a rational legislator, who, according to Ernst Kantorowicz – a theorist important for both theology and the theory of law, has two "bodies": one living and concrete, the other eternal and ideal. [18] Hans Kelsen, whose thinking about the law dominated the continental jurisprudence of late modernity, wrote:

> The state also is essentially conceived as a person, and as such is merely the personification of an order: the legal order. The concept of the legal order enables us to apprehend as a unity the multitude of legal relations between individuals. But the abstract unity of the legal order is rendered palpable in the idea of a person, whose will signifies the content of this legal order, just as the will of God finds expression in the world order – whether as a moral order or an order of causal law. If law is the will of the state, then the state is the person, which is to say, the personification, of law. [19]

But how does the problem of political neutrality figure in this context? Without a doubt, it also has a theological character – political neutrality is an element of fidelity to the law, a drive to bring about the triumph of *logos*. Political neutrality manifests itself in interpretive passivity and obedience. The belief in the salvific action of instances derives from the Catholic tradition; the subject situated higher in the legal-theological hierarchy has broader powers because the hierarchy ensures order and protects against heresy. In turn, the Reformation tradition, and to some extent also the Counter-Reformation, postulates fidelity to the text for exactly the same purpose – the loss of faith will lead to a destruction of order, and chaos is a satanic invention. Politics is the domain of the will; it is therefore possible wherever the will is possible.

In Catholic theology, the concept of free will has to be one of the most perverse. Man is endowed with will, with the proviso that only by adhering to the rules of the divine plan can free will be preserved because succumbing to whims leads, in fact, to enslavement and the mere semblance of will. According to the classic representative of Catholic thought, Augustine of Hippo: "our

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[17] Leszek Nowak, "Metodologiczne kryterium demarkacji i problem statusu teologii," *Nauka* 2014, No. 3: 126.

[18] Ernst H. Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton: Princeton University Press, 1998), passim.

[19] Hans Kelsen, "Bóg i państwo," *Archiwum historii filozofii i myśli społecznej* 2014, No. 59: 361.

freedom is submission to the supreme truth of reason and wisdom."[20] Thus, it follows that free will is, from an external point of view, just a limited will. Only the God-legislator is possessed of unlimited will.

In other words, free and legitimate implementation of the will is permissible at the stage of creating rules. However, it is not advisable at the stage of their application or observance because there "true freedom is ensured by submission." Consequently, on the basis of post-theological positivism, volitional politics is possible only where the law is created as writing. There the freedom of the will is limited by a higher reason and sense. Hence, this explains the dual nature of the constitution (as both a statute and part of the positive order, and as a reason that goes beyond the legal order endowed with essentially unlimited content) – an issue I addressed elsewhere.[21] At the stage of interpreting the law, as action in accordance with the will, politics is subject to restrictions: it can be dictated only by necessity, or reserved for those whose bodies, if we use a Foucauldian metaphor, are properly trained by the institutional system, which minimises the risk of chaos. As Jerzy Leszczyński notes in his work bearing the significant title *The Positivization of Law in Dogmatic Discourse*, the paradox of positivism lies in the fact that it assumes the *a priori* nature of law, while simultaneously creating this *a priori* in discourse through the cult of rules and the acceptance of a certain dose of will, although to a very limited extent.[22] Legal positivism accepted the idea of political neutrality as fidelity to the rules and the text itself. This is in line with the broader tendencies of modern science, which developed the post-theological ethos of a faithful "reading" of reality based on the right method. Of course, this priestly belief was still accompanied in some form by a "heretical" thought based on the conviction that the status quo was far from the theological ideal. However, the tangible impact of such unorthodox thinking on the mainstream was limited.

3. The First Wave of the Crisis

The historical moment when heresy can be seen to be spreading is during the twilight of the legal-political *belle époque*, the intellectual symbol of which is the famous dispute between Hans Kelsen, a strong supporter of the post-theological

[20] Św. Augustyn, "O wolnej woli," in *Dialogi filozoficzne*, vol. III (Warszawa: PAX, 1953), 148.

[21] Adam Sulikowski, *Konstytucjonalizm a nowoczesność: Dyskurs konstytucyjny wobec tryumfu i kryzysu moderny* (Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, 2012), chapter 2.

[22] Jerzy Leszczyński, *Pozytywizacja prawa w dyskursie dogmatycznym* (Kraków: Universitas, 2010), 97.

approach to the political neutrality of law, and Carl Schmitt. The latter, it should be emphasised, did not belong to the relativistic tradition at all, and although he represented a counter-Enlightenment position, his position was not anti-theological. Schmitt perceived that the relative success of Kelsen's theory, which was based on the idea of the divine sovereignty of law, had been constructed upon a fairly significant understatement, or rather a paradox. The cult of law is based on the conviction that it has a specific content, at least with regard to the basic assumptions – concerning who rules in the state, the imponderable elements of state power, and the fundamental axiology.

At the same time, the real perspective of party politics and the arguments deployed therein prove that the individual participants involved in the power game understand the "dogmas of legal religion" in their own way.[23] In other words, everyone seems to consent to the notion of divine rule, but they perceive God in such varied ways that shared faith is actually a fiction. As Michał Paździora and Michał Stambulski noted, referring to Lacanian concepts, the law became empty of meaning: "every political discourse could understand something different under a given concept and at the same time claim that it is the only just and politically neutral understanding."[24]

For Schmitt, such an assertion required a certain reset in the approach to law. Maintaining the fiction of non-political law, whose content is blurred in party struggle, is as senseless from a theoretical point of view as it is dangerous from the point of view of state pragmatics. For Schmitt, politics is based on the friend-enemy opposition. Politics is a struggle against the enemy, and since law is used in this struggle, it implies that the law is involved in politics. The point is that the political nature of law is, firstly, hidden and, secondly, entangled in party interests, whose games weaken the state and divide society along artificial lines. According to the prevailing interpretation of Schmitt's theories, the situation in which politics dominate over law is somehow a natural state. The rule of law is a fiction. The content of law should therefore be explicitly political, as should be its application, interpretation, etc. Schmitt advocates the takeover of power by a real sovereign, one who is able to give political sense to the law by subordinating it to the requirements of a "state of emergency" and defining the enemy. Thus, law will facilitate the creation of a uniform society of friends who are ready to fight a real enemy – also by means of law. In this way, the law

[23] Carl Schmitt, *Teologia polityczna i inne pisma*, translated by Marek Cichocki (Warszawa: Aletheia, 2012), 45ff.

[24] Michał Paździora and Michał Stambulski, "Co może dać nauce prawa polityczność. Przyczynek do przyszłych badań," *Archiwum Filozofii Prawa i Filozofii Społecznej* 2014, No. 1: 56.

will become real, gain political content, and cease to be an empty and seemingly politically neutral totem.

Another interpretation of Schmitt is offered by Jerzy Zajadło:

> […] the point for Schmitt is not a permanent state of emergency, but about a moment of beginning, a starting point, a decision that creates a new political-legal order from ground zero, out of "nothing." This symbolic "nothing" only means the complete primordiality of the initial legitimacy, but it does not entail its total arbitrariness [...]. After the "exceptional state" of the original decision, the original resolution, comes, however, "normality," which is the natural environment of law as the main component of a specific order and policy conceived in terms of acting for the common good. [25]

However, it cannot be denied that, in the text entitled *Der Führer schützt das Recht* [The Leader Protects the Law], Schmitt clearly identified with and supported the Nazi vision of society in which loyalty to the leader in every aspect (including the approach to the law and its interpretation) was a key element in building the political community.

The way of thinking described above clearly fits the previously mentioned conception of populism outlined by Müller – the existing "amorphous" political nature of the law, masked by the narrative of its alleged rule, must give way to a real "embodiment." The theory and practice of Nazi jurisprudence and, interestingly, Soviet jurisprudence—in which the ideas of Yevgeny Pashukanis, firmly rooted in traditional Marxism, were replaced more or less consciously by Andrey Vyshinsky's Schmittian visions[26] (i.e. the key role of central command, loyalty to the power center in every aspect, the fight against the external and internal enemy as the basic tasks of the Soviet state, the state of permanent revolution as the equivalent of a state of emergency)— permit the formulation of the thesis that, in a totalitarian system, the specific "political neutrality" of jurisprudence, understood as the invincible reality of law, the extreme limitation of doctrinal discretion, axiological cohesion, and the ability to fill gaps in accordance with the logic and grammar of the system, was achieved through extreme politicisation, understood as systemic loyalty to the central political power and the strategy it implements.

Similar tendencies, although of course in varying degrees, were apparent in many regimes, which, using Müller's conception, can be considered populist and authoritarian. As A. Kozak once remarked, totalitarianisms and authoritarianisms constituted "spasmodic attempts to regain certainty and

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[25] Jerzy Zajadło, "Prawoznawstwo – polityczność nauki czy nauka polityczności?," *Przegląd Prawa i Administracji* 2017, No. 110: 45.

[26] Adam Lityński, *Prawo Rosji i ZSRR 1917–1991, czyli historia wszechzwiązkowego komunistycznego prawa (bolszewików): Krótki kurs* (Warszawa: C.H.Beck, 2010), 9ff.

legitimacy in accordance with the rules of the game established before the Enlightenment." The character of Judge Roland Freisler, the President of the People's Court extremely loyal to the National Socialist ideology, and especially his behaviour during the July Plot show-trials, i.e. proceedings against the perpetrators of the unsuccessful plot to stage a coup after assassinating Hitler in the Wolf's Lair, may provide a representative picture of totalitarian – or more broadly authoritarian – thinking about law and jurisprudence. Indeed, any "autonomous" legal institutions, such as the right of defence or instances, were treated as relics of the old politics, which were hostile to the overtly political needs of the current authorities; the doctrine was expected to respond decisively, to declare unwavering loyalty to the leader, contrary to the habits and traditions of legal thinking. In other words, in view of the theoretical and practical impossibility of achieving non-political jurisprudence, the solution is to bring about an open and full politicisation of jurisprudence.

In a book published in 1936, written in collaboration with Franz Gürtner, a criminal lawyer and Reich justice minister, bearing the significant title *Das neue Strafrecht: Grundsätzliche Gedanken zum Geleit* (New criminal law, Reflections on the Directions of [changes]), Freisler wrote: "Our future criminal law, which is people's criminal law, will have to be based on National Socialist ideology because the people and the National Socialist movement are one."[27] According to these Nazi criminal lawyers, the goals of criminal law, are:

> […] firstly securing and strengthening the unity of the blood of the German people and its life force, its essence and its manifestations; secondly, the fulfillment of the demand for retaliation, which inevitably results from the German concept of life and the moral need for self-purification of the people, as well as the recognition of the fact that loyalty to the people is honor, and honor is the very heart of human personality; thirdly, strengthening the readiness of citisens to cooperate in the reconstruction of the people, giving each member of the people the certainty that the state is fighting, with justice and firmness at the very head of the nation, to protect the entire nation and fulfill its moral demands of revenge. In this way, the inclusion of German legal ideology in the necessity of German life will be accomplished. Criminal law must reject the idea of neutral supranational and eternal law and adopt the principle: "Law is what benefits Germany." [28]

The chain of argument here is simple: daydreaming about a neutral approach to the law must be abandoned. The law must be ideologised because this is required by the objective need of the National Socialist movement and, consequently, the need of the German people (because the movement and the people are identical). It should be noted that, according to the logic of Freisler's

[27] Franz Gürtner and Roland Freisler, *Das neue Strafrecht: Grundsätzliche Gedanken zum Geleit* (Berlin: von Decker Verlag, 1936), 36.

[28] Gürtner and Freisler, *Das neue*, 40.

reasoning, maintaining the fiction of ideologically neutral law and, as can be deduced, politically neutral jurisprudence, would lead to the incompatibility of law with the vital and objective moral needs of the German people. Such neutrality would not be justified: neither pragmatically, nor—above all—axiologically. Expressing this thought in terms of post-theological narrative, it can be said that the political nature of the law is inevitable, but this does not mean a departure from "freedom as submission." In this context, politics becomes non-volitional: instead of promising freedom of action, there is a commitment to goals and principles becoming extensively bound together. However paradoxical it may sound, politics in the context of National Socialist law is essentially non-political because its ideological foundations cannot be rejected – it cannot be an object of political change.

As I have already mentioned, in Soviet totalitarianism, especially the Stalinist version, after Stalin's rejection of so-called legal nihilism,[29] there are many analogies to National Socialist thinking about law. Under Stalinism, jurisprudence and the process of applying the law had to be subordinated to ideology because, on the one hand, ideology had the status of undisputed truth and, on the other hand, because the existence of the state and the Soviet nation were under threat. The politicisation of law is therefore determined by necessity and does not entail (at least in theory) the introduction of an element of arbitrariness, i.e. a departure from post-theological "freedom as submission," but rather restores it to the status of true law – real and founded on truth, devoid of the artificial formalism of law as defined by a certain vision of rationality. It is no accident that the Stalinist theory of law was described as "socialist normativism."[30]

[29] The views of Mikhail Kozlovski are representative for the so-called legal nihilism. He wrote: "In this era, the law is not a code, an unwritten set of laws; armed people are fighting their class opponents, without any laws, without any special rules" ... Communist existence knows no law, … such concepts as crime and punishment will cease to exist," quoted from Adam Lityński, "Prawo bolszewików. Rewolucja i ewolucja," *Zeszyty Prawnicze UKSW* 2011, No. 4: 16.

[30] Adam Bosiacki, "Między nihilizmem prawnym a socjalistycznym normatywizmem. Z rozważań nad koncepcją prawa państwa stalinowskiego," in *O prawie i jego dziejach księgi dwie. Studia ofiarowane profesorowi Adamowi Lityńskiemu w czterdziestopięciolecie pracy naukowej i siedemdziesięciolecie urodzin*, tom II, ed. Józef Ciągwa et al. (Białystok-Katowice: Wydawnictwo Uniwersytetu w Białymstoku, 2010), 118; Olufemi Taiwo, *Legal Naturalism: A Marxist Theory of Law* (New York-London: Cornell University Press, 1996), 80.

4. Demoliberal Hegemony and the Contemporary Crisis

The collapse of the totalitarian and authoritarian regimes in Europe took different courses. The end of the Nazi regime came as a result of the defeat in the Second World War and the form of the state was imposed by the victorious powers. The Soviet regime went into decline mainly, it seems, due to the deepening economic failure, while the Iberian authoritarianisms decayed quite rapidly after the death of dictators. In the countries liberated from German domination, which found themselves within the West during the Cold War, there was a gradual reconstruction of law and jurisprudence in the spirit of demoliberalism. One of its basic assumptions was the thesis on the political neutrality of expert reflection, based on rational criteria.

Under the influence of American hegemony, a legal system was created that was generally based on the assumptions of continental positivism, but with legal expert bodies occupying key positions, that is the courts of high instance, in particular constitutional courts. Courts of high instance were able to make far-reaching adjustments to positive law in a liberal spirit, often ignoring statutory and even constitutional provisions in the process of building a specific "non-political" understanding of law in the form of the so-called *acquis constitutionnel*.[31] The role of jurisprudence (and above all of juristic dogmatics that are, in pragmatic terms, undoubtedly the key discourse in the system) in the implementation of the positivist post-theological idea of political neutrality involved making validating, interpretative and systematising conclusions that were affirmative with regard to—or at least non-critical of—the liberal jurisprudential strategies of legal expert bodies.

Of course, how dogmatic discourses functioned varied in practice, but, as Alexander Peczenik argued, their ideological assumptions can be considered as consistent throughout the continental West, which was gradually joined by subsequent states as totalitarian and authoritarian rule ceased to exist. [32] Interestingly, these assumptions also proved quite resistant to the influence of critique in the fields of linguistics and general philosophy, which in fact constituted a considerable threat to the theoretical foundations of legal dogmatics. As Artur Kozak observed, the foundations of dogmatics were threatened by

[31] I wrote about this in more detail in the already mentioned work Adam Sulikowski, *Konstytucjonalizm a nowoczesność*, Chapter 3, passim.

[32] Aleksander Peczenik, *Scientia Iuris. Legal Doctrine as Knowledge of Law and as a Source of Law* (Dodrecht: Springer, 2005), 2ff.

the collapse of the phenomenological conception of language, which assumed at the least the possibility of a strict correspondence between language and thought. An alternative conception was created by hermeneutic and structuralist concepts. Both are based on the assumption of the inadequacy of thought and language, (...) Both also seek alternative categories to language as it is traditionally understood, reaching primarily for conversation and discourse, and are caught up in the crisis of referentiality.[33]

The assumption of referentiality is the foundation for the legitimacy of dogmatic activity. It grounds the official relationship of correspondence between the products of the legislator and those of the dogmatics. Though this is seldom realised by dogmatists, this relationship legitimises their efforts and at the same time is a necessary condition for being able to view dogmatic intellectual operations as politically neutral. In general, Western dogmatics ignored the crisis of phenomenological epistemology. Dogmatic tendencies are, to some extent, consistent with the more or less conscious strategy of survival adopted by other sciences. As Jürgen Habermas observed, after the disintegration of the philosophical foundations underpinning the idea of "one, coherent knowledge," fleeting and co-existing syntheses of specialised information have taken the place of general interpretations. In this way, scientism saves face: it manages to maintain not only the internal authority of science at a respectable level, but also preserves "everyday positivist consciousness."[34] In any case, relativistic tendencies in epistemology[35] did not undermine the position from which the representatives of dogmatics perceived themselves.

A real crisis only arrived with that of demoliberalism. Mouffe and Laclau attempted to elucidate the sense of this crisis and their diagnoses have recently returned to favour. It should be borne in mind that in the mid-1980s Mouffe and Laclau had already predicted that liberal democracy would be seriously weakened and had foreseen the return of populism and emotional politics, arguing that the contradictions between the liberal and democratic elements in

[33] Artur Kozak, "Dylematy prawniczej dyskrecjonalności. Między ideologią polityki a teorią prawa," in *Dyskrecjonalność w prawie*, eds. Wiesław Staśkiewicz and Tomasz Stawecki (Warszawa: LexisNexis, 2010).

[34] Jürgen Habermas, "Na czym polega dziś kryzys?," in *Teoria i praktyka*, Jürgen Habermas (Warszawa: PWN, 1983), 471.

[35] If we draw the consequences from the assertions of modern science studies, then the conclusion can be quite radical. It can be expressed in the words of an Italian philosopher: "there is no non-ideological zone of reality that would qualify as a zone of realism; it is not a zone designated and protected by an epistemological attitude established through science based on perceptive judgments – what is more, it is one of the most typical philosophical ideologies that still circulate in contemporary culture. [...] There is no science that would give us definitive guarantees, there is only the positivistic myth of such a science; moreover, talking about science in the singular actually makes no sense." Ferrucio Rossi-Landi, "Semiotyka a ideologia," in *Współczesna filozofia włoska*, ed. Andrzej Nowicki (Warszawa: PWN, 1977), 161

the dominant paradigm of governance would necessarily lead to this.[36] In the opinion of Mouffe and Laclau, the basic contradiction of liberal democracy lies in the fact that the liberal and democratic elements have completely different logics and intellectual foundations. The fact that they entered into partnership is the result of coincidental factors and the effects of this partnership are rather short-lived.

The liberal element – a certain vision of freedom and rights, usually associated with the elites – tends to dominate the democratic element. The liberal element is based on the belief that basing the social order on some imaginary consensus, the content of which is acceptable to all rational participants of social interaction, is a possibility and a necessity. The legal surrogate of this consensus was to be a jurisprudential-doctrinal complex established by experts, which is subject to petrification and neutralisation in the mainstream media and journalistic discourses. This surrogate is placed in the position of an indisputable order sanctioned by reason, which clearly limits the space for the democratic component of demoliberalism. The liberal component tends to systematise order and becomes the key to understanding laws and even the constitution. However, the content of the constitutional text is to some extent irrelevant. The text must give way to an imagined consensus in situations of conflict, that is when it cannot be "bent" through interpretation. The "liberal order" attains its hegemony, which, as Laclau notes, constantly places certain content into words that are "empty" of meaning (empty signifiers), such as "freedom," "equality" or "justice," which, as long as democracy functions, "surrender to power," i.e., can be filled with content imposed by a dominant political power for a limited period of time only (to the moment of *alternance politique*). [37]

The hegemonic filling of empty signifiers with meaning, and the juridification of the "liberal consensus" mean that all parties and institutionalised political forces must respect the status quo if they want to be taken seriously as law-abiding organisations; to avoid populism, political rationalists must respect the status quo. Consequently, they become similar to each other: professionalise and blend ideologically into a relatively homogeneous expert-professional complex. Real political conflict seems to have been eliminated. Politics, along with the individual and group competition for positions and influence, of course, persists, while the political is repressed, as an emotional and overt ideological attitude to the status quo. However, if you believe the

[36] Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (London: Verso, 1985), passim.

[37] Ernesto Laclau, "Dlaczego puste znaczące mają znaczenie dla polityki?," in *Emancypacje*, eds. Leszek Koczanowicz et al. (Wrocław: DSW, 2004), passim.

general diagnoses of Mouffe and Laclau, what is democratic, or rather what belongs to the political and difference, cannot be subdued. The political, as a primary antagonistic force, leads certain groups to create an enemy and over time creates identities uninterested in consensus, which formulate a claim for validity (this thesis distinguishes the diagnoses of Mouffe/Laclau from those of Schmitt – for the latter identities are *a priori* to conflict, while Mouffe/Laclau argue that they are created by populists). This is usually accompanied by a sense of disappointment and a lack of real democracy – the elite consensus ceases to appear to certain social groups as something pure, non-ideological, and objective; it begins to be perceived as dominated by enemies, or at best tolerant of those enemies. According to Mouffe, such a mechanism is a safety valve for democracy, one that threatens the liberal hegemony. The emergence of anti-systemic movements in this context is therefore a phenomenon inscribed in the logic of the contradictions in the bosom of demoliberalism.[38]

The return of populism, as I have already mentioned, poses a real threat to the idea of politically neutral jurisprudence. Whereas hitherto the existing balance of power had been treated as the only correct one, populism forces the view that this balance is political in nature into mainstream politics. Jurisprudence comes under attack and finds itself in a similar situation to Kelsen's normativism under Schmitt's fire. Of course, from an external point of view (and this is effectively imposed in the discourse), it is difficult to argue that the dogmatic status quo was ever something other than an affirmation of the current hegemony.[39] The impression of political neutrality is reduced to a subjective conviction. The dogmatist professing this view is perceived either as too naive or not reflective enough to embrace reality, or as a perfidious officer of the *ancien régime* who allegedly instrumentally uses neutral fidelity to the rules in order to defend the past. The inclusion of jurisprudence in the logic of friends and enemies, and supported by an accompanying social engineering, is in practice much more dangerous for assumptions about political neutrality than the epistemological crisis (of post-structuralism and neopragmatic relativism) mentioned above. Changes in the philosophical environment can, as Habermas argued, be quite effectively ignored by preserving positivist consciousness. However, political changes cannot be ignored.

If Müller is to be believed, an effective method of fighting populism may be to highlight its flaws and inconsistencies in specific political projects. However, this strategy must be implemented with the help of tactical actions effective

[38] Cosmin Cercel, "The Destruction of Legal Reason: Lessons from the Past," *Acta Universitatis Lodziensis. Folia Iuridica* 2019, Vol. 89: 25–27.

[39] Cfr. Mańko, "Nauki prawne," 46–49.