

STUDIJE I ČLANCI III  
STUDIES AND ARTICLES



Miroslav Milović  
Faculty of Law  
University of Brasilia

## Jusnaturalism and Idealism

**Abstract:** *The paper reconstructs Modernity following two of its most important lines of philosophy of law: jusnaturalism and idealism.*

**Key Words:** *jusnaturalism, idealism, Modernity*

What is Modernity? Where and how did it start? To answer these questions we shall go back and take a look at the structure of traditional Greek and christian thought and life. Then, Modernity will appear in a better light.

103

The traditional thinking gives, for example, a specific primacy to contemplative life and theory. These are the ways to understand the metaphysical foundations of the world. Modernity will confront this metaphysics. Thus Cartesian thought, which marks the beginning of modern philosophy, confronts the metaphysics of the objective world. Even when talking about the *I* which thinks, Descartes doesn't yet open the way to another metaphysics which will mark Modernity, and is called the metaphysics of subjectivity. He confronts the traditional metaphysics having in mind a scientific reconstruction of the world. What it tells us about the world is not speculation anymore, but natural science. This is one of the aspects of a specific disenchantment of the modern world. At the bottom we have the laws of science, physics, and no metaphysics. Obviously, questions may arise – how will metaphysics return? Another explicit question is how will philosophy itself return. Following science, post-Cartesian philosophy got linked to a name – rather unfortunate I would say – epistemology, the name that marks the near disappearance of philosophy at the beginning of Modernity. What would this new modern philosophy be?

These are the questions with which to begin the discussion about Modernity. But the questions seem to be too specific and too academic. In that sense, they do not represent the historical path of Modernity. In other words, the confrontation with theory is not the beginning of Modernity. And, as Buckhardt says, Modernity appears in Italy and Italian cities in the 13th century. It is a Modernity linked to practical processes

developing at the time. Perhaps this progress of the practice may explain a specific affirmation of Aristotelian thought at the time. But the practice that is being installed is not the practice of the Aristotelian system. We could recollect this other moment of the traditional thought structure. After the articulation of theory comes the reconstruction of the practical, which the Greeks see as getting closer to the speculation basis. Thus the affirmation of general wellbeing in the political context can be understood as a political consequence of a philosophical reasoning about the primacy of the general. This explicit connection with metaphysics and theory determines, as we already know, the structure of practice. Thus, following theory and talking explicitly about the primacy of the general, Aristotle will separate the private world of economy from the public world of ethics, politics and law. The modern change began there, tied to this relationship between the private and public, or rather, began with the economy. Perhaps that is the historic beginning of Modernity. The realization of economy is ever more explicit. Or even better, it is ever more explicit that the economy is leaving the private sphere, and that it is being realized in the public sphere. Today our public world is economic, but it was not like that for the Greeks. The economy belonged only to the slaves, the family, and to the private. How did this change happen, then? How did the economy leave the private and determine the public? According to Buckhardt's thesis, the economy establishes itself as early as the beginning of the 13th century. It supports the Crusades, which will bring changes to the European social map. Many new towns are founded, for example, and new market conditions are created. However, perhaps it was not Catholicism that initiated the progress of economy and capitalism. Max Weber's theory suggests it was Protestantism. With Protestantism, economic development will gain a religious justification. Religion supports the economy. The economy no longer belongs exclusively to slaves, creating the conditions for the economy to leave the private and move into the sphere of the public. A new space is created between the private and the public, and we can call it social space. It doesn't exist in traditional life. The only question is how and when this new social space becomes visible to thought. The economy is developing, conquering the world, and philosophy is not saying anything about that, for example. It is rather strange, this specific philosophical autism regarding the social. Descartes, for example, is going to tell us that dealing with the social and history is almost a waste of time. When will thought deal with this appearance of the social? These are the questions which take us to jusnaturalism and later to German idealism.

So, the classic structure of practice changed. The economy has left the private. And the public structure also changed. The ethics is no longer, as Machiavelli teaches, the presumption of politics. It does not bring us closer, as Aristotle thought, to the common good. It returns ever more to the private and our private convictions. This becomes clear, for example, in David Hume's discussions on knowledge, where it remains unclear how to talk about moral objectivity. The ethics goes to the private sphere. Even today we have doubts and expectations about the new relation between the ethics and politics, about its possible resurgence in public. The politics are deprived of an ethical orientation and perhaps delivers itself to the dictate of economy, just like law. At one point Habermas says that the law did not understand its own possibility in the modern world and, instead of asserting the democratic processes it remains linked to a specific colonization of the world. It seems that we remain in the cage of Modernity itself, a thing that Max Weber already sees very clearly. These are the questions that come afterwards, but are nevertheless important. How to articulate the modern social, and how to colonize the social world? But the questions are the ones with which we can better relate to the attempts to confront the social – and this is the case of jusnaturalism and of German idealism.

105

So both theory and practice have changed. Where and how this happens – these are precisely the possibilities to understand the breaks and the appearance of Modernity. Modernity is something different, not just a new word, but a reference to this break. Modern theory appears, and the public-private relation is differentiated in Modernity. Traditional structure does not speak anymore about the foundations of the world and does not even give us a safe orientation in it.

The differences appear even in details. In that sense, Leonardo da Vinci's *Treaty on Painting* is illustrative. At one point he says that the painting is an imitation of the world (da Vinci 1996: 14). We can think of the Greek *mimesis*, the imitation that follows the metaphysics. But Leonardo says: the painting is the true imitation of all things (ibid.). That is the break. The imitation does not refer to the profound. The superficial is being imitated, open for the eyes. Truth may be on the surface. That is why the matter is painting, and not philosophy anymore, the superficial and not the profound anymore. Perhaps Mona Lisa's smile is another beginning of Modernity.

But we cannot understand Modernity as the rejection of profound questions. What is a human being? The question reappears. It is the

beginning of modern jusnaturalism, not inspired by our duties, but by our nature and our individuality. It remains an open question whether the realization of the individual, announced at the beginning of Modernity, become true. Can Modernity fulfill its own promises?

For a long time jusnaturalism was taken as Philosophy of Law (Bobbio 1997: 13). It inspired modern revolutions. Let us see up to where this philosophy comes, and reconstruct the responses of Hobbes, Locke and Rousseau. Perhaps the truth about the social will also appear on this path. Descartes tells us about the truth of the objective world, of nature. And marginalizes, in a certain way, the social. What is the truth of the social? The question becomes explicit in Hegel's philosophy. Let's see the responses of jusnaturalism and let's try to understand the possible confrontation between jusnaturalism and German idealism.

106 The word *freedom* stands at the beginning of the discussion. When talking about the difference between the Tradition and Modernity, Hegel will say that this word separates two worlds. The traditional world is moral, and the modern world is free. This word also stands at the beginning of Hobbes' jusnaturalism. We are free by nature. The question that remains open is how will German idealism, in order to explain our freedom, try to separate it from the natural order. We still can't find this in jusnaturalism, but its break becomes visible. At the beginning there is the human being and its freedom. In this way we can understand the modern world as a promise of realization of the human being. Why did this not happen? Why, as I asked, did Modernity not deliver on its own promise? But the break becomes visible. The discussion starts with the human being, and not with the metaphysics of nature. The nature in question is the one of the human being itself. And it points to our freedom and equality. We cannot find this, for example, in the Platonic and Aristotelian worlds. Freedom can be found only at the end of the discussion, and it is inequality that Aristotle uses as a concept that does not need to be questioned. The question for the modern ones is: is it, and how is it, possible to realize our nature? Does the state realize us, for example. Discussing the history of jusnaturalism it is also possible to understand the differences between the absolutist, liberal, and democratic states. These will precisely be the differences among Hobbes, Locke and Rousseau.

Hobbes himself has doubts regarding this point. We are free by nature, but this doesn't mean that freedom is automatically realized in the forms of social life. Freedom, moreover, causes problems, since we all have the same rights. This causes conflicts and war, and that is the

theme of *Leviathan*. So, the only way is to give up the rights we have, or better put, transfer our rights to an authority. Or better yet, renounce our natural rights in order to survive. This is the beginning of the famous jusnaturalistic theory of social contract. The reason for the contract is pure calculation – how to survive. The ultimate goal, says Hobbes, “The final cause, or design of men [...] is the foresight of their own preservation” (Hobbes 1979: 103).<sup>1</sup> We have to ask ourselves how yet to think of another theory of reason, beyond the calculation, and the response awaits for us in the German idealism.

In the State of Nature only the moral arguments speak about the human being, but we also have violence. We have, then, to overcome the conditions of nature, even if we can find possible conditions for legitimacy of the State in it. Hobbes thinks that only laws can guarantee a social life. We can find almost two different types of arguments in Hobbes. On one side the jusnaturalism, and on the other positivism.<sup>2</sup> Jusnaturalism is the inspiration, but the justice comes from positive laws and political authority. The contract marks the break between natural and civil law, between nature and the state, between the moral and the political. The crowd in the State of Nature still does not create another political inspiration – which will begin with Spinoza, and extend to the present day in the works of Negri. The crowd is the subjectivity that cannot alienate its own power by assassinating the contract. Natural and civil rights cannot be confronted. These are the messages that come even from Spinoza. The people, the crowd still don't appear as constituents in Hobbes, even though they are making the contracts. And Hobbes says: “For if we could suppose a great multitude of men to consent in the observation of justice, and other laws of nature, without a common power to keep them all in awe, we might as well suppose all mankind to do the same; and then there neither would be, nor need to be, any civil government or Commonwealth at all, because there would be peace without subjection.” (Hobbes 1979: 104) Thinking here still means thinking about power, and not the possibility. The multitude has

1 English text taken from <http://ebooks.adelaide.edu.au/h/hobbes/thomas/h681/chapter17.html>.

2 Several works of Norberto Bobbio could be quoted related to this matter. I think that we would be able to reconstruct the history of jusnaturalism. The difficulties appear with Kant's and Hegel's philosophy. I think that Bobbio perhaps didn't understand the idea of subjectivity which marks the difference between the jusnaturalism and idealism. This explains a certain lack of coherence in Bobbio's books, where said he says, for example, that Rousseau is the last jusnaturalist (cf. Bobbio, N., *Direito e Estado no pensamento de Emanuel Kant*, São Paulo, 2000, p. 70) and afterwards in the same book claims that Kant is a jusnaturalist (ibid, p. 137).

to overcome itself and, transferring its own rights, unite in one person called the State. The one who is the bearer of this person, says Hobbes, “is called the *sovereign*, and said to have *sovereign power*.” (ibid.: 106) The sovereignty is of the State and we will see if there will be changes of this concept in the context of the jusnaturalist discussion. Is it possible, for example, to imagine sovereignty of the people on this modern path and where can it be found? Perhaps in Locke or Rousseau?

108

In this reconstruction I will follow the arguments proper to jusnaturalism, thus coming to Hegel and to another perspective of Modernity. I deem that it is Hegel who makes it clear what ultimately is the truth of the modern social which we are looking for. Hegel will also show that we finally don't have to choose between jusnaturalism and positivism. In searching for another theory about the human being and the reason we can overcome both. Jusnaturalism and positivism do not represent the only two alternatives of modern political thought.<sup>3</sup> Obviously, another possibility, the third one, could be Spinoza's path. I will leave this reconstruction and a possible confrontation between Hegel and Spinoza for another occasion.

Hobbes is aware of the consequences of the argument itself. Freedom is in the beginning, and our safety in the end, or to put it better, the conditions of our servitude. Where did the freedom from the beginning of Modernity disappear? How to recover it in its own social context? Obviously these are still questions for us. I already mentioned once that today we still find ourselves in the authoritarian Hobbesian state.<sup>4</sup> Even today, in order to survive terrorism, we have to accept another authoritarian state called the United States, which the Bible fortunately still did not know, although it knew the Leviathan (Job 41). Today globalization is a form of colonization of the world. The example of my country, former Yugoslavia, is explicit. The winner of the last war that happened there were not the particular states, which split from Yugoslavia. They all lost their autonomy and identity. The winners of the war were the American and European corporations.

Let us return to our topic. How can we preserve our natural freedom? These are already questions for Locke and Rousseau, and for an elaboration of the Democratic Liberal State.

<sup>3</sup> Regarding this alternative I also recommend a wonderful book by Roberto Lyra Filho, *O que é Direito*, São Paulo, 1984.

<sup>4</sup> Milovic 2004: 64–65, as well as the discussion about Hobbes in: Milovic 2002: 34–42.

The inspiration for Locke is the same. We are free by nature, with the right to self-preservation. The State of Nature is not the State of War. In this context Locke includes something else that we do not find in Hobbes. It is the property that can already be found in the State of Nature. Thus God, says Locke “gave authority so far to appropriate: and the condition of human life, which requires labour and materials to work on, necessarily introduces private possessions.” (Locke 1991: 230)<sup>5</sup> God gave us the world and what we have depends on our labor. Later I will return to this measure of property by the extent of work and the political consequences.

If man is so free in his natural state, why would he give up this freedom, asks Locke at the beginning of chapter X. And the answer is simple: to preserve freedom. In that way Locke not only wants to start the discussion with jusnaturalist assumptions, but wants to see these assumptions realized. This makes him, we could agree with Bobbio, “a jusnaturalist from the beginning to the end.” (Bobbio 1997: 75)

109

In the State of Nature many conditions lack for this purpose (Locke 1991: 264). For example, an established law is missing. A judge, an objective decision, also lack, because in this state every person “hath a right to punish the offender, and be executioner or the law of nature.” (ibid.) It is also missing, “many times, the power to sustain and support the sentence when just, giving it the deserved implementation.” (ibid.) These are the reasons to think about the idea of the State, based, again, on the contract. Locke, however, much like Hobbes, does not see any break in this process. The state is the continuation of our nature. We only have to renounce our own justice. “... [B]eing the men partial to themselves, passion and revenge will carry them too far in the cases which interest them...” (ibid.) In the civil State we find the same freedom which we had in the State of Nature. There would be no sense in leaving the State of Nature if we would lose something that we had in it. It is wrong, says Locke, obviously against Hobbes, “to think that the legislative or supreme power of any community can make whatever is their will and dispose of property of the subjects arbitrarily, or take any part of them at own will” (ibid.: 271). The contract does not establish any authority, as is the case with Hobbes. Is this already the affirmation of another sovereignty, not of the State, but of the people? Is the Liberal State the affirmation of the sovereignty of the people? Locke, after all, talks about the well

<sup>5</sup> English text taken from <http://ebooks.adelaide.edu.au/l/locke/john/181s/complete.html>.

being of the people, at the end of chapter XI. Soon I will come back to these questions.

In the civil state freedom is linked to laws. Where there is no law, says Locke, there is no freedom (ibid.: 238). With the laws we only articulate the guarantees for our natural rights, and those guarantees cannot be found in the State of Nature. Here Locke touches on an important concept: the one of civil disobedience, or the right to resistance. This right appears because the State itself, as a result of our consensus or contract, has unlimited power. Locke even was the witness of the historical process in which England was constituted as the first modern constitutional state, with separation of powers.

110

Self defense, deems Locke, is part of the law of nature (ibid.: 308). We enter society in order to preserve it. If this did not happen, we would not have any obligation to follow this legislation. The people, Locke uses this word again, are released from subjection (ibid.: 301). Bobbio elaborates here the idea of the State of Law in Locke. "The State in which the right to resistance is no longer an unprotected natural right, but a protected positive right, is generally called 'the State of Law'" (Bobbio 2000: 36). Thus the State becomes the institutionalized nature. So, the natural rights of preservation of life and property, the contract in the sense of a consensus which founds the State, the power which is not authoritarian, but limited, and the right to resistance are the principal points of Locke's argument. Or, in other words, the principal points of the elaboration of the Liberal State. Many use the *Second Treatise of Civil Government* as the beginning of this elaboration (ibid.: 59). Locke also appears to be the apologist, or the theorist of the 1688 Revolution (Bobbio 1997: 161).

Questions about labor and the assumptions of liberal democracy remain open. The latter question opens the path to understand Rousseau's position. We saw that the economy was long marginalized by philosophy. In the traditional world it doesn't reach the public sphere nor the conditions to achieve the common good. The perspective did not change in Modernity, despite tremendous economic progress. Even though being the determining factor in the public sphere, the economy still does not provoke a philosophical reflection. Locke shows a different sensibility. God, as he says in chapter V of the *Second Treatise*, has given to men the authority of appropriation and ordered them to work (Locke 1991: 229). Thus, as we mentioned, the extent of property is set by the extent of work (ibid.: 230). Work, ignored, we may say, until the Protestant change, returns to be the main topic of the discussion. Except that Locke

does not start the discussion about the labor structure itself. What is, for example, the basis of modern manufacturing and modern work organization? These questions return only with the Marxist discussion. In that sense, Marx will understand labor as, we might say, a certain social ontology. Work constitutes the social world. Hegel already understood this constitutive role of work, with which nature changes and becomes the historical world of the human being. This constitutive role still remains visible under the metaphysical assumptions in, for example, the *Phenomenology of the Spirit*. This type of discussion is still lacking in Locke.

This also has consequences for the second question I mentioned, about the liberal assumptions of politics. Work is the extent of property, and property determines the conditions of political participation. Obviously political rights are not the rights of all. Locke still does not reach the idea of political equality, or a democratic theory. Nor does he talk about slavery of black people, for example. It seems obvious, as Bobbio concludes, that “the political rights should be granted to all citizens, and not only to the land owners.” (Bobbio 2000: 55) This is the point that Rousseau understood very well. This is why we can already understand his theory as the possibility of articulating the idea of the Democratic, and not the Liberal, State. Locke, as we have seen, speaks several times about the people and it even seems that he understands people as a certain political subjectivity. The people released from subjection, the well being of people - are some examples of this. Even other commentators confirm this misunderstanding. “Not in Hobbes, but in Locke, we can say that the sovereign is the people and that this makes for a popular sovereignty.” (Salgado 2008: 144) A dangerous connotation, I would say, because it creates the mistaken impression that the liberalism already articulates the possibilities of democracy. Today, even, we are the witnesses of the existence of several liberal-democratic parties. These two concepts seem very close. Liberalism is not democracy. This is visible already in Locke, where, as I mentioned, the political rights are not the rights of all. Liberalism is perhaps just a simulation of democracy. And we have to ask ourselves whether the modern world is capable of implementing democracy, the equality announced in the premises of justice and naturalism. The Marxist readings point to a deep modern world contradiction between labor and the capital, which has a consequence of deep social polarization. The simple message is – not all of us can earn money and be rich in capitalism. Capitalism does not allow for universalization, also understood in the sense of theory of democracy. At the bottom, as Marx sees it, and his diagnosis is still valid today, we have

a confrontation, and not conditions for universalization. What can be universalized in capitalism?

Locke has a vision of harmony in the State of Nature, which was determined by God, and liberal results. Not analyzing the assumptions, which become obvious in the question of the idea of labor, he does not come far in the attempt to think of a new sovereignty, perhaps of the people. In the end, his world is of individuals. God and individuals, to put it better. Obviously it is not clear how to think in this context about the idea of the common world.

112

I remember that during the war in my country, former Yugoslavia, I was asked several times something like, OK, you criticize the communism, we can understand that because of the totalitarian heritage of communism. You criticize nationalism. We can understand that as well, because of the social exclusion that it affirms. But why do you criticize capitalism? The answer becomes visible even in the context of this discussion about Locke. Capitalism eliminates the possibility of democratic coexistence. Capitalism only wants to function by liberating us, so to say, from ourselves. The foundation is not discussed, as the question of labor indicates. Where, then, could we find another inspiration to constitute the common world. Is democracy still possible? And is it possible within Modernity? It seems like an attempt that fails at the very beginning. But let's first hear Rousseau's answer.

The initial inspiration which unites Hobbes, Locke, and Rousseau is freedom in the Natural State. But the reconstruction of the Natural State already creates differences. In the State of Nature there are no conditions of competition and war, as Hobbes thinks. Actually "the men in this State of Nature, not having among themselves any kind of moral relation or common obligations could not be neither good nor bad..." (Rousseau 1983: 251). Rousseau doesn't see any moral inspiration to justify the political consequences. We saw that this inspiration still strengthens Hobbes' perspective against positivism. The Natural State is characterized by the attempt of self-preservation, and, we could say, a certain self-sufficiency of the man. The savage lives within himself, says Rousseau (*ibid.*: 281). That is what he also calls pride. Equality is found in this state. It disappears with civil society and with the introduction of property. So, Rousseau does not agree with Locke that property is a natural right. It is something that comes later and seems to be the cause of the evils in history. It is the beginning of inequality. This confrontation of nature and culture and the diagnose of malaise in the culture will determine

many discussions. It is also the beginning of another relationship of man with himself, which Rousseau names self-love and describes it like this: "Self-love should not be mistaken for pride; these are two very different passions both by their nature and their effects. Self-love is a natural sentiment that makes every animal zeal for its own survival and which, in a man guided by reason and changed by pity, causes humanity and virtue. Pride is nothing more than a relative, fictitious sentiment generated in the society, which makes every person care about himself more than about anyone else, which inspires men to all evils that they cause to each other..." (ibid.: 307). Rousseau is not going to follow the idea of this loss of the other in culture, because he finally thinks that he can search for a certain articulation of the common life. But the message is dramatic – the loss of oneself and of the other. Or, as Starobinski put it beautifully: "The 'false lights' of civilization, far from illuminating the human world, scumble the natural transparency, separate men from each other, make interests private, destroy any possibility of mutual trust, and substitute the essential communication of souls with a fictitious trade devoid of sincerity: this is how a society is created in which each individual is isolated in his own self-love and is hiding behind a false self image" (Starobinski 2011: 38). Surely Starobinski found inspiration in Rousseau's words: the savage lives in himself; the social man, always outside of himself. (Rousseau 1983: 281) For some time I have been asking myself, isn't the Internet the example of the emptiness of self-love?

113

So, Rousseau follows the jusnaturalist intuition about our freedom, but he will not articulate an individualist elaboration of jusnaturalism. This is an important difference between Rousseau on one side and Hobbes and Locke on the other. The idea of the social contract is also different. Rousseau does not elaborate a continuation between the Natural State and the Civil State, as Locke does. The relation between the two states is a break, Rousseau shares Hobbes' thinking. We are giving up natural rights in the name of a new possibility of social freedom. Except that the point of the social contract, as we saw, is different in Rousseau. The social contract is not the foundation of civil society. It is a necessary deterrent against the evils caused by this society. The contract comes later and it questions the possibility of, almost, rediscovering the conditions of our freedom and our nature in civil society. The importance of moral arguments appear at this point in Rousseau. They are used to overcome the selfishness found in the beginning of the civil society, and conditions are met for a common well being, which Rousseau understands as a creation of the common will. Natural equality is substituted by

the moral equality, that is the message of the *Social Contract*. Rousseau says, and this is very important to understand in order to be able to evaluate Hegel's criticism: "There is often a great deal of difference between the will of all and the general will; the latter considers only the common interest, while the former takes private interest into account, and is no more than a sum of particular wills." (ibid.: 46–47) Rousseau sees civil freedom as obedience to this general will (Bobbio 2000: 75).

114

We are giving up our rights not in the name of an authority, as in Hobbes, but in the name of this general will, in the name of all. This could be understood as the elaboration of the Democratic State. With Rousseau we can already talk about the sovereignty of the people. This overcoming, however, of the particular does not necessarily lead to the affirmation of pluralism, as in the case of Hannah Arendt, but to the submission to the general will. We have to understand the sovereignty of people in Rousseau in the context of this possible approach to totalitarianism. Bobbio understood civil liberty in Rousseau as a fuller and higher freedom. In the Natural State we are free because there are no laws. In the Civil State we are free because we obey the laws that we ourselves create (ibid.: 73–74). Rousseau's words indicate more a balance than enthusiasm: "What man loses with the social contract is the natural freedom... What he gains is the civil liberty and the property of all he possesses." (Rousseau 1983: 36)

I will mention here two criticisms of Rousseau and some suggestions on how to read his argument. One criticism comes from Hegel, and the other one from Nietzsche. One closes the understanding of Modernity, and the other opens the way for a possible break from Modernity. The premise of Hegel's criticism is another difference between the nature and freedom which does not put freedom in the natural context. Kant initiates this reading by separating the two worlds of which we are citizens: the world of nature, and the world of freedom. Liberty is not natural, Kant thinks. Radicalizing Kant's perspective, Hegel comes to the conclusion that freedom can only be social. In his *History of Philosophy*, exactly in the part about Rousseau, Hegel will say that the freedom of a human being is not abandoned in the State, but on the contrary, it is constituted in the State (Hegel 1986: 307). And in order to understand this we cannot develop the discussion around individuals. Perhaps Hegel does not think here about Rousseau, but about Hobbes and Locke, but the message of the *Philosophy of Right* is explicit: We can not allow the State to depend on individuals and their will, articulated in the contract. This part of the

criticism already includes Rousseau. Hegel thinks that the general will cannot be the result of the will of all. We saw that Rousseau also speaks about this. Could Hegel have not understood Rousseau? I think that Hegel has different expectations of the general will. The general will is a concept and not a contingency. Hegel's philosophy is determined by concepts. We need to understand, he says in the *Philosophy of Right*, that the law cannot be understood differently than the idea (Hegel 2005: 39). The spiritual is the foundation of right (*Das Geistige ist der Boden des Rechts*) (ibid.: 41). It is a strong message to be reconsidered in this time of profound domination of positivism, in which the jusnaturalist inspiration was lost. The profound crisis of law is, just as the word implies, in the lack of understanding of its own foundation. The baseless foundation of law. This is not the place to follow this reading. In the end, Hegel does not need to appear as a reference. The discussion can be articulated with another focus: the French Revolution itself. By confronting Rousseau in this way, Hegel thinks that he opens the possibility to understand the spiritual character of the revolution (cf. Milovic 2004: 11–24). According to him, this is what Rousseau and jusnaturalism did not understand. In the *History of Philosophy* where he talks about Rousseau, Hegel will say that those who reject thought when talking about freedom do not know what they are talking about (Hegel 1986: 308). He continues, the unity of thought with itself is the liberty, the free will (ibid.). The will (ibid., loc. Cit.) is free only thinking. We could quickly try to simplify Hegel's message. The thought in matter is not an isolated act, distant from the world. It is a mediation; a historic one, even. With this mediation the universal aspect of the thought is mediated with the particularism of the world, coming to a specific unity of the world and thought. This is what in the end happened with the French Revolution, where each person was recognized as such, where the individual and the universal united. Thus, the end of history is accomplished with the French Revolution. In this way, Hegel thinks, freedom is realized in the social context. The social, which does not even appear in the Greek context, is what realizes or constitutes us here in Modernity. This constitutive role of the social became visible with the German idealism, and even Marx will find inspiration in it. Here politics constitutes metaphysics.

115

In this sense, Hegel maybe thinks, we can overcome the doubts that remain after Rousseau, if the general will is the realization of freedom or perhaps the signal of totalitarianism. I think that Starobinski takes this as a motive when he says: “[...] having lost equality in the natural independence, the man now gets to know the equality in servitude:

Rousseau doesn't tell us how people can gain equality in civil freedom." (Starobinski 2011: 47) Hegel thinks that he has the answer to this doubt. The French Revolution finally speaks about equality, and the question is, Hegel thinks, only how to understand this equality. Hegel is still far from a diagnosis which reveals the profound inequality in modern capitalism. It is only a suggestion of reading, in order to finally be able to confront the Hegelian conviction that Modernity realized our freedom. Again, we are free as modern beings, Hegel thinks.

116

Nietzsche's criticism, expressed, for example, in *Twilight of the Idols* is not an apology of Modernity, but one of its strongest criticisms. Where does Rousseau finally want to go, Nietzsche asks. "Rousseau, this first modern man, idealist and *canaille* in one person... to ask this once more, to what did Rousseau want to return?" (Nietzsche 2000: 106) There is no foundation of human nature, that is why it is not clear where Rousseau wants to get. This absence of the bottom in the articulation of the human being leaves doubts which reach to present day.<sup>6</sup> I hate, continues Nietzsche, Rousseauan morality: "The doctrine of equality! [...] There is no more poisonous poison: for it *seems* to be preached by justice itself, whereas it is the termination of justice...". (Nietzsche 2000: 107) Modernity and the termination of justice. Equality and the termination of justice. Instead of affirming the idea of the individual, Modernity perhaps achieves its failure. Why do we still yearn to be Modern?

But let's go back to Modernity and try to understand the arguments that speak in its favor. That is the case, as we saw, of the Hegelian philosophy. Hegel is so enthusiastic about Modernity that he cannot imagine anything beyond it. His well known message is that as modern beings we are free. Let us see if we can still follow this Hegelian enthusiasm. Let us go back to the beginning of theoretic Modernity which, in a way, we identify with jusnaturalism. An excerpt from the *Encyclopedia* can give us guidance. Hegel says: "The phrase 'Law of Nature', in use for the philosophy of right involves the ambiguity that it may mean either right as something existing ready-formed in nature, or right as governed by the nature of Things, i.e. by the notion. The former used to be the common meaning, accompanied with the fiction of a State of *Nature*, in which the law of nature should hold sway; whereas the social and political state rather required and implied a restriction of liberty and a sacrifice of

6 On the one hand I can mention Foucault's reading of Nietzsche, thinking genealogy of the human without foundations, and on the other Lévi Strauss's research. Already the title of his article on Rousseau is illustrative: Rousseau, fondateur des sciences de l'homme, in: *Anthropologie structurale deux*, Paris, 1973, PP. 45-56.

natural rights. The real fact is that the whole law and its every article are based on free personality alone — on self-determination, which is the very contrary of determination by nature. The law of nature — strictly so called — is for that reason the predominance of the strong and the reign of force, and a state of nature a state of violence and wrong, of which nothing truer can be said than that one ought to depart from it. The social state, on the other hand, is the condition in which alone right has its actuality: what is to be restricted and sacrificed is just the willfulness and violence of the state of nature.” (Hegel 1995: 289)<sup>7</sup> The state of nature in which the new theoretical sense of Modernity is being affirmed is not the state of freedom and rights. There are no natural rights, thinks Hegel. The question of right is a social context. The sense of right is the relation with others. Hegel thinks that things are that way through thought. Then we have to understand two perspectives: one is historical, which Hegel understands as the way out of nature and of affirmation of freedom, and the other, the way of the thought, concept, a conceptual articulation of the thought. The way of freedom and the way of thought. These are two inseparable Hegelian perspectives. He returns to an almost forgotten word in philosophy: ontology. And on the other hand Hegel wants to analyze the logic of thought which leads to concept. From the beginning Hegelian philosophy is an intimate relationship between ontology and logic. Except that his ontology will not be the Greek one. Although full of admiration for Greek thought, Hegel does not agree with a presupposed primacy of general and collective which we find explicitly in Plato and Aristotle. Even wanting to affirm the collective again, Hegel wants to do it by justifying it, and not postulating it. The primacy of the collective has to be the consequence of the concept itself. On the other hand, Hegel is confronted with the unlimited affirmation of the individual in modern times, linked to the advance of liberalism. He thinks about another synthesis of the collective and the individual, but not in the sense of a new ecumenism. This relation has to be understood as a consequence of the concept itself. Thus, the ontology which comes back is not Greek. It is the story of the concept itself, and not of an already determined static metaphysical structure. Hegel’s reasoning is easy. The pre-modern world is an articulation of objective metaphysics, where we have to fit in. Because of that, he several times names the context as the state of unhappy consciousness and humiliation of man, of man’s essence which always

<sup>7</sup> English text taken from <http://www.marxists.org/reference/archive/hegel/works/sp/osabstra.htm>.

remains outside of him. Perhaps the Jewish people are a better example of this than the Greek people. It is the Greeks, in the end, who find the glow in the collective. Even so, Hegel links freedom only to Modernity. Perhaps at the very beginning of jusnaturalism is the theory of human rights. But this world – of which Hobbes is a witness – is the world of violence and we ought to depart from it, as Hegel himself confirms in the mentioned paragraph. Here we have one more argument, related to the mentioned relation between logic and the ontology. We have to depart from the State of Nature, not only because of violence found there, but because in the natural law and the nature, according to Hegel, we only have the relationship with things and not with ourselves. Natural rights do not create the environment for a specific self-understanding of the human being which Hegel searches. Who are we? And even more, who are we after the French Revolution? Natural law is not our self-consciousness. Our self-consciousness does not stay connected to nature, but to the historical path, which takes us to the French Revolution. Nature is not a place of the human being. That is why, as we mentioned, speaking about natural rights is even contradictory.

We ought to depart from nature. Kant is an important step on this path. Leaving the area of Law we are entering morality, and that is where Kant comes in. It is the context of a relation not anymore with things, but with ourselves, it is the question of subjectivity. Hegel affirms here Kant's position, but also speaks about its limits. He mentions a specific power and at the same time the impotence of reason. Reason is constitutive, transcendental, but at the same time isolated from the world, impotent. Morality affirms our interiority, and not our exterior, social world, where Hegel finally wants to recognize constitutive reason. That is why the ethical life outweighs morality. This is the path to an exteriority of reason. It again passes through the natural context represented by the family and enters civil society, in the liberal context of individuals. Even though he criticizes the liberal individual isolated from reason, Hegel thinks that this is a necessary step for the realization of modern social rationality. He is the first to make an important step in the discussion about economics. It does not belong to the private world anymore, it is the context of realization of individual necessities. The economy is civil society, and that does not exist in the Greek thought. Hegel will now confront civil society with individuality, thinking of a possible reconciliation between the individual and the general. The state overcomes economic problems, the misery of the world, Hegel thinks. We are finally getting to the French Revolution and the political decision of

recognition. At this point Hegel confronts Kant again. We saw that Kant comes to the reciprocity of the wills, talking about the right and the external conditions of our freedom. But Hegel thinks that Kant does not show, in an argumentative way, how this reciprocity is reached. Hegel's solution is that the individual is realized as having purpose in himself by mutual recognition of individuals. He thus arrives at the idea that the recognition is the right to have rights (cf. Williams 1997: 101). The right is confirmed as the existence (Dasein) of free will (Hegel 2005: § 29).

It is important to understand that Hegel does not mean that the decision of recognition is a contingent decision for each of us. That would be the idea of the contract. The recognition is the example of realization of the spirit, and not a contingent decision. This is the moment to consider the connection between logic and ontology in Hegel and perhaps think of some criticisms.

119

This is about the relation between the particular and the general. In the beginning there is the particular, any individual, for example. In this context, he still has not developed his full potential. We saw that only history shows what the human being is and what his potentials are. The truth about the human being is only at the end of this process. The particular as it is, remains abstract. Historical development is the concretization of individual abstractness. It is the progress of our will that overcomes the isolation of the reason. Hegel associates this free will with thought, thus creating the difference between humans and animals (ibid.: § 18). The development of the concept is the same. Starting with particularities, thinking about their mediation through reflection and thus reaching the concrete of reason. In nature we have the identity between the particular and the general. It is the case of animals. However, it is a given identity. In the case of humans the particular still is not the general, it is realized as the general. The context of this realization is history. History is the stage of the human being. The concept is this historical and reflexive unity between the particular and the general. Our self-consciousness is the consciousness about freedom, about its objective realization. The path of thought and the path of freedom are the paths that start with the abstract particular and end with the concrete general. The real general, says Hegel, is the general of freedom (ibid.: § 188), realized in Modernity.

The Hegelian subject is not separated from the world, as in the Kantian sense. Its presence in the world, that is, its social aspect, creates another

historical perspective. The social self articulates the metaphysical context, the background of historical events. The social, which is not even perceived by the Greeks, here has the role of constitutive subjectivity. Hegel criticizes Kant's elaboration of subjectivity in which subjectivity still remains abstract. Subjectivity can only be understood as identity between the subject and the object (ibid.: § 123).

120

So, instead of saying metaphysics and politics, in the sense of metaphysical constitution of politics, in Modernity we can say politics and metaphysics, that is, social conditions for the possibility of metaphysics. This is the structural change between the Tradition and Modernity. At the end of this process, the French Revolution realizes the individual as such, and not as something linked to natural characteristics. Hegel represents the consciousness of this process. We can be conscious of this history of realization of social freedom only at its end. And we need this consciousness. In the end, what would it mean to be free and not to know it.

Realization of the general is the very purpose of individuals (ibid.: § 260). Similar words can be found in Aristotle's Politics. Except that the latter misses the historical elaboration of subjectivity and thus the ontological articulation of freedom. The Greeks did not understand the human being in its complete general sense (*die ganze Allgemeinheit*), says Hegel (ibid.: § 209). But, Hegel does not see the possibility of this identity between the particular and general in economy. When thinking of economy, Hegel, it seems, remained contaminated with his own liberal articulation of economy. It is the space of atomized individuals which lacks general and political equality. Hegel perhaps does not see the possibility of another economy and of an economic intersubjectivity.

The property doesn't belong to freedom of the will. Only the relation among the wills creates the space of freedom. Thus Hegel reaches only the political intersubjectivity. In the Philosophy of Right he says that Plato understood very well the ethical life of Greeks thinking that the private property still is not the general principle, because it contains slaves (ibid.: § 29). It is not enough to say, Hegel continues, that slavery is unjust in itself. The human being does not exist only in himself, but is conscious of his freedom. The ethical life and recognition and thus the intersubjectivity is a political event. Hegel believes that this is realized in the French Revolution. Marx's doubts about this political emancipation are well known. Habermas is also basing his whole theory on this

impossibility of realization of intersubjectivity in Modernity. It is a political danger, as we will still see, to think that Modernity is the realization of democracy or intersubjectivity. For Habermas there is still a possibility, which for many there is not, to see democracy in Modernity.

Abside from the question of intersubjectivity, we can also mention the question of difference. In his book about Hegel, Williams uses beautiful words to describe the Philosophy of Right as the phenomenology of intersubjectivity (Williams 1997: 229). But, according to the same author, one comes to the conclusion that the recognition of the other is the recognition of his difference (ibid.: 25). The Other in Hegel, is recognized, according to Williams, within its proper singularity and difference (ibid.: 69). Williams also emphasizes the very process of recognition as the relation with the other (ibid.: 58). I think that we still cannot look for these motives in Hegel. The example that Williams is discussing is the difference between the recognition and the contract. We cannot let the State and the concept depend on the individual contingencies and decisions. The idea of the State is much more important, Hegel thinks. Its nature is different, since it is the realization of the spiritual will (Hegel 2005: § 75). Thus I think that the other cannot even appear as the other, but within this glorious way of the spirit. It seems to me that at this point Hegel does not overcome Kant's philosophy. In Kant we cannot think of the encounter with the other. The other is inside a reflexive procedure of philosophy (Williams 1997: 33). The other in Hegel also only appears on the reflexive path of the spirit. This difficulty of encountering the other reaches perhaps even Habermas. Moreover, just like Hegel, Habermas also does not look for an economic intersubjectivity, but a political one. He thinks that Hegel remained only with the philosophy of subjectivity (Habermas 1985: 34–59), which is now called the spirit, and that because of that the intersubjectivity project remains open. But, with all the difficulties of Modernity that we will discuss, another question also arises, now against Habermas: what is the sense of searching for intersubjectivity where it cannot happen? Modernity is not the world of intersubjectivity as Hegel thinks and as Habermas still believes.

The teleology of the spirit ultimately erases the differences. In that sense Hegel will proclaim the end of history and the impossibility of social differences. The example of women is illustrative. In the Philosophy of Right Hegel will confirm that they do not overcome nature and the private (Hegel 2005: § 172). They do not reach the public and the general

perspective of the concept. Thus, we can conclude that Modernity does not reach even the idea of intersubjectivity or the idea of difference. Perhaps its image cannot be more Hegelian. Let's see which could be the other diagnosis of Modernity.

Translated from the Portuguese by Jovan Tatić

#### Bibliography

- 122
- Bobbio, N. (1997), *Locke e o Direito Natural*, Brasília: UnB
- Bobbio, N. (2000), *Direito e Estado no pensamento de Emanuel Kant*, São Paulo: Mandarim
- Lévi-Strauss, C. (1973), "Rousseau, fondateur des sciences de l'homme", in: *Antropologie structurale deux*, Paris: PUF
- da Vinci, L. (1996), *Trattato della pittura*, Milano: I Mammut
- Habermas, J. (1985), "Hegels Begriff der Moderne", in: Habermas, J., *Der philosophische Diskurs der Moderne*, Frankfurt: Suhrkamp
- Hegel, G.W.F. (1986), *Vorlesungen über die Geschichte der Philosophie III*, Frankfurt: Suhrkamp
- Hegel, G.W.F. (2005), *Die Philosophie des Rechts*, Frankfurt: Suhrkamp
- Hegel, G.W.F. (1995), *Enciclopédia das Ciências Filosóficas, III*, São Paulo: Loyola
- Hobbes, Th. (1979), *Leviatã*, São Paulo: Nova Cultural
- Locke, J. (1991), *Segundo tratado sobre o governo, Os Pensadores*, São Paulo: Nova Cultural
- Lyra Filho, R. (1984), *O que é Direito*, São Paulo: Editora brasiliense
- Mascarelli Salgado, G. (2008), *Contrato como Transferência de Direitos in Thomas Hobbes*, Curitiba: Juruá Editora
- Milović, M. (2004), *Comunidade da diferença*, Rio de Janeiro: Relume Dumara
- Milović, M. (2002), *Filosofia da Comunicação*, Brasília: Plano
- Nietzsche, F. (2000), *Crepúsculo dos Ídolos*, Rio de Janeiro: Relume Dumara
- Rousseau, J.J. (1983), *Discurso sobre a Desigualdade, Os Pensadores*, São Paulo: Nova Cultural
- Starobinski, J. (2011), *Jean-Jacques Rousseau: a transparência e o obstáculo*, São Paulo: Companhia de Bolso,
- Williams, R., R. (1997), *Hegel's Ethics of Recognition*, Berkeley: University of California Press

#### Miroslav Milović

Pravni naturalizam i idealizam

Apstrakt

Ovaj rad rekonstruiše Modernu prateći njena dva najvažnija pravca filozofije prava: pravni naturalizam (jusnaturalism) i idealizam.

**Ključne reči:** pravni naturalizam, idealizam, Moderna