

Articles

Law on the road from postmodern situation¹

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Law on the road from postmodern situation. The postmodern condition has been exhausted even in the law. There are the first signs of a new situation, return to some version of universality, the growing importance (almost distate) of the requirement of information technology, etc. One of the actual roads from the postmodern condition is its consolidation or even freezing. The consolidation of the postmodern condition characterised by changes and development is paradoxically the overcoming of it.

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Nothing lasts forever; even the postmodern times will be over. We may already be experiencing the final stage of the postmodern period. It is hard to grasp the qualities of a postmodern situation, but literature of good standard dealing with them is available.²

We are living in a period of rapid changes and fragmentation of almost all spheres of our lives and conditions. Our experiences are of small value and sometimes even bar the understanding of new trends and facts of life. The previous words resemble traditional descriptions of postmodern situation, but there are others that signal the overcoming of postmodern freedom and openness. The postmodern mood of tolerance and openness to the new, different and unexperienced is exhausted due to the premodern nature of some new traits of the recent development. Some of them are directly relevant for law, or even are part of legal pluralism. The others are surprising, but probably foreseeable consequences of basic postmodern trends.

When change, pluralism and diversity are the catchwords of postmodern situation, then some new order seems to be the natural result of overcoming the postmodern times.³ But there are many roads from the postmodern condition. Law has been characterised as a principle of order⁴, and so the replacement of disorder seems to be a sign of a better era for law and legal profession. But law is not only the principle of order. It incorporates

¹ The title of this paper and the reasoning about universality and particularities has been inspired by excellent book. Hauser, M.: *Cesty z postmodernizmu. (The Roads from Postmodernism)* Praha, Filosofia 2012.

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² e.g. LYOTARD, J. – F. *O postmodernizmu.* Praha : Filozofický ústav AVČR, 1993.

³ BĚLOHRADSKÝ, V. Kam vedou cesty z postmodernizmu. In KANDA, R. a kol. *Podzim postmodernizmu. Teoretické výzvy současnosti.* Praha : Filosofia, 2016, p. 30-31.

⁴ "Law is a principle of order." JENKINS, J. *Social Order and the Limits of Law. (A Theoretical Essay.)* Princeton : Princeton University Press ,1980, p. XI.

also other values and ideas. Speaking only about a “technical” part of legal order, it is connected with equality, predictability and usually also with something like freedom. Latest from the modern times, the law of so-called civilised nations protects a cluster of values, which enabled the postmodern diversity, openness, pluralism, etc.

In previous modern times the diversities of all kinds flourished under the umbrella of a single and uniform legal order in each state. The conditions of legal dualism or trialism have been felt as anomalies which have to be overcome by effort and development. The symbol of law has been the civil code.⁵ The changes in and of society and its parts have been more frequent than the changes of law: with a relatively stable legal order and a changing and diversified society, it has been the idealised model of law and society in modern times. But this situation has changed.

Diversities and changes in society have found their way into law and so the law has been increasingly diversified and changing too. The catchword of these developments may be responsive law.⁶ Single civil codes have been, even in continental Europe, replaced by 3 or 4 codes (civil code, commercial code, labour code, family code, etc.). The road for the postmodern in law has been opened.

The postmodern in law is a combination of at least two changes: (1) of reality and (2) of perception or conceptualisation of the new situation. Probably the best example of this combination is the core concept of postmodern in law, legal pluralism. There are many theories and kinds of legal pluralism from the situation in postcolonial Africa with a traditional, predominantly customary legal system competing with the modern one imposed by former colonial administration and/or by new national elites striving for modernisation⁷ of their states to so-called European constitutional pluralism with coexistence and/or competition between national constitutional systems, EU law with constitutional ambitions, human rights law of the Council of Europe and maybe even the human rights law of United Nations.⁸ There are also other well-known examples of legal pluralism. The situation in central New York described by S.F.-Moore and in favelas of the Brazil cities analysed by B. de Sousa-Santos.⁹ Legal pluralism has become a central characteristic of law in the postmodern situation or of the postmodern situation in law.

The underestimated part of the postmodern situation in law is the flourishing of soft law, quasi-legal normative orders and law-free spheres of life (e.g. sport, internet).¹⁰ All

⁵ “... we do not have a uniform subject of law – citizen, uniform law – civil code and singular sovereign – state.” COLOTKA, P. – KÁČER, M. – BERDISOVÁ, L. *Právna filozofia dvadsiateho storočia*. Praha : Leges, 2016, p. 238.

⁶ “In responsive law order is negotiated, not won by subordination.” NONET, P. – SELZNICK, P. *Law and Society in Transition. Toward Responsive Law*. New York, Octagon Books, A Division of Farrar, Stratus and Giroux 1978, p. 94.

⁷ MOORE, S. F. *Law as Process. An Anthropological Approach* (1978) reprint Münster –Hamburg, LIT Verlag, Oxford, James Currey Publishers 2000.

⁸ MacCORMICK, N. *Beyond the Sovereign State*. *The Modern Law Review*. Volume 56, January 1993, No 1, p. 17.

⁹ SOUSA – SANTOS, B. de. *Toward a New Legal Common Sense. Law, Globalisation and Emancipation*. Second Edition London. Edinburgh, Butterworth, LexisNexis 2002.

¹⁰ “... state – law is more often replaced by stateless law.” MORAWSKI, L. *Główne problemy współczesnej filozofii prawa. Prawo w toku przemian*. Warszawa : Wydawnictwo Prawnicze LexisNexis, 2003, p. 160.

of them are worthy of deep study, but even a very superfluous look reveals their multifaceted role at the final stage of the postmodern period. But it is this contradictory role that signals the roads from a postmodern situation to the unknown and almost unforeseeable future of law.

Soft law is from the legal point of view probably no law at all, but for the subject or addressee it is sometimes hard to resist its requirements. It is not becoming more legal, but more binding. It is a legal ground for action, but does not a breach of it mean a breach of a legal duty? Quasi-legal normative orders are very often the dark side of law-free spheres of life. We are speaking about the “law of internet”, etc.

An individual faces internally diversified (pluralistic) law without clear and understandable borders with other normative systems backed by coercive powers of different natures. They are usually not supported by the traditional law-enforcement agencies that are able to use as ultima ratio even physical force like police. But their postmodern sources of power are effective enough to secure the obedience to rules. And sometimes they are interwoven with law, or even backed by law. The breach of a professional code is a sufficient ground for prohibition to carry on the profession. Decision of a professional organisation (usually called chamber) is backed by law and supervised by a state authority, usually a court. This example is not postmodern, but the extension of abovementioned model to new spheres of life is postmodern.

There are many roads from a postmodern situation and numerous modes of overcoming it. The first one is the return to some previous conditions, to something resembling the modern or even premodern times. The postmodern situation has been repeatedly compared with premodern modes of organising society, but anti-elitism, democracy and authoritarianism are a distinguished modern heritage.¹¹

I wage the hypothesis that the postmodern condition and information society are two sides of the same coin. Information society is based on information technologies. This simple deduction reminds us of the old Marxist model of base and superstructure¹², but it is hard to look at high-quality information technologies as a base in the precise Marxist meaning. They are reshaping almost all spheres of our life, not only production of goods and services, and therefore the old Marxist model of base and superstructure is more inspiring as describing and explaining. But the role and power of information technologies to model the conditions in almost all spheres of life represent an important sign on the road from the postmodern condition of plurality and constant change. The role of information technologies in shaping law and its realisation (not only application) is of utmost importance. It differs from the influence of previous technological changes and industrial revolutions on law. Law has always been confronted with the task of regulating new technologies and their impact on society and individuals. But the content of law, the way how to regulate new technologies, has not been directly dictated by regulated technologies, probably with an important exemption of the parts of legal system that

¹¹ HAUSER, M. Cesty z postmodernismu. Praha : Filosofia, 2012, p. 26.

¹² MARX, K. – ENGELS, F. Vybrané spisy v piatich zväzkoch. Zv. 1. Bratislava : Pravda, 1977, p. 340, 491, Zv. 2. p. 436-7.

directly regulate the production process. The old-fashioned concept of responsive law can serve as the starting point of analysing this development. The postmodern openness to the change, the new and the feeling of freedom are replaced by the imperatives of information technologies combined with their use and misuse by hidden, and irresponsible subjects. It is that kind of frozen postmodern condition, where we do not know if the content of law is determined by technologies, particularly the information ones, or by somebody behind them using the false imperatives of technology for unknown purposes or without any formulated purposes.

The law and even more its application are influenced and sometimes almost determined by public opinion, protests, requirements of minorities created, directed and supported by a combination of the mass media, social networks and information technologies in general. It looks very democratic, but the influence of public opinion and/or noisy protesters on law enforcement is a dangerous road out of the rule of law. The law enforcement system is losing its independence, despite reiteration of independence of courts and judges. They are effectively protected from orders or even resemblance of influence from politicians, i.e. from legislative and executive powers. But they become increasingly exposed to the pressure from the mass media, social networks and noisy protesters.

The legal system loses its position of the last decision-maker and authority and becomes subjected to the “democratic pressure” of the active strata of society, which is sometimes surprisingly narrow, but well-organized by means of information technologies, particularly social networks. It is difficult to distinguish spontaneous networking from manipulation by a hidden subject. Even unpopular court decisions are standardly enforced, but in a complicated and multilayer judicial and broader law enforcement system it is hard to stand against these manifold pressures from predominantly unidentified sources. Law and law enforcement agencies, especially courts, are ideologically losing the position of ultimate arbiters to the media gurus, who set themselves up as representatives of society, and when they want to keep respect for their decisions, they are forced not to contradict the prefabricated “public opinion”. They are moving down the road from protectors of the public to enforcers of public opinion presented by the media, social networks or even protesters.

The abovementioned process is one of the results of the importance shift between sources/means of power in the postmodern period. The state has preserved the absolute dominance of physical force and its legitimate use. It is still probably the only organisation able to contact anybody. But other organisations are equally well equipped with information and abilities of their dissemination. The propaganda potential of the state is relatively weak. The state has never been the richest organisation. Due to the propaganda weakness it is losing even parts of legitimacy.

The new power centres based on information technologies and devoid of the responsibilities of state and other institutions of public power are consolidating their positions. Sometimes it is difficult to distinguish between private and quasi public agencies. A very dangerous divorce of power from responsibility takes place. The new

power centres are acquiring real power, but responsibility still rests with state and other constitutions of public power. The postmodern condition has been characterised by constant change of power positions. The end of postmodern times is characterised by power position consolidation of new institutions based predominantly on the use of information technologies connected with new wealth acquired also with information technologies. The new institutions of power are subject to constant changes, but their relations with traditional holders of public power consolidate.

One of the actual roads from the postmodern condition is its stabilisation or even freezing. The consolidation of the postmodern condition characterised by changes and development is paradoxically the overcoming of it.¹³ This consolidation of postmodern plurality of particularities means for law the preservation of legal pluralism as a part of broader normative pluralism without clear and easily distinguishable borders between law and other normative orders. Legal pluralism has not fulfilled the promise of freedom and humanism and is becoming a world of unpredictable oppressions and possibilities. I have heard a senior judge to say: “On the supreme court the case only starts.” It is an exaggerated expression of situation when simultaneous validity of more than one legal system opens for an experienced lawyer almost always some other possibility and the case is never definitely won or lost.

The other road from the postmodern condition may be symbolised by the arrival of some new universality overcoming the boring postmodern multiplicity of particularities. This road is very promising, but also dangerous. The history has many times proved the dangers and exposed the dark sides of basing the organisation of society on a single principle, idea, concept, theory or ideology.¹⁴ Even the contemporary so-called “liberal” capitalism is not an exemption, but its declaration of tolerance and openness has served as partial antidote. The striving for a new or revived universality is omnipresent as natural reaction to postmodern glorification and flourishing of particularities. It is suspected of totalitarian tendencies or hidden intentions, but in contrast to postmodern pluralism and change, even a public interest or bonum commune is a kind of universality in public life. The striving for universality is or at least may be useful for a human being, because it opens the door from her/his subordination to orders of different social subsystems and corresponding social roles.

In the reality of law and its enforcement the tendency to universality is weak, because its requirements contradict the particular interests of private power centres. But despite this weakness the universality represents a hope for law in the final period of postmodern situation. Law has usually been connected with some version of or at least aspiration to universality. Even in the medieval times of legal particularism with numerous local and group legal “systems” or privileges there have been the “universal” church law and later the revival of Roman law.

¹³ “Minimally it is impossible to start from the idea, that in law modern is integrally replaced by postmodern.” BOGUSZAK, J. Právo v postmoderní situaci. In *Právník*, 2005, č. 11, p. 1202.

¹⁴ “Reducing the explanation of social phenomenons to any single principle results in its demal.” HOLLÄNDER, P. *Filipika proti redukcionizmu*. Bratislava : Kalligram 2009, p. 62.

On the road from a postmodern situation the tendency to universality in law has at least two levels: institutional and ideal or ideological. The first one is represented by institutions of public power aspiring to some modes of universality. The best known of them is the old but still very vivid national state. It has always been an institution aspiring to the universal power on some particular territory. The law of state is a legal system binding all citizens of the state and with some exceptions (diplomats) all persons on its territory. Law of state is a typical universal law of previous modern times. It survived the post-modern period and still represents an important group of legal systems connected with idea and tradition of universality.

There are other institutions of public power trying to acquire the status of universality. In Europe it is especially the unique organisation of European Union, but it does not embrace all spheres of life and depends on law enforcement by agencies of the EU Member States. The huge amount of regulation cannot hide the particular character of this unprecedented “supranational” legal system.

The ideal and ideological level of universality in law is represented mainly by some nebulous but widespread belief in natural law and/or justice and by ideology of human rights and the human rights law. The idea of natural law or a law superposed to “positive” (valid) human law is very old and there is a long tradition of and huge literature on natural law. It has been an important ideology and mode of legal philosophy, but I hesitate to call it law.

The idea, ideology, theories and law of human rights connect the institutional and ideal/ideological levels of universality in law.¹⁵ The human rights law is keenly connected with some institutions of public power. There are international systems of human rights law connected with United Nations, Council of Europe, European Union and other regional (continental) international organisations. The constitutions of the states usually contain catalogues of human rights. Each of the above-mentioned organisations has established a system of protection, and at least the national state also a system of enforcement of human rights. But the idea and ideology of human rights are indispensably universal, because they are based on the ultimate universal idea of equal rights for everybody and all human rights laws represent “emanations” of this universal principle.

The postmodern fatum of legal pluralism has not avoided even human rights and so more than one human rights catalogue is binding for the same natural and legal persons on the same territory. But the universal aspiration of the idea of human rights shows the road from postmodern situation. It is a counterpart of particular interests and technological dictates (e.g. information technology) in law.

Any attempt to reinstall universality as the core idea in law will be challenged by the postmodern and even modern requirement of greater responsiveness of law or, to use a more suitable phrase, of legal regulation. When the content of law is too much dictated

¹⁵ “... there is, by virtue of human nature an order or a disposition which human reason can discover and according to which the human will must act in order to attune itself to the necessary ends of the human being. The unwritten law, or natural law, is nothing more than that.” MARITAIN, J. *The Rights of Man and Natural Law*. New York : Charles Scribner’s Sons, 1951, p. 61.

by the logic of regulated sphere of life, then the unavoidable result is particularism, because there is no universal principle or “code” organising all spheres of differentiated modern and postmodern society. It is useful to look back to the modern times when the diversity of society flourished in the protective shadow of “great” institutions and legal order of state. Is it really a task of law to incorporate as much as possible of the various and changing logics or codes of relatively closed spheres of postmodern society? The described difference between modern and postmodern models of relations between law and society is based on extreme simplification resembling the ideal types of Max Weber.¹⁶ But the modern idea of diversity and change flourishing under the protective umbrella of a single and relatively contradiction – free legal order may be worth preserving in quality of a “regulative idea”. It is not a plea for less legal regulation but for reintroducing more uniformity or “universality” into legal order.

The return of or to universality is a dangerous but promising road from postmodern situation in law. There is a tempting possibility of some legitimate but particular interests and ideas occupying the position of universality using the power of law, but there is also the chance of universality based on human rights ideology which protects humans against encroachments of particularities on their different plans of life. It looks like a contradiction and may be paradox, but higher degree of order connected with universality is usually more beneficial for the proverbial man in the street.

There is a growing feeling of weariness and sometimes even fatigue from constant flux of change and multiplying pluralism characterizing postmodern situation even in law. The combination of numerous possibilities, unpredictability and invisible limits or glass ceilings engenders the striving for a modicum of risk limitation that can be offered also by law. Other non-legal ways of risk limitation in our legalistic culture proud of the rule of law are almost unacceptable.

There is a sociological concept of risk society¹⁷ describing important characteristics of a situation called “postmodern”. Postmodern conditions are sometimes very oppressive, but it is a strange new kind of oppression without subject of oppression, without an oppressor. On the road from a postmodern situation some new subjects of oppression appear. They are sometimes surprised of their own positions in the dramatic postmodern powershift (using the title of excellent book by Alain Toffler)¹⁸, but they learn quickly to use them in a traditional way.

There are too many roads from postmodern situation with many unknown crossroads and even most developed societies only stand in the exit from the postmodern condition. But it is useful to become aware of the simple fact, that even the postmodern times with their constant change, pluralism, particularism, but also openness, possibilities and some particular freedoms are exhausted. This awareness is important for understanding of the

¹⁶ WEBER, M.: *K metodológii sociálnych vied*. Bratislava : Pravda, 1983, s. 126.

¹⁷ BECK, U. *Riziková spoločnosť. Na cestě k jiné moderně*. Praha : Sociologické nakladatelství, 2011, second edition.

¹⁸ “... the changed role of knowledge – the rise of the new wealth – creation system – either caused or contributed to major shifts of power.” TOFFLER, A. *Powershift: Knowledge, Wealth and Violence at the Edge of the 21st Century*. New York – Toronto – London – Sydney – Auckland : Bentam Books 1990, p. 9.

new situation waiting somewhere round the next corner. Law is a human construct and so it can be shaped and reshaped by conscious effort, but only in the context of society. Law of distinct qualities and structure has been an integral part of postmodern situation. At the moment when postmodern characteristics acquire such dominance in law, that it is possible to talk about postmodern paradigm of legal order and its enforcement, the postmodern in law is on the road to overcome itself. The new order and universality are probably good auguries for law and the law is a suitable and civilised instrument to introduce them into society. It is of utmost importance what kinds of law and universality are going to be established. Are they going to be dictated by technologies and requirements of efficiency and competitiveness, or by other more human values? They will be some mix of both. When this mix represents the result of conscious decisions, then law is the most suitable instrument to construct this part of the roads from postmodern situation.