Judicial Censorship as a Place for the Breakdown of Positivist Jurisprudential Discourse

Rok Svetlič

University of Primorska, Faculty of Humanities, Koper
rok.svetlic@guest.arnes.si

This paper discusses one form of censorship: judicial inhibition of publishing. This kind of act places discourse on judicial positivism, the widest positivist school of jurisprudence, in a borderline situation. Positivism is a captive of the illusion of the "here and now" of meaning. The law can almost be held in hand. It is the statute book lying on the table, with its text clearly structured in paragraphs so that anyone can read and understand it effortlessly. Upon obtaining a judicial decision for censorship, this discourse breaks down. It is not only that "vague notions" in literary interpretation are created, but also that a firm articulation of meaning – that is, theticism – disappears. Artistic texts do not "assert" anything. On the other hand, in its verdict the court still has to accuse the author of stating something that is forbidden: "insulted", "instigated", "slandered", "called", and so on. How is it possible to bridge this gap between the positivist concentration on the "here and now" of meaning, and the obvious unsuitability of this approach for truth in literature? This paper shows that this gap has never existed and that the interpretation of both judicial and literary texts is based on the same openness of the interpreter to the meaning as such.

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The tradition of western philosophy as a whole has probably never experienced such a deep critique as in the twentieth century. It is not only that particular concepts have been cast negatively, but rather that the entire western spiritual tradition is in a period of crisis in thinking. This has created an entirely new image. The golden age of spiritual development – in the form of ancient Greece, which for millennia was respected as an inexhaustible inspiration – suddenly disappeared. Plato's philosophy was

no longer considered a magnificent step from *mythos* to *logos*, but rather a fatal slide into a period of aimless spiritual wandering lasting more than 2,000 years.

This reserved attitude toward tradition is found in different radical variants. One of the most fundamental views is embedded in Martin Heidegger's philosophy, which is also to some extent the platform of this paper. It critiques the legal positivism mentioned in the title in connection with the philosophy to which it belongs. This arises under philosophical conditions developed in the social philosophy that follows the Cartesian ontological return to the man; that is, to his thinking. Legal positivism attempts to construct a solid scientific structure for law, just as natural science has for its own discipline. This attempt has failed, and this becomes apparent when it is seen that deep problems arise when we try to apply the basic postulates of positivism to specific cases. This paper demonstrates one such situation based on the example of judicial censorship.

What is legal positivism, actually? The most widespread description states that "positivism strictly excludes morality from the law".[1] In other words, legal science must deal with the question of what the law *is,* and leave aside the question of what it *should be*. This definition is correct, but it demands additional explanation because it can mistakenly lead us to the conclusion that morality is ignored on account of unnecessary formalism, lawyers' rigidity, and so on. This interpretation implicitly assumes that the mistake was avoidable and that it is, to some extent, reparable.

The motive for excluding morality from legal discourse is much deeper than just the over-formality of the system or the stereotypical attitudes of professionals. It is nothing other than an attempt to solve the crisis of thinking, an attempt to maintain law as the science of life. The means to achieve this are, however, the same as in the intellectual tradition. With every redefinition of a particular notion, something in it is excluded to an extent. Let us take the notion of nature, for example. For the ancient Greeks, nature was the source of everything, including moral rules, the meaning of life, and so on. For Christianity, however, nature is just a creation of God intended for man. Moral orientation and existential meaning now come from revelation. For Newton, however, nature is merely the composition of particles and their motion. It does not exist "for" anyone; nor does it have any meaning, or even less any purpose. Physics does not tell us anything about meaning (of creation, of human life, etc.). As we see, every redefinition of the notion tightens its extent. Legal positivism takes just the same steps. It carries out

three reductions capable of scientifically dealing with the law, which are intended to assure the solid core of phenomena. Let us briefly examine these reductions.

The first reduction concerns *components* of the law and introduces a distinction between *rules* and *principles*. A rule may read as follows: "Any individual that exceeds the speed limit of 50 km/h will be punished by a fine of €100." A principle reads: "Everyone must act in such a way that other people are not endangered by their actions." As we can see, both sentences have a similar point, but on the other hand they are also quite different. The rule has much clearer content and structure that make it suitable for application in concrete cases. The principle, however, is always complex, and it is controvert, which for science is a nightmare. It contains only a basic moral orientation, but not unambiguous instructions for action. Therefore, the first reduction includes only rules as part of the science of law, and leaves principles outside its area of interest.

The second reduction concerns the *validity* of the law, and introduces the distinction between the *pedigree* and the *content* of the rule. If someone has to find out whether or not a concrete rule is in force, it is much easier to determine if the rule was accepted correctly than to evaluate whether or not its content meets several moral standards. Thus, positivism asks only about the pedigree of the law. Controversies about morality are simply not of scientific interest.

Let us now examine the third reduction, which is the most important for our further explication of the breakdown of positivist discourse. It concerns the *application* of the law and introduces the distinction between the *definition* and the *interpretation*. This reduction is based on the assumption that a text can attain a condition that makes its meaning totally present, entirely "here", lying naked in front of the reader. For this reason the reader can be absolutely passive, without having any interpretative attitude toward the text. If, in exceptional cases, some expression becomes obscure, it can be made clear by using adequate definitions. It is necessary to find the definition of the questionable expression in a dictionary or lexicon that makes the meaning of the whole text shine in full splendour. In Dworkin's words:

> We follow shared rules, they say, in using any word: these rules set out criteria that supply the word's meaning. Our rules for using "law" tie the law to plain historical fact. (*Law's Empire* 31)

In brief, positivism assumes that only uncontroversial notions that do not require any interpretation can be incorporated in the law.

From the pairs *rule/principle*, *pedigree/content*, and *definition/interpretation* positivism designates only the first component of each of the three pairs as adequate for science. This should enable the law to be closed. Metaphorically, in the "meaning" box *everything* inside the box is the law, while *nothing* outside of it is the law.

It is necessary to emphasize that these reductions are only a continuation of the first reduction in the history of philosophy. The central issue is the beginning of Plato's philosophy, his teaching about ideas, which is basically a kind of reduction. Let me explain this. The original Greek expression for the truth is *aletheia*. It is constructed of the prefix *a-*, *privative alpha*, expressing negation, and the root *lethe* 'hidden'. *Aletheia* therefore means 'un-concealed', 'taken out of secrecy', or the state of 'not being hidden'. For the pre-philosophical Greeks the truth did not mean the "hard fact", but rather the process of coming out of being concealed. It did not mean a lasting state, but rather a happening, the happening of *physis*, as the Greeks called nature. Nature was not only the totality of all phenomena, it was the equilibrium of them, the balance. Darkness, for example, was not a hostile opposition to light. It was only the contrast to it and its equal pole.

At some point this "dynamic" and balanced notion of the truth enters into crisis, and the rise of philosophy is the answer to this crisis. In Heidegger's words:

> Unconcealment, the space founded for the appearance of being, collapsed. "Idea" and "assertion", *ousia* and *kategoria*, were rescued as remnants of this collapse. Once neither "being" nor "gathering" could be preserved and understood on the basis of unconcealment, only one possibility remained: that which had fallen apart and lay there as something present at hand could be brought back together only in relation to the fact that it itself had the character of something present at hand. (*An Introduction to Metaphysics* 203)

Heidegger is discussing Plato here. For Plato, that which is true can only be that which can be seen by non-physical eyes, whatever is safe from alteration, from the eruption of the Nothing. The world of ideas is an eternal world, saturated with light. The truth is no longer a happening. It now becomes a hard fact: the idea.

Plato's philosophy is the first scientific answer to the crisis of the truth. The means of resolving it, however, remain the same to today: that is, by excluding those phenomena that resist intellectual mastery or intellectual treatment. Plato constructs this by collecting out of the "remnants" only eternal elements with a clear shape: ideas. The phenomena left over are infected with alteration and with constant change

and are therefore not suitable for intellectual treatment. With regard to these things, science (*episteme*) is impossible; only an opinion (*doxa*) is possible.

The positivist reductions described here all have the same aim. They try to delimit the concept of truth. Before the rise of positivism, moral discourse was able to appear scientific and was therefore included in jurisprudence. At some moment that became impossible, and legal positivism is the response to that shift. It selects, in the same way as Plato did, the "bright" and clear parts of phenomena; that is, the left side of the pairs *rule:principle*, *pedigree:content*, and *definition:interpretation*. The exclusion of morality is therefore not a formalism or the result of scientists' carelessness. It is an act into which legal science was ontologically forced.

As stated at the outset, our platform is the critical perspective on philosophy of the twentieth century. What critics asserted for philosophy as a whole also holds for judicial positivism. The attempt to enclose the law in the "meaning" box had to fail. Positivism follows the appealing example of natural science. When we say that force is the product of mass and acceleration, we say the whole truth. Nothing remains for further discussion, for new research, or for the next symposium.

This is a temptation that is difficult to resist. Legal positivism tries to transmit it into law with the help of reductions. In addition to the conciseness of natural science, the ideal also includes the neutrality of the subject. When the scientist reads the voltmeter, his opinion about the issue, his worldview, whether he is liberal or conservative, and so on simply do not matter. Positivism tries to perform this neutralization of the subject within the law. It believes that the reductions can leave all the controversial topics outside. It believes that it is possible at one point to say "this and only this is the law". Dworkin expresses this using a distinction between theoretical and empirical disagreement in which, by the exclusion of controversial topics, it can be assured that theoretical disagreement is not possible within jurisprudence any longer:

> Legal philosophers are of course aware that theoretical disagreement is problematic, but it is not immediately clear what kind of disagreement it is. But most of them have settled on what we shall soon see is an evasion rather than an answer. They say that theoretical disagreement is an illusion, that lawyers all actually agree about the grounds of law. I shall call this the "plain fact" view of the grounds of law. (*Law's Empire* 7)

The "plain fact" view of law would put the judge in the same position as the scientist, reading the voltmeter. He just pronounces what he sees.[2]

This is naïve. Such attempts do not pay any regard to the basic mechanism of understanding the text. This is totally different from natural science. A text is not the solid structure of fact but rather the horizon of meanings. Dworkin expresses this sharply:

> I want instead to consider various objections that might be made not to the detail of my argument but to the main thesis, that interpretation in law is essentially political. I shall not spend further time on the general objection already noticed: that this view of law makes it irreducibly and irredeemably subjective, just a matter of what particular judges think best or what they had for breakfast. For some lawyers and legal scholars this is not an objection at all, but only the beginnings of skeptical wisdom about law. But it is the nerve of my argument that the flat distinction between description and evaluation on which this skepticism relies – the distinction between finding the law just "there" in history and making it up wholesale – is misplaced here, because interpretation is something different from both. (*A Matter of Principle* 162)

The signs of this type of mistake are the trouble that becomes apparent when positivism goes into a borderline situation. Without entering into the rich discussion that hermeneutical tradition has dedicated to the ideal of passive cognition, I focus on only one of the numerous situations in which positivism breaks down, the judicial censorship of a literary work.

Imagine the situation of a court ruling on the following case: Someone demands the censorship of a literary work, stating that it was insulting to him. The court, of course, receives the text to be read. This text is profoundly different from the kind of text that forms the law, however. It turns out that the lesson learned through positivism is completely useless. The problem lies not only in the great number of vague notions that inevitably demand an interpretation. It is even worse; the structure of the text is no longer thetic. Literary texts do not "claim" anything at all! If we do read them that way, and then try to check whether or not indeed "something is rotten in the state of Denmark", then we entirely miss the *truth* of the literature. Or, in another example, if we try to properly understand the exclamation "my kingdom for a horse!" by using countless dictionaries to seek the true meaning of the expressions "a horse" and "my kingdom", this will not bring us even an inch closer to the sense of this culmination.

The following problem shows that if the text insults someone the court simply has to accuse its author of committing an insult in its sentence. But how can that be done? The author does not speak in propositions in his work. He speaks through complex relations between countless liter-

ary characters. It is very likely that in the entire text not a single sentence can be found with an explicit statement of insult, such as "person X is stupid".

Obviously, though, a text can be intentionally insulting. It can allow readers to recognize beyond doubt a concrete person in some character, and it can lead him through a chain of embarrassing situations. In a word, the entire story can be built upon his stupidity. The reader clearly understands this insulting act. The judge understands it as well. However, this is exactly what leads positivist jurisprudence into a tricky situation, because it is impossible to indicate "where" in the text the assertion is written down that "person X is stupid". From a positivist point of view, it is not written down at all.

This paradox leads us much further than the wisdom of common sense does, by hinting that it should be read between the lines. In short, the problem is that in the text we inevitably find only half of its meaning, metaphorically. The second half is always contributed by the interpretative attitude of the reader. The reason for this awkward situation is to be sought in the specificity of the legal terminology, the main characteristics of which are that the *contestability* of the expressions should strictly be distinguished from their *vagueness*:

> Indeed the very practice of calling these clauses "vague," in which I have joined, can now be seen to involve a mistake. The clauses are vague only if we take them to be botched or incomplete or schematic attempts to lay down particular conceptions. If we take them as appeals to moral concepts they could not be made more precise by being more detailed. (Dworkin, *Taking Rights Seriously* 136)

The contestability of the notion is one of its qualities, not an imperfection. Even the perfect technique of composing a legal text cannot abolish the contestability of a notion that refers to morality.

From the fact that the law is composed of contentious notions that irreducibly remain open, and from the ascertainment that together with understanding a notion we always understand the horizon that makes it understandable, we can derive the following conclusion: *in a law only the half of the law is always and inevitably written down*. The other half cannot be written down and has to be made with the help of interpretation, in each case separately, and every time anew. It can be seen that this concept is strictly different from the positivist one, which (only) concentrates on what "is written down in the law", even though it admits that this is sometimes hard to read out. The nature of legal terminology itself prevents the law from being entirely written down. The contestability of the notions and

not the desultoriness of the legislator demand that "half" of the law always remain unwritten.[3]

By using precise terminology, this "half" can be diminished to a minimum, and this requires as little interpretative activity as possible on the part of the reader. Conversely, unclear text can employ many difficult and controversial interpretations. This leads positivism to a false conclusion. It believes that, by using perfect composition skills, only clear notions, and so on, that the point can be reached, at least at an ideal level, where absolutely *nothing* remains for the reader to interpret. This is the situation in which there would not be any more difference between the judge reading the law and the scientist reading the voltmeter.

Clear texts of course can reduce (quantitative) participation by the reader. However, their (qualitative) attitude to the text, and their basic hermeneutical openness toward the meaning as such, cannot be abolished at all. The more the language is purified and perfectly structured, the more plausible the positivist illusion can appear, but a theoretically corrupted position also emerges at the empirical level sooner or later. One such situation has been shown in the exanimate case of judicial censorship of a literary text. There is an unbridgeable gap between the *fact* that some of the text is obviously insulting and the *fact* that the insult is not written down "anywhere". The court has to write in the verdict that the "author intentionally insults person X", but at the same time it cannot add even one quotation. This is inevitably a reminder of the corrupted theoretical background of legal positivism.

NOTES

[1] As Hans Kelsen's famous provocative statement puts it: "Therefore any arbitral contents can be the law" (*Rechtslehre* 201).

[2] "in England, as of course in continental Europe, the prevalent conviction is that the judicial decision is a politically neutral decision" (Strolz, *Ronald Dworkins These* 125).

[3] See also Svetlič, "Pravna hermenevtika" 189–204.

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