

JURISTS AS GAMEKEEPERS

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ABSTRACT

In the article the author proceeds from the metaphorical illustration offered by Zygmunt Bauman in one of his essays from 1987, in which he established a polarity between two basic views of the order of the world – modernism and postmodernism.

In Bauman's work, the role of an intellectual in modernism, for which the world is an ordered totality, is presented through the metaphor of a 'legislator,' and in post-modernism, which perceives the world as an unlimited number of models of order, through that of an 'interpreter.' While legislators produce and propagate rigid law, interpreters translate statements made within one communally based tradition so that they can be understood within the system of knowledge based on another tradition.

Further in the article, as a heuristic device to construe post-modern legal reason, the author draws on Bauman's view of the role of intellectuals in modern and pre-modern worlds through the metaphor of 'gamekeepers' and 'gardeners.' Gardeners have to design, supervise and oversee their gardens, lest they be overwhelmed by the wilderness from which they emerged, since a garden design – however well established – can never be relied upon to reproduce itself. Gamekeepers, on the other hand, do not tend the vegetation and animals which inhabit the territory entrusted to their care, rather they try to ensure that the plants and the animals self-reproduce undisturbed – the gamekeepers have confidence in their charges' resourcefulness. The author includes in this illustration lawyers as keepers of a multi-ordered world and deals with the factors of legal flexibility through history.

Key words: intellectual history, law, sociology, Zygmunt Bauman, modernism, post-modernism

I GIURISTI COME 'GUARDACACCIA'

SINTESI

L'autore procede dall'illustrazione metaforica proposta da Zygmunt Bauman in uno dei suoi saggi del 1987, nel quale discusse la polarità tra le due fondamentali visioni del mondo – il modernismo e il postmodernismo.

Nel lavoro di Bauman, il ruolo del lavoro intellettuale nel modernismo, che considera il mondo come una totalità ordinata, viene delucidato attraverso la metafora del 'legislatore', nel postmodernismo, invece, che comprende il mondo come un numero illimitato di modelli di ordine, mediante la metafora de 'l'interprete'. Mentre i legislatori producono e propagano un diritto intransigente, gli interpreti traducono le dichiarazioni fatte nell'ambito della tradizione di una comunità, perché possano essere intese in un sistema di sapere basato su un'altra tradizione.

Per meglio interpretare il ragionamento giudiziario postmoderno, l'autore attinge poi alla rappresentazione traslata di Bauman del ruolo dell'intellettuale nel mondo moderno e premoderno, illustrata con la metafora dei 'giardinieri' e i 'guardacaccia'. I giardinieri devono progettare, sorvegliare e vigilare i propri giardini per prevenire che questi vengano sopraffatti dalla forma spontanea e selvatica dalla quale sono stati derivati, perché un design di giardino – per quanto ben sviluppato – non può mai riprodursi da se, con le proprie risorse. I guardacaccia, invece, non si occupano delle piante e degli animali che si trovano nel territorio sotto la loro cura, ma cercano di assicurare che questi vi si riproducano senza interferenze – i guardacaccia hanno fiducia nell'ingegnosità degli esseri nel loro affidamento. L'autore include in questa interpretazione i giuristi come guardiani di un mondo di svariati ordini, ed esamina i fattori di flessibilità legale nel corso la storia.

Parole chiave: storia intellettuale, diritto, sociologia, Zygmunt Bauman, modernismo, postmodernismo

In a 1987's essay on the sociology of intellectuals, Zygmunt Bauman (Bauman, 1987)¹ establishes a polarity between two basic views of the order of the world, each one corresponding to (although not exhausted by) modernism and post-modernism.

¹ Bauman (Emeritus Professor, University of Leeds) is considered by Anthony Giddens as "the theorist of post-modernity". His most recent book is a brilliant search for a post modern morality.

"The typically modern view of the world – he writes – is one of an essentially orderly totality; the presence of a pattern of uneven distribution of probabilities allows a sort of explanation of the events which – If correct – Is simultaneously a tool of prediction and (if required resources are available) of control. Control ('mastery over nature', 'planning' or 'designing' of society) is well nigh synonymously associated with ordering action, understood as the manipulation of probabilities (rendering some events more likely, others less likely). Effectivity of control depends on the adequacy of knowledge of the 'natural' order. Such adequate knowledge is, in principle, attainable. Effectivity of control and correctness of knowledge are tightly related (the second explains the first, the first corroborates the second), whether in laboratory experiment or societal practice. Between themselves, they supply criteria to classify existing practices as superior or inferior.

Such classification is – again in principle – objective, that is, publicly testable and demonstrable each time the above-mentioned criteria are applied. Practices which cannot be objectively justified (for example, practices which legitimize themselves by reference to habits or opinions binding in a particular locality or particular time) are inferior as they distort knowledge and limit effectivity of control. Moving up the hierarchy of practices measured by the control/knowledge syndrome, means also moving toward universality and away from 'parochial', 'particularistic', 'localized' practices.

The typically post-modern view of the world is, in principle, one of an unlimited number of models of order, each one generated by a relatively autonomous set of practices. Order does not precede practices and hence cannot serve as an outside measure of their validity. Each of the many models of order makes sense solely in terms of the practices which validate it. In each case, validation brings in criteria which are developed within a particular tradition; they are upheld by the habits and beliefs of a 'community of meanings' and admit of no other tests of legitimacy. Criteria described above as 'typically modern' are no exception to this general rule; they are ultimately validated by one of the many possible 'local traditions', and their historical fate depends on the fortunes of the tradition in which they reside. There are no criteria for evaluating local practices which are situated outside traditions, outside 'localities'. Systems of knowledge may only be evaluated from 'inside' their respective traditions. If, from the modern point of view, relativism of knowledge was a problem to be struggled against and eventually overcome in theory and in practice, from the post-modern point of view relativity of knowledge (that is, its 'embeddedness' in its own communally supported tradition) is a lasting feature of the world" (Bauman, 1987, 3–4).

To each one of these *Weltanschauungen* will correspond to a different nature and role of intellectuals.

"The typically modern strategy of intellectual work is one best characterized by the metaphor of the 'legislator' role. It consists of making authoritative statements which arbitrate in controversies of opinions and which select those opinions which, having been selected, become correct and binding. The authority to arbitrate is in this case legitimized by superior (objective) knowledge to which intellectuals have a better access than the non-intellectual part of society. Access to such knowledge is better thanks to procedural rules which assure the attainment of truth, the arrival at valid moral judgment, and the selection of proper artistic taste. Such procedural rules have a universal validity, as do the products of their application. The employment of such procedural rules makes the intellectual professions (scientists, moral philosophers, aesthetes) collective owners of knowledge of direct and crucial relevance to the maintenance and perfection of the social order [...] Like the knowledge they produce, intellectuals are not bound by localized, communal traditions. They are, together with their knowledge, extraterritorial. This gives them the right and the duty to validate (or invalidate) beliefs which may be held in various sections of society. Indeed, as Popper observed, falsifying poorly founded, or unfounded views is what the procedural rules are best at.

The typically post-modern strategy of intellectual work is one best characterized by the metaphor of the 'interpreter' role. It consists of translating statements, made within one communally based tradition, so that they can be understood within the system of knowledge based on another tradition. Instead of being orientated towards selecting the best social order, this strategy is aimed at facilitating communication between autonomous (sovereign) participants. It is concerned with preventing the distortion of meaning in the process of communication. For this purpose, it promotes the need to penetrate deeply the alien system of knowledge from which the translation is to be made (for example, Geertz's 'thick description'), and the need to maintain the delicate balance between the two conversing traditions necessary for the message to be both undistorted (regarding the meaning invested by the sender) and understood (by the recipient)" (Bauman, 1987, 4–5).

Further in the explanation, Bauman uses another metaphor that deepens the range of the distinction, that between "gardeners" and "gamekeepers":

"Wild cultures', says Ernest Gellner, reproduce themselves from generation to generation without conscious design, supervision, surveillance or special nutrition. 'Cultivated' or 'garden' cultures, on the contrary, can only be sustained by literary and specialized personnel. To reproduce, they need design and supervision; without them, garden cultures would be overwhelmed by wilderness. There is a sense of precarious artificiality in every garden; it needs the constant attention of the gardener, as a moment of neglect or mere absent-mindedness would return it to the state from which it had emerged (and which it had to destroy, evict or put under control to emerge). However well established, the garden design can never be relied upon to

reproduce itself, and never can it be relied upon to reproduce itself by its own resources. The weeds – the uninvited, unplanned, self-controlled plants – are there to underline the fragility of the imposed order; they alert the gardener to the never-ending demand for supervision and surveillance.

The emergency of modernity was such a process of transformation of wild cultures into garden cultures. Or, rather, a process in the course of which the construction of garden cultures re-evaluated the past, and those areas that stretched behind the newly erected fences, and the obstacles encountered by the gardener inside his own cultivated plot, became the 'wilderness'. The seventeenth century was the time when the process acquired momentum; by the beginning of the nineteenth century it had by and large been completed in the Western tip of the European peninsula. Thanks to its success there, it also became the pattern to be coveted by, or to be forced upon, the rest of the world.

The passage from a wild to a garden culture is not only an operation performed on a plot of land; it is also, and perhaps more seminally, an appearance of a new role, oriented to previously unknown ends and calling for previously non-existing skills: the role of the gardener. The gardener now takes over the place of the gamekeeper. Gamekeepers do not feed the vegetation and the animals which inhabit the territory entrusted to their care; neither do they have any intention to transform the state of the territory to bring it closer to that of a contrived 'ideal state'. Rather, they try to assure that the plants and the animals self-reproduce undisturbed – the gamekeepers have confidence in their trustees' resourcefulness. They lack, on the other hand, the sort of self-confidence needed to interfere with the trustees' timeless habits; it does not occur to them, therefore, that a state of affairs different from the one sustained by such habits could be contemplated as a realistic alternative. What the gamekeepers are after, is something much simpler: to secure a share in the wealth of goods these timeless habits produce, to make sure that the share is collected, and to bar impostor gamekeepers (poachers, as the illegal gamekeepers are branded) from taking their cut" (Bauman, 1987, 52–53).

It is not by a linguistic hazard that Bauman used the concept of legislator to describe the modern ideal type of intellectual. Actually, modern legislators – those who invent and then disseminate all over the world the rigid law – fit exactly in the above description of:

- I. a self confident and authoritative intellectual;
- II. exclusive owner of a true and general (both supra-empirical and extra-territorial [or extra-communitarian]) knowledge about nature and morals;
- III. aggressively blind to existing normative arrangements or to alternative (namely, rooted, traditional, communitarian) approaches to social order;
- IV. capable of asserting the order of things (better, capable of imposing an order to the things);

- V. capable of deciding controversies according to monotonous standards and
- VI. capable of overpass empirical *aporias* by intra-systemic and coherent rearrangements (like: interpretation, analogy, even equity).
- VII. By opposite, medieval and modern lawyers were not legislators. They were *prudentes*:
- VIII. experts of scrutinizing different and nigh entangled orders (*diviniarum atque humanarum rerum notantes*);
- IX *Deus] omnia animalia docuit*;
- X. assuming the derived, local and limited nature of their arbitrations (*non ex regula ius sumatur, sed ex iure quod est regula fiat*);
- XI. claiming a role of mediators (translators, interpreters) between different normative sets (religion, piety, grace, friendship, community usages, princely will), through bridge concepts (like *pietas, natura, gratia, utilitas, usus, potestas absoluta, debitum quasi legalis*) that allow the conversation amidst, in both directions, local orders.

Contrasting with the colorful, detailed and historically updated chapters on the construction of modern intellectuals (legislators) (Bauman, 1987, 51–109), chapters on interpreters (Bauman, 1987, 110–148) are mainly attracted to the current models of post-modern intellectual function and practices. The reference to traditional folk culture (Bauman, 1987, 63 ss.) is almost the only token to pre-modern pluralism. Correspondingly, the evocation of the erasing of pre-modern sensibility is concentrated in the (brilliantly exposed) thematic of the new hierarchy between reason, interest and passion (Bauman, 1987, 55 ss.). The sudden oblivion and ruthless repression of the older pluralistic legal culture by the Enlightenment passed unnoticed, as it also is for the still dominant historical culture on the construction of modernity in Europe.

The brightness of Bauman's work – this book, but also *Postmodern ethics*, 1993, a fundamental piece in the reconstruction of a pluralistic (under several points of view) morality – is a sufficient reason to take it as the theoretical framework (and underlying *Vorverständnis*) of my exposition on flexibility in medieval and early modern law. As a contrasting case – as the example of the most authoritarian and self-confident legislator – I will present some topics on the rigidity of western law, as an imperial normative knowledge, during the golden age of European imperialism.

To take Zygmunt Bauman as the grounding stone for a lecture on law is a rather paradoxical decision. In fact, most lawyers, as well as non lawyers, will assume that law is irreducibly linked to modernism, so deep is the oblivion of older conceptions about societal order and so inevitable seems to be the current identification between law and State. I intend to prove that this not so.

However, I am also aware that, even if the proof succeeds, almost everything in legal theory has to be rebuilt to restore lost capacities

- I. to render visible the plans of emergence of order;
- II. to activate bridges between different societal orders;
- III. to control the validity of normative transactions between them;
- IV. to dress conjunctural hierarchies amidst normative constellations.

More than this. A momentous acknowledgement, with deep intellectual, political and existential incidences, has to be taken by jurists. Legal knowledge cannot expel neither politics nor personal commitment generating decisions. Any decision is always a risking bet, which can succeed or fail. Succeed or fail, in this context, is to build or not relevant consensus. So that to decide is to propose, with locally binding arguments, a solution able to be accepted and, therefore, to restore peace. Even a propulsive (programmatic) decision must comply with this compromissory nature, although in a higher level or scale. Actually, in spite of being refused by the proxy societal environment, it can be accepted if it is consensual in a higher, broader, *but not heterogeneous*, communitarian level.

MEDIEVAL LAWYERS AS GAMEKEEPERS

For medieval world view, order was an original gift of God. Aquinas – who exercises a momentous influence, before and after the council of Trento (1545–1563), even in the reformed countries – elaborated deeply in the concept of order. Its soundest manifestation was this attraction which moves things one to another according to their natural sympathies (*amores, affectiones*) transforming Creation in a huge network of organic symbiosis. In a *quaestio* on love (Aquinas, 1265–1274, q. 26, a. 3, resp), Aquinas defines love as the (plural) affection of things for the Order of the Whole. He underlines also that

- these affections are not monotonous, but drawn by the different nature of each thing (and of its relations both to the Whole and to the others), and
- expressed by different levels of sensibility (intellectual, rational, animal or natural).

This core idea of a global order, auto-sustained by natural and plural impulses, is the key to understand the place of law within the mechanisms of world regulation.

To begin with, it explains the proximity and tight relation between disciplinary devices today viewed as so distant as law, religion, love or friendship. Being the Order, in its origin, an act of love, and being the creatures innerly linked by affections, human (civil) law isn't but a rather rough and external device to correct an occasional deficit of this universal sympathy. In a higher layer of Order – because of their greater innerness – are other devices: those which trigger religious feelings or impulses of friendship, of liberality, of gratitude, of sense of honor or of shame. In a sense, they are yet more deeply related to Justice, as the virtue that "gives the due to each one" (*ius suum cuique tribuit*), or to natural law, as that "which Nature or God

taught to every animal" (*quod Natura [gl. id est Deus] omnia animalia docuit*). It's why theologians and jurists define this set of duties as nigh legal (*quasi legali*) (cf. Clavero, 1991), a token to the diffuse boundaries between the different normative territories.

Jurists are the keepers of this multi-ordered, self-ordered, world.

Their role is not to create or rectify the order. Nor to assess authoritatively the fair balance. Is rather to induce it from the nature, taking advantage of all the resources (*virtus*) of human sensitivity (*amor, bonitas, intellectus, sensus*), in an era where intellectual methods of finding the law were not yet deprived of non rational approaches (cf. Hespanha, 1992; 1997).² And then, they perform their role taking it for granted, letting it be, as it arises from spontaneous arrangements of things (namely, human things).

Legal *poiesis* is not up to them. Up to them is to note, to introspect, to sense, to belief, to remember, to ruminate and to interpret orders existing inside, outside, downside and upside them. To perform an unlimited hermeneutics of God, men and nature. And to find ways of putting it in a way that can gain a communitarian consent.

A constellation of normative orders

Love was, therefore, the glue of human communities. More exact would be to speak of loves (*philiae*), each one according to each kind of social relation (communication).

Aquinas (Aquinas, 1265–1274, qu. 26) lists a quite large series of human affections:

- love by kinship, based on natural communication;
- love by kinship and parenthood, based on generation;
- love by co-nutrition, based on common childhood;
- love by election, based on common enterprises;
- love by co-citizenship, based on the sharing of a common polity;
- love by camaraderie, based on military *compagnonage*.

To this list some other normative items could be added. To begin with, religion, an overwhelming source of obligations. But also, this harsh nature of non human things that make them evasive to many of our claims or desires: the rhythms of life and death, climate influences, gender specificities, conceptual or logic cogency. In a word, the nature of things (*natura rerum*).

Amidst these different types of love (and respective duties) a hierarchy and a communication surely existed. All the 26th question of the *Secunda secundae* da

² In general, all the essays included in Petit, 1997.

Summa theologica was voted to the exploration of the model of relating such different orders of duty: domestic obligations, duties of friendship, pragmatic solidarities, political bounds or injunctions.

In principle, the proximity to the source of the order (God, Nature) – the innerness – was a decisive asset. Revelation, divine law, were supposed to have a paramount position. Then the more external and voluntaristic canon law. In some cases, divine order precluded human orders. The best examples were the cases where the observance of human law induced in sin³. In other cases, divine order could only bent the stiffness of civil law (as in the case of adjusting it to the mildest positions of the *aequitas canonica*). Finally, civil law was also sensible to other *stimuli* coming from above: v.g., criminal judges had to temper the harshness of the legal law (*rigor legis*) with mercy (*misericordia*).

Thereafter, those orders where nature "speaks loud", like the domestic order, partially absorbed in the previous due to the sacramental nature of the marriage. Here, the transactions with law arose from the very nature (*natura, honestas*), inscribing in the *corpus iuris* the commands of the *natura sexus*. Weakness, indignity and badness of women; nature of sex (monogamist, hetero-sexual, vaginal – *vir cum foemina, recto vaso, recta positio*); nature of domestic community (unitary, monarchic); such were the data that the prudence of lawyers could translate in legal norms (Hespanha, 1993a; Hespanha, 1994).

As the family was not the only natural institution, other matrix of human relations had also their claims upon the law. Even those which today's legal culture considers as fully disposable, like contracts. Nature of contract (*natura contractus; also vestimenta pacti*) was the concept coined to import those claims to the local order of law (cf. Grossi, 1986).

The necessity and possibility of transcribing values from one order to the other was systematically tested. Between political order and law, mutual transactions were policed by concepts like (from politics to law): public utility (*publica utilitas*), common good (*bonum communem*), absolute or extraordinary power (*absoluta vel extraordinaria potestas*), possession of status (*possessio status*); (from law to politics), acquired rights (*iura quaesita*), stability of legal decisions (*stare decisis*), legal reason (*ratio iuris*).

As normative hierarchies were case-sensitive and the transcribing formulae had not a fixed efficiency, the result was an entangled and mobile whole order, whose concrete instantiations could not be foreseen with certainty. This is what can be called the variable geometry of common law (*ius commune*). Instead of a closed system of normative layers, whose reciprocal hierarchies were defined once forever, common law was a open and flexible constellation of orders whose architecture

3 Even here, the rule was not absolute: prostitution, although a sin, could be allowed in order to avoid the diffusion of promiscuity (*coitus vagus*).

could not be decided out of a concrete project of arbitration. Each normative order (with its solutions and global intentions: *instituta, dogmata, rationes*) wasn't but a heuristic topic (or approach) whose efficiency (of building, both normative and communitarian, harmony) had to be proofed. Therefore, it was up to the judge to supply an arbitrativ solution⁴ around which harmony could be found (*interpretatio in dubio est faciendam ad evitandam correctionem, contrarietatem, repugnantiam*) (cf. Grossi, 1995, 223–236; Hespánha, 1997, 92–97).

Flexibility through grace

However, legal flexibility was, furthermore, the result of the idea that – embedded in an entangled set of orders – the territory of law was a like hanging garden, suspended between Heaven and raw life. Legal norms, legal doctrinal maxims, legal justice were standards to life. Normally, they did well. But they were not the ultimate standard.

Like the rule of Nature (*causae secundae*) did to non human things, the rule of legal Justice instituted a pretty fair order to social behavior. However, above the order of Nature, as well as above the order of Justice, was the paramount and inutterable Order of Grace, tightly linked to the very Divinity (*causa prima, causa incausata*).

Because of its influence on the understanding of the geometry of the layers of order, it is useful to remember the theology of Creation, such as it was exposed by the great Iberian (and Italian) jus-theologians of early modern Catholicism (cf. de Soto, 1556, liv. I, q. 1, art. 1). The act of Creation, as first act, is a uncaused and free act, an act of pure (absolute) will, an act of *grace*. However, being God the Highest Perfection, the Creation is not an arbitrary act. Creation is not good (just) for conforming a goodness prior to God; but neither God could have wanted otherwise. Summing up. Creation is an undue and free act, but not an arbitrary act.

Besides this prime act, God develops order (adds higher order to the order) by other acts, also free and undue – other acts of grace (from which emerge the miracles). The general trend of catholic theology after Trento has been the restraining of God's free will, making Him less sovereign in the domain of the acts of grace. Insisting on the justifying role of men's actions. To catholic sensibility, actions were palpable, accountable, objective, facts, which forced God in His management of grace. Like vassals' services, which forced kings in the attribution of awards and benefits.

On politico-constitutional level, uncaused acts (as the edition of statutes or the princely acts of grace), which reshape or alter the established order, are, therefore, exclusive and extraordinary prerogatives of God's vicars on earth – the princes. Us-

4 "Arbitrium iudex relinquitur quod in iure definitum non est".

ing this extraordinary power (*extraordinaria potestas*), princes imitate God's grace and, as dispensers of grace, introduces a divine flexibility in human order. As Lord of Grace,

- he introduces new rules (*potestas legislativa*) or revokes old ones (*potestas revocatoria*);
- makes punctually inefficient existing rules (*v.g.*, dispensing law);
- modifies the nature of things (*v.g.*, emancipating minors, legitimating bastards, bestowing nobility to plebeian);
- reshapes and redefines the own of each one (*v.g.*, giving awards or benefits).

In a way, these prerogatives are the most visible face of the thaumaturgic power of kings. Theorizing on this "free and absolute" acting of kings, João Salgado de Araújo, a Portuguese political writer of the mid 17th century, uses expressly the word "miracle" (cf. Araújo, 1627, 44), while another one states that "the Prince can change squares in circles" (*mutare quadratos rotundis*, cf. Pegas, 1669, 308, n. 85.).

As *extraordinaria potestas*, as act out of the order, grace cannot be presumed. Therefore – in order to be clearly distinguished from inconsideration, mistake or violation –, the intention of using grace had to be expressed by means of appropriated formulae – *de motu proprio et potestate absoluta, non obstant, pro expressis, de certa scientia* (cf. Dios, 1994, 77 ss.). Through them, the king announced his intention of leaving the sphere of his ordinary power (of maintaining order, doing justice), using his extraordinary miraculous prerogative of vicar of God, Lord of Creation.

However, the momentous passage to the universe of grace doesn't introduce us in a world of absolute flexibility. On the one side, grace is a free and absolute act (*i.e.*, as is said in a conspicuous legal source: *plenitudo potestatis, seu arbitrio, nulli necessitate subjecta, nullisque juris publici limitata*, [a full power or will, free from every necessity, unbound of every limitation of public law], *Cod. Just.*, 3, 34, 2). On the other side, grace is not an arbitrary decision, as its invocation must comply with a just and elevated cause (*salus & utilitas publica, necessitas, aut justitiae ratio*). Finally, it didn't exempt neither the observance of equity, good faith and fair reason ("*aequitate, recta ratio [...], pietate, honestitate, & fidei data*"), nor the duty of a fair indemnity to those collaterally affected (cf., with further details, Hespánha, 1993b; Dios, 1994, 264 ss.).

As grace is not the full arbitrariness and instantiates rather a paramount layer of order, princely *potestas extraordinaria* appears not as a violation of justice, but rather as a sublimated complement to it. To João Salgado de Araújo the government by extraordinary means or out of the due course of administrative matters (the famous and controversial "joints") represented the ultimate way of fulfilling justice when this could not be achieved by ordinary means (Araújo, 1627, 46).

"As the sovereign Prince is the sea of all earthly jurisdiction of their realms, which he exercises through His Royal Person and his ministers [...], in any case that

touches his royal obligation and conscience, he can and he must dry the channels of ordinary justice and diffuse it by others, always in order to the best way of ascertaining the truth and of doing justice [...]" (Araújo, 1627, 46).

This kind of flexibility corresponded, therefore, to the existence of successive layers of order. The most elevated they hung, the most hidden and unutterable they were, Flexibility was thus the mark of human impotence to exhaust, at least by discursive means, the whole order of nature and mankind.

Flexibility through equity

Equity was another factor of flexibility. The discussion on equity was a long one in European legal tradition (Vallejo, 1992), evoking rather different problems. In the 12th century, Gracian linked to this question of the legitimacy of privileges, *i.e.*, singular normative provisions that opposed general norms: "Therefore, we conclude from the previous that the Holy Mother Church can preserve to some their privileges and, even against general decrees, bestow some special benefit, considered the equity of the reason, which, as mother of justice, in nothing differs from her. As, for example, privileges bestowed because of the religion, of the necessity, or to manifest grace, since they don't harm anyone (*Gracian's Decretum*, II, C. 25, q. 1, c. 16).

This way of posing the question identifies the problem of equity with that of grace. To express the idea of grace / equity as a paramount normative order, unutterable in terms of the general propositions of justice the above text uses the colorful image of a maternal relation between mother and daughter. They are the same, though there is some kind of superiority of equity, as mother / source of justice.

Another, more elaborated, step is Aquinas' discussion on justice and equity (Aquinas, 1265–1274, qu. 80, art. 1). The departure point is Aristotle's statement that equity (*epieikeia*) was a virtue annex to justice. Using his peculiar technique of reasoning (*quaestio*, progressing from a local problem to wider and wider questions), Aquinas arrives to the crucial point when he recedes to the conclusions of a previous discussion on the nature of *gnome* (Aquinas, 1265–1274, qu. 51, no. 4; "If *gnome* is a special virtue"):

"I answer that the habits of knowing are distinct, as they are grounded on higher or on lower principles. Thus, the knowledge of speculative things deals with higher principles than those of science. Those things that are beyond the order of inferior principles or causes are evidently dependent from the order of higher principles: for example, although monsters are beyond the order of active forces of semen, they fall under the order of higher principles, like heavenly corps or, beyond them, under the order of divine Providence [...]. However, it happens sometimes that it is necessary to do something that is beyond the rules of common acting [...] and thus, in this case, one must arbitrate according to principles higher than the common rules according to

which decides the *synesis*. To arbitrate according to those higher principles one needs another judicative virtue, called *gnome*, which asks for a certain perspicacity of judgment [...].

"[...] Everything that can happen beyond normal course of things must be considered as belonging solely to divine Providence. Anyway, amidst men, that who is more penetrating can arbitrate many of these things by the use of reason. Gnome relates to this, asking for some discernment of judgment".

This insight in the underlying psychology – that confirms, in an expressive way, what has been said about the different layers of order – allows a sharper distinction between justice and equity. Going on his analysis of Aristotle's statement about the difference (although under the form of "annex virtues") (Aquinas, 1265–1274, qu. 80, art. 1, to ns. 4 and 5), Aquinas distinguishes between legal (general) and particular justice, restraining to the first the otherness with equity. On contrary, equity and particular justice would be one and the same thing, corresponding to the *eugnomo-syna*, which Aquinas defines as *bona gnome* [knowledge of good] and identifies with the above *gnome*.

Later on, discussing equity as virtue (Aquinas, 1265–1274, qu. 120, art. 1; "If equity [*epieikeia*] is a [self-standing] virtue"), Aquinas retakes the problem in poorer terms, dealing with problems of interpretation, namely the non-correspondence between legal words and legal spirit:

"To no. 1 must be therefore said that equity doesn't drive away from every just, but only from that just that is fixed by law. Even in this case, equity doesn't clash legal just with severity, complying with the truth of law only in these things that are appropriate. Actually, obey to the words of the law in inappropriate cases is something vicious". And quotes a Roman constitution on the violation of the spirit of the law by a strict respect by its words (C., 1, 1, 14, 5, "Undoubtedly violates the law that who, grasping the words of the law, takes position against its will").

But later in the same book (Aquinas, 1265–1274, qu. 120, art. 2; "If equity [*epieikeia*] is a part of justice"), the issues regains a widest range, although without the grounding references to the conceptions related to the articulation of the layers of order.

"[...] From here we derive that equity is a part of justice. We speak of justice relating to equity in a proper way than relating to legal justice. Actually, legal justice is directed by equity. Hence equity is a superior (so to say) rule of human actions.

Concerning no. 1, it must be explained in what extent legal justice corresponds properly to legal justice, in what extent equity is contained it and in what way it exceeds legal justice. In fact, if one defines legal justice as that which tempers [statutory] law, either regarding the words or the intention of the legislator (which is more), then equity is the most powerful part of legal justice. But, if one defines legal justice only as that which tempers law in literal terms, then equity is not a part of le-

gal justice, but rather a part of justice taken in a common sense, distinct of legal justice in so far the prior exceeds the later.

Concerning no. 2, one must say that, as it is said by the Philosopher [Aristotle] in Book V of *Ethics*, equity is a better justice than legal justice, which comply with the words of law. In fact, although legal justice be some kind of justice, it is not the better of all".

After the secularization of the world and the triumph of rationalism, the idea a super-natural and hidden sphere of order, from where a tempering of law becomes possible, lost all its sense. Grace, as an unbound criterion of adjusting general law to particular cases, was expelled from law. The only remnants – such as pardon and amnesty – were entrusted to supreme political power. But even here implicitly bounded by objective, generalizable, criteria. Definitely, grace and equity seem to be no more of this world.

The idea of non rational, non discursive, insights in this paramount layer of order was also the basis of the theory of law as an argumentative discipline (cf. Viehweg, 1953), the theory of *arbitrium iudicis* (cf. Hespanha, 1988), as well of the guidelines of the deontological portrait of the lawyers (cf. Hespanha, s.a.).

COLONIAL LEGISLATORS

Early colonial legal constitution combined a basic respect for indigenous polities, rooted in the pluralism of classical European learned law. Although belonging to the humankind, native populations were not "natural vassals", and, so, didn't participate in the metropolitan legal sphere. This situation of legal pluralism or mixed jurisdiction was normal in the context of early modern political and juridical imagery. Several powers, several political status, several laws shared social space, none of them pretending the exclusive social regulation (cf. Pagden, 1982; Clavero, 1994; Hespanha, 1995; Pagden, 1995).

This pluralistic attitude was wider in cultural areas that impose respect to Europeans for their brightness and religious "neutrality". This was namely the case of India and China, where the Portuguese, since the beginnings of Expansion recognized the institutions of Hindu (but not Muslim) and Chinese communities. In some core districts of Goa (Ilha de Goa, Portuguese State of India), for example, the usages of Hindu villages were recognized and codified in 1526, fifteen years after the Portuguese conquest. In Portuguese settlement of Macao, Portuguese justices have never dealt with Chinese litigation or even criminality (Hespanha, 1995).

Early proto-anthropology, based on ancient ideas about nature of civilized and barbarian men, tamed the sharpness of this principle, allowing the disrespect of native institutions as far as they manifest a underdeveloped humanity (Pagden, 1982). On the other side, this very idea of the undeveloped humanity of natives promote

their assimilation to children or peasants (*rustici*), subduing them to the model of a patriarchal rule, also used in Europe towards rustics (Hespanha, 1983b). Like the European peasantry (or other "weaker people", like women or children), indigenous also deserved a mild recognition of their customs and regime, tempered by a solicitous and paternal care, in order to protect and guide them. More than regulative implications, from this pattern sprang an epistemic attitude of devaluation of indigenous institutions, based on their less capability. This attitude had also a ravaging quotidian outcome, although disguised in a protective domestic solicitude, preparing the racist predicament of the 19th century.

In Catholic countries, after Trento's council (1545–1563), the religious militancy in Catholic colonialism was yet stressed, springing from religious to civil matters, and constituting the most notorious source of dismantling of indigenous rule. In this sense, a Catholic colonialism must be identified as a specific ideal type of colonial dominance. It must be stressed that this religious militancy existed both home and overseas. Similarities between indigenous peoples and dissident or resistant religious layers of the European society have been identified and practical disciplinary and catechetical inferences have been drawn from it.⁵

The "Catholic colonialism" introduced a centrifugal dynamics in crown colonialism. Royal power was conceived as a solidary "arm" of the ecclesiastical power. Therefore, (national or Roman) Church got some kind of paramountcy, according to which it was entitled to control colonial polities, at least on matters related to faith or moral and ecclesiastical discipline, and to impose correspondent legal norms. In spite of disturbing conflicts between Portuguese crown and Church, related to the slave trade in Africa, to the control of native villages in Brazil and Paraguay or to ecclesiastical discipline and organization in China, the model functioned for almost three centuries. The emblematic institution of this political coupling has been the (royal) Court of the Holy Inquisition, which had a pervasive and permanent disciplinary action in Latin America and in the Portuguese State of India. Both ecclesiastic and secular matters were under its jurisdiction. Its role in the subversion of everyday local order has been the most decisive, amidst all the colonial political dispositives.

These exceptions to a full recognition of indigenous self-rule were combined with a quite autocratic conception of colonial government. Unlike regular home state servants, colonial officers were conceived as extraordinary magistrates⁶ (viceroys, captains, commissioners), whose competence escaped from the rule of law. Their government was direct by decisionistic, opportunistic, casuistic and experimental criteria; and not by the standards of the legal or learned law. Their statutes were issued di-

5 On the assimilation between missionary activities and discipline amidst European *rustici* and American Indians, see Prospero, 1997.

6 Using a *extraordinaria potestas*, like military chiefs (*duces*) or king's *ad hoc* delegates (*commissarius*); for the concepts, Hespanha, 1984.

rectly by the king's chamber; their operation took place thousands of miles from home, in a completely foreign landscape where the *exempla* codified by jurists could not work. Only their judgment and will made law.

These last traits of legal imperialism did not dismantle the substantially pluralistic approach of European classical colonialism towards native law. However, Catholic dogmatism and decisionistic government were surely forerunners of 19th century legal imperialism.

Imperial knowledge

In the later colonialism (late 18th–20th centuries) law played a more systematic, yet paradoxical, role. Now, the axiom that European order and law were the framework of whatsoever human order became central. Therefore, what had to be justified was the leniency towards indigenous institutions.

The new (rationalist) political *episteme* concerns both law and state. Law is now conceived as the offspring of a natural, universal, human reason (jus-rationalism), which sparkled in every human mind. On the other hand, proper polities are imaged as obeying to a sole and centralized ruler (sovereign, state), fostering public interest and a reasoned (enlightened) political wisdom.

The model included a paradoxical moment that hampered colonial theory decades along. How was it that, being legal and political reason a universal feature, there were open contradictions between colonizers' and indigenous juridical values? And how was it that, being the things so, colonizers' reason had to correct native reason? Anyway, the expansive force of rationalist model, both in political (State) and legal (statute, official law) dimensions, was strong enough to veil the paradox. Only by the end of 19th century, a sociological "realism", relying on racist theories, solved the paradox by recognizing the gradualism of the fulfillment of reason amidst humans.

Also in this imperialist phase, the colonialist role of law wasn't so different from the role it played at home in the disassembling of Ancien Regime polities. Arguments and strategies that have been developed to undermine domestic order, peripheral polities, social hierarchies, local "customs" ("law" being reserved for state discipline), informal dispute settlement, popular legal reasoning and ascertaining, applied both to European traditional corporations (Hespanha, 1983; Hassemer, 1976; Santos, 1980)⁷ and to colonial polities.

The major traits of the new pattern of colonial law were:

- Universalism: legal values are universal and therefore common to metropolis and colonies.

⁷ In general, on the repression of popular culture, Bauman, 1987, 63 ss.

- Abstraction, generality and equalitarianism: legal norms must be abstract and general, in the sense that they cannot acknowledge differences (of culture, rank, gender).
- Sovereignty: state power is unique and cannot recognize transactions with lower powers or polities.
- Publicism: state power is entrusted to care of (and only of) the general interest of the community; private interests must be excluded from the political calculus.

Flexibility was theoretically to be fully expelled. Any compromise with local rules or with the peculiar circumstances (namely, cultural) of the new citizens would violate, on the one hand, the new project of an universal society, kept by inflexible legislators and gardeners. On the other hand, it would contradict (or, at least, viciously circumvent) the basic *dogmata* of liberal State. Seen from the peculiar perspective of natives, the price was surely high, as none of the new legal values, procedures or therapeutics made any sense to them. In an effort to demonstrate the full realization of assimilatory policies in Portuguese colonies, namely in the domain of justice, a colonial magistrate in Angola, could not avoid a pungent admission:

"However, the trial of a native leaves us always a distasteful impression, bringing to the memory those medieval trials where animals answered in court for the damages they caused [...] the respondent only understood that he went free or returned to jail. The reading of procedural acts, prosecution, defense, sentence, were for him meaningless sounds" (Cunha, 1900, 29).⁸

Here, we face the supreme form of depersonalization of dissident legal cultures in a legalistic culture. Dissident values and their human carriers are not even educated or innerly bound. They are merely transformed in brute objects, whose sole external compliance with legal order was enough.

Another token of this absolute nullification of dissent was the fact that, notwithstanding the fact that native populations neither could not comply with the presuppositions of liberal constitution and law, nor were supposed to be integrated in them, the theme was never aired in political or legal arena. Natives were not simply visible.

At least in this dogmatic level.

The preclusive grace: empire, humanity and decency as limits to self rule

In practice, however, life was what it was and established practical dispositives to deal with natives. When the solution was not dysfunctional to colonial projects, they were left with their customary rule. When transactions with colonizers were closer, provoking conflicts or hitting the colonizers' sense of humanity or of decency, self rule fell in oblivion or had to be restrained.

⁸ Answer to an inquiry of the organisational committee of the International Congress of Colonial Sociology, Paris, August, 1900.

As law didn't recognize any particular legal or political order, such limitations of self-rule could not assume a legislative form. They were introduced by acts of government or by the *arbitrium* of the judges. Finally, anew the grace, as a non legal insight that allowed a wiser arbitration in a concrete case. New times were not, however, times for a bend of sound democratic legality for these evanescent and metaphysical hermeneutics of nature. In spite of the bestowing by Constitutions (since 1838; but definitely, after 1852) (cf. Hespánha, 1995) of legislative prerogatives to colonial supreme authorities, this pluralistic opening didn't work till the end of the century, as it clashed with several sacred *axiomata* of liberal constitutionalism (such as, generality of law and separation of powers).⁹

Anyway, at a lower level, that of the everyday life court practices, pragmatism surely dominated, under the form of a *cadi's* justice, administered by colonial magistrates or even learned judges. In fact, if magistrates could not apply metropolitan law to the most of the native situations, they could not either arbitrate according to native usages, with which they were not acquainted and on which informers produce ill-translated or even intentional distorted versions.¹⁰ The situation is described by contemporary witnesses:

"From the struggle between the fulfillment of the duty, that commands the enforcement of law, and the impossibility of, rationally, to accomplish it, arises this anomalous state, common in our Oversea, where the most of our laws are dead words: some of them have never been enforced, others are willingly disobeyed [...] to do justice" (Magalhães, 1907, 39).

A practical question ...

By the mid-19th century, European social thought began to problematize the liberal agenda. Equality of mankind and universalism of human values seemed a utopian or metaphysical construct with no correspondence in "positive" features of human conviviality. Human polities, and even the whole Humanity, begun to be conceived as organic entities, marked by natural hierarchies, functional diversity and different stages of evolution. Instead of a fixed nature, what characterized human individuals and polities was a pluralism of values and constitutions. Anyway, as social

9 After an essay in the Constitution of 1838 (art. 137), the power of colonial authorities to adapt general legislation to colonial situation has been foreseen by the *Acto adicional* of 1852 (art. 15). But it was severely restrained by constitutional doctrine and practice ("este sistema não está em execução, pois as propostas chegam e não se lhes dá execução", Magalhães, 1907, 81; reactions against legislative decentralization; Magalhães, 1907, 95 ss.).

10 On African situation, Magalhães, 1907, 131-132; on Portuguese India (fuzziness of traditional Hindu law due to contradictory informers, its corruption by European conceptual frames, F); Magalhães, 1907, 133 ss.; on Macau, Hespánha, 1995; Magalhães, 1907, 144 (lies of Chinese informers on Chinese law).

thought was marked by an evolutionist (progressive) model, human diversity became a hierarchy from primitive to modern forms of thinking and organizing.

This new intellectual framework served to combine the liberal model with a colonial rule marked by paternalism or autocracy. Renewing distinctions with a very long tradition in European thought concerning the Other, the new colonial theory restricted the efficiency of the liberal constitution to civilized nations, while uncivilized or less-civilized peoples had yet to wait for their moment, under the guidance of the white man's rule. This distinction not only justified the refusal of liberal political rights to the natives, but also recommended the maintenance of their original rule by the colonizer, in order to avoid unnatural civilisational leaps. Self-rule, dual development, setting up of a legal system based on native customs and courts, bonded work (as a mean of fostering self-improvement), "indigenous status" (as the Portuguese *Estatuto do indigenato* for African colonies), all these features became a core part of the new constitutional agenda for colonies.

Differentiation of evolutionary stages also allowed a different treatment of colonial populations, according to an old hierarchy in European anthropology. Africans were at the bottom of the scale. Asian, by opposite, occupied a mid-rank, yet degraded by pervasive topics, such as "the illness of the Turk", the "femininity of the Indian", the "immobility of Chinese". This hierarchy influenced the degree of self-rule, as well as the division of administrative work in colonies.¹¹

There was thus a new momentum for pluralism. A string of colonial experts began to propose open forms of self rule of native populations, as well as a formal acknowledgement of their legal orders. Some of them tried to link this new policy to the wisdom of the original Portuguese colonialism, namely the protection accorded by Afonso de Albuquerque to Hindu rule in Goa (Pinto, 1901). Others were inspired by the English policy in India or by the most recent (sociologically oriented) colonial doctrine (Magalhães, 1907; Costa, 1903). But all of them were opposed to liberal doctrinarism that sacrificed the facts of life to abstract or metaphysic conceptions of humankind. Even in legal texts, this anti-doctrinarian trend becomes visible: "It is not a basis for a good administration to establish general legislation equal to peoples in different conditions, being necessary to break energetically with doctrinaire predicaments" (Royal provision of 9. 12. 1890). In 1906, the International Congress of Colonial Sociology, Paris, also recommend: (a) the study of the native institutions; (b) the preservation of native law, in matters of family and property; (c) the preservation of native jurisdictions in civil matters; (d) the preclusion to natives of appeal to colonial jurisdiction; (e) the organization of penal codes and of codes of criminal procedure to natives; (f) the implementation of a separate penitentiary system for natives (Moreira, 1952, 9).

11 In East-African colonies, Indians formed the intermediary layer of civil service; in Asia, Africans were used often as "brute" military force (cipoies, *sipaios*).

Also the most updated Governors or High-Commissioners of African Provinces of the late 19th century held similar points of view (Albuquerque, 1934, 243 ss.; Couceiro, 1948, 436).

The formal acknowledgement of native law begun, in Portugal, with the extension to Overseas of the Civil Code of 1867. The decree of 18. 11. 1869 (art. 8, 1) secures: (I) in India, the usages of the "New Conquests" (new Maratha territories incorporated in Goa, by the end of the 18th century), of Damão and Diu, in codes organized some decades before,¹² as far as they didn't oppose to moral or public order; (II) in Macau, the usages of the Chinese; (III) in Timor, the native usages in native litigation; (IV) in Africa, the usages of some (mostly Islamized) tribes in Mozambique and in Guinea in their litigation (cf. Gonçalves, 1937).

Actually, the new policy, combined with the fact that the principle of the official character of justice wasn't abandoned, create a practical dilemma:

"The codification, or at least the study of the usages and customs of the natives of each region imposes itself with a force that cannot be ignored. We cannot expect that each judge or civil servant arriving to a country to do justice or to administrate, undertake this study; it would take more time than his stay there; and while he didn't obtain this knowledge, would apply them hazardously, as happens today; and, as they, generally speaking, don't have information, they guide themselves by the metropolitan law ! Judges and administrators need codes or at least books where they can learn rapidly those usages and customs; even codified, it is not a minor work to apply them to the current hypotheses" (Magalhães, 1907, 149).

The elaboration of codes was also foreseen in the decree that enforced the civil code of 1867. However without visible results.

Codification was the last revenge of legalism. There were surely practical reasons that promote the writing of traditional law. But the very enterprise of codification represented not only a unique opportunity of normative cleansing, but also a dramatic shift in the nature of traditional law. Studies in course about the results of this codificatory policy will show it more in detail.

CONCLUSION. BACK TO BAUMANN: FLEXIBILITY AND CONTEMPORARY ETHICS

Zygmunt Bauman is not a historian. Although the academic *nomenklatura* classifies him as a sociologist, what he really cares about is ethics. In *Legislators and interpreters* the crucial theme is, finally, the moral role of intellectuals. How can the

12 Código dos Usos e Costumes das Novas Conquistas, 1824 (reviewed in 14. 10. 1855); compilation of the usages of Damão and Diu, 31. 8. 1854, 4. 8. 1855, 16. 12. 1880; new codes: 16. 1. 1894 (Diu), 30. 6. 1894 (Damão). Already in force according to the *Reforma da Justiça do distrito da Relação de Goa*, dec. 7. 12. 1836. Cf. Gonçalves, 1923, *maxime* 146–163, 344–363; Gonçalves, 1950.

intellectuals, if they can, ascertain rules for the human conviviality? In a further book, *Postmodern ethics* (1993), the moral agenda is fully explicit.

Taking his previous exegesis of the role of intellectuals before, during and after modernism, Bauman rejects the possibility of founding an ethic for current times in a legislative project – such as rationalism, technologism, logical positivism, neo-contractualism. More than this, he accuses the legislative (rational) project of an anesthesia of moral impulse.

"If the successive chapters of this suggest anything, is that moral issues cannot be 'resolved', nor the moral life of humanity guaranteed, by the calculating and legislative efforts of reason. Morality is not safe in the hands of reason, though this is exactly what spokesmen of reason promise. Reason cannot help the moral self without depriving the self of what makes the self moral: that unfounded, non-rational, unarguable, no-excuses-given and non-calculable urge to stretch towards the other, to caress, to be for, to live for, happen what may [...].

Morality can be 'rationalized' only at the cost of self-denial and self-attrition. From that reason-assisted self-denial, the self emerges morally disarmed, unable (and unwilling) to face up to the multitude of moral challenges and cacophony of ethical prescriptions. At the far end of the long march of reason, moral nihilism waits: that moral nihilism which in its deepest essence means not the denial of binding ethical code, and not the blunders of relativistic theory – but the loss of ability to be moral" (Bauman, 1993, 247–248).

Instead of an "underwritten moral code", Bauman proposes, conscience must be guided, today as before modernism, by an almost amputated force of inner moral impulse. "If in doubt – consult your conscience":

"Moral responsibility is the most personal and inalienable of human possessions, and the most precious of human rights. It cannot be taken away, shared, ceded, pawned, or deposited for safe keeping. Moral responsibility is unconditional and infinite, and it manifests itself in the constant anguish of not manifesting itself enough. Moral responsibility doesn't look for reassurance for its right to be or for excuses for its right of not to be. It is before any reassurance or proof and after any reason or absolution" (Bauman, 1993, 230).

Deprived from their role of legislators, gardeners, guides or safe keepers, intellectuals have anew an old role to accomplish: that of clarifying options, of inter-translating values amidst different local ordered *corpuscula* (communities, cultures, discourses, moral traditions, everyday life rules of thumb) (that of "mediating the communication between 'finite provinces' or 'communities of meaning'"; Bauman, 1987, 197). They give matter to decide, making understandable to each self the huge plurality of partial approaches. Once again, they turn interpreters, committed in a strategy that has nothing to do with the authoritative mission of the legislator:

"It does abandon overtly, or put aside as irrelevant to the task at hand, the assumption of the universality of truth, judgment or taste; it refuses to differentiate between communities which produce meanings; it accepts those communities' ownership rights, and the ownership rights as the only foundation the communally grounded meaning may need" (Bauman, 1987, 197).

Paradoxically, there is not so much in Bauman about lawyers. Apparently, in his broad panorama of the institutionalization of the Order in the West, jurists were anything but minor personnel. Order came from above, from philosophers, when they institute Reason as a universal mandatory standard for human acting. In this sense, rationalist natural law wasn't but a secondary step. First, because it didn't represent more than a local instantiation of the general principle of the primacy of Reason. Secondly, because, at heart, it was a useless step, as Reason doesn't need the force of law (of State) to become cogent.

Anyway, rationalist natural law – as later pandectistic and every form of 19th century legal scientism – played an important role in dismantling the older (pluralistic, probabilistic, hermeneutical) structure of legal discourse. With this intellectual move, they produced also a momentous twofold moral result. Firstly, they secure jurists – as neutral keepers of a pre-written code – against moral and political responsibility. Later on, with the statist positivism of 19th century, this responsibility was endorsed to politicians. Secondly, as normativism evacuates both casuist and judge decisionism, judges were also discharged from the moral anxiety of concrete arbitration.

However, if Bauman's ethical agenda is to be assumed by jurists, a Copernican turn will take place in law:

- theory of sources of law and theory of interpretation will have to be revised upside down (in the sense of those dominant under *ius commune*);
- discursive structure must renew with an argumentative, topic, case and *quaestio* oriented strategy;
- jurists and judges must be made aware of the bet nature of their arbitrations;
- public should be informed of the political nature of legal adjudication and of the indissoluble link between legal case and life case, legal reason and common reason.

And, above all, jurists have to forget the long assumed cheerful "legal Project" and assume the forgotten humility of older times, combined with the cautious and wise disenchantment recommended by our age. And be happy with it.

"E sto bene,

Io sono bene come uno che si sogna;

Non lo so se mi conviene

Ma sto bene, che vergogna !

Io sto bene" (Giorgio Gaber: 'L'illogica allegria', album: *Pressione bassa*, 1980).

"To the likely objection "This proposition is unrealistic", the proper response is: "It had *better* be realistic"" (Bauman, 1993, 240).

PRAVNIKI KOT GOZDARJI

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POVZETEK

Avtor v prispevku izhaja iz metaforične ponazoritve, ki jo je v svojem eseju iz leta 1987 podal Zygmunt Bauman v sklopu svojega – na moderni in postmoderni pol ločenega – razumevanja pogleda na urejenost sveta.

V Baumanovem delu je vloga intelektualca v modernizmu, ki svet razume kot urejeno celoto, predstavljena s prisposodbo 'zakonodajalca', v postmodernizmu, ki svet dojema kot neomejeno število modelov reda, pa s prisposodbo 'interpreta'. Pri tem so zakonodajalci tisti, ki ustvarjajo in širijo rigidno pravo, interpreti pa prevajajo izjave, ustvarjene znotraj določene skupnostne tradicije, zato da jih je moč razumeti znotraj sistema znanja, ki temelji na neki drugi tradiciji.

Kot hevristično sredstvo za tolmačenje postmodernističnega pravnega razmišljanja avtor nadalje navaja Baumanovo videnje vloge intelektualcev v modernističnem in predmodernističnem svetu skozi prisposodbo 'vrtnarjev' in 'gozdarjev'. Vrtnarji morajo oblikovati in nadzirati svoje vrtove, da ti ne bi podivjali in se povrnil v nepravilno obliko, iz kakršne so se razvili, saj se nobena oblika vrta – naj si bo še tako skrbno zasnovana – ne more reproducirati sama. Nasprotno pa gozdarji ne gojijo rastlin in živali na svojem ozemlju, temveč jim skušajo omogočiti nemoteno samoreprodukcijo – zaupajo namreč iznajdljivosti svojih varovancev. V to ponazoritev avtor članka vključi pravnike kot skrbnike sveta mnogoterih redov in se posveča dejavnikom pravne fleksibilnosti skozi zgodovino.

Ključne besede: intelektualna zgodovina, pravo, sociologija, Z. Bauman, modernizem, postmodernizem

SOURCES AND BIBLIOGRAPHY

Aquinas, T. (1265–1274): Summa theologica. Secunda Secundae Partis.

de Araújo, J. S. (1627): Lei régia de Portugal. Madrid.

Bauman, Z. (1987): Legislators and Interpreters. On Modernity, Post-modernity and Intellectuals. Cambridge, Polity Press.

- Bauman, Z. (1993):** Postmodern ethics. Oxford, Blackwell.
- Cunha, J. A. (1885):** Estudos acerca dos usos e costumes dos banianes, bathias, parses, mouros, gentios e indígenas. Moçambique, 42.
- Cunha, J. de A. (1900):** Os indígenas nas colónias portuguesas d'Africa e especialmente na provincia de Angola. Luanda, Imprensa Nacional.
- Gonçalves, L. da C. (1923):** Direito hindu e mahometano. Comentário ao decreto de 16 de Dezembro de 1880, que rressalvou os usos e costumes dos habitantes não cristãos do distrito de Goa na Índia Portuguesa. Coimbra, Coimbra Editora.
- Gonçalves, L. da C. (1950):** Usos e costumes dos habitantes não cristãos do distrito de Goa na Índia Portuguesa. Lisboa.
- Pegas, M. Á. (1669):** Commentaria ad Ordinatones Regni Portugalliae. Vol. IX. Ulyssipone.
- de Soto, D. (1556):** De iustitia et de iure. Cuenca.
- Xavier, F. N. (1840-1851):** Collecção de bandos e outros diferentes providencias [...] para o governo económico e social das Novas Conquistas. Vol. I–III. Nova Goa.
- Xavier, F. N. (1851-1853):** Collecção de leis pecculiares das commuidades agricolas das aldeias dos concelhos das Ilhas, Salsete e Bardez. Nova Goa.
- Xavier, F. N. (1861):** Códigos dos usos e costumes das Novas Conquistas. Nova Goa.
- de Albuquerque, M. (1934):** Moçambique. 1896–1898. Vol. II. Lisboa, Agência Geral das colónias.
- Carrive, P. (1994):** La pensée politique anglaise: passions, pouvoirs et libertés de Hooker à Hume. Paris, P.U.F..
- Clavero, B. (1994):** Derecho indígena y cultura constitucional en America. Madrid, Siglo XXI.
- Coissoró, N. S. (1964):** As instituições de direito costumeiro negro-africano. In: Angola. Curso de extensão universitária, 1963–1964. Lisboa, I.S.C.P.U.
- da Costa, E. (1903):** Estudos sobre a administração das nossas possessões africanas. Memoria apresentada ao Congresso Colonial Nacional. Lisboa, Imprensa Nacional.
- Couceiro, P. (1948):** Dois anos de Governo: Junho 1907–Junho 1909. História e comentário. Lisboa, Edições Gama.
- Dios, S. (1994):** Graça, mercê e patronazgo real. La Camara de Castilla entre 1474–1530. Madrid, C.E.C.
- Grossi, P. (1995):** L'ordine giuridico medievale. Bari, Laterza.
- Grossi, P. (1986):** Sulla 'natura' del contratto (qualche note sul 'mestiere' di storico del diritto, a proposito di un recente 'corso' di lezioni). Quaderni fiorentini per la storia del pensiero giuridico moderno, 15. Milano, 593–619.

- Hespanha, A. M. (1983b):** Savants et rustiques. La violence douce de la raison juridique. *Ius commune*. Frankfurt/Main, 10, 1–48.
- Hespanha, A. M. (1988):** Da 'iustitia' à 'disciplina'. Textos, poder e política penal no Antigo Regime. *Anuario de história del derecho español*. Madrid.
- Hespanha, A. M. (1992):** O poder, o direito e a justiça numa era de perplexidades. *Administração*. Administração pública de Macau, 15. Macau, 7–21.
- Hespanha, A. M. (1993a):** Carne de uma só carne: para uma compreensão dos fundamentos histórico-antropológicos da família na época moderna. *Análise social*, XXVIII, 123/124. Lisbon, 951–974.
- Hespanha, A. M. (1993b):** Les autres raisons de la politique. L'économie de la grâce. In: Schaub, J.-F. (ed.): *Recherche sur l'histoire de l'État dans le monde ibérique (15e.–20e. siècle)*. Paris, Presses de l'École Normale Supérieure, 67–86.
- Hespanha, A. M. (1994):** O estatuto jurídico da mulher na época da expansão. In: *O rosto feminino da expansão portuguesa*. Congresso internacional. Lisboa, Comissão da Condição Feminina, 54–64
- Hespanha, A. M. (1995):** Panorama da história institucional e jurídica de Macau. Macau, Fundação Macau
- Hespanha, A. M. (1997):** La senda amorosa del derecho. Amor e iustitia en el discurso jurídico moderno. In: Petit, C. (ed.): *Pasiones del jurista. Amor, memoria, melancolia, imaginación*. Madrid, Centro de Estudios Constitucionales, 23–74.
- Hespanha, A. M. (s.a):** Doctor perfectus. Para uma antropologia cultural dos juristas na época moderna [forthcoming].
- Kosambi, D. D. (1974):** The Village communities in the old conquests of Goa. *Journal of the University of Bombay*, 15. Bombay, 63–78.
- Magalhães, A. De (1907):** Estudos coloniaes. Vol. I. Legislação colonial. Seu espírito, sua formação e seus defeitos. Coimbra.
- Nelson, D. M. (1992):** The Priority of Prudence: Virtue and Natural Law in Thomas Aquinas and the Implication for Modern Ethics. Pennsylvania, Pennsylvania State University.
- Pagden, A. (1982):** The Fall of Natural Man. The American Indians and the Origins of Comparative Ethnology. Cambridge, Cambridge University Press.
- Pagden, A. (1995):** Lords of all the World. Ideologies of Empire in Spain, Britain and France, 1500–1800. New Haven, Yale University Press.
- Pereira, C. R. G. (1954):** História da administração da justiça no Estado da Índia. Século XVI. ...
- Petit, C. (ed.) (1997):** *Pasiones del jurista. Amor, memoria, melancolia, imaginación*. Madrid, Centro de Estudios Constitucionales.
- Pinto, C. (1901):** O antigo imperialismo portuguez e as leis modernas do governo colonial. Memória apresentada ao Congresso Colonial Nacional. Lisboa, Imprensa Nacional.

Prosperi, A. (1997): Tribunali della coscienza. Milano, Einaudi.

Viehweg, T. (1953): Theodor, Topik und Jurisprudenz. München, C. H. Beck.

Wilensky, A. H. (1971): Alfredo Héctor: La administración de justicia en África continental portuguesa (contribución para su estudio). Lisboa, Junta de Investigações do Ultramar.