On the Legal Logic of Social Ontology. Short Remarks on Hans Lindahl's Recent Book[♣]

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1. I have been inspired by this work. It is heavy food for thought. I might not share several of Lindahl's insights and claims; however, I am strongly sympathetic to the general framework and sense of his research programme. So my criticism will be a constructive effort to improve and go forward in that programme.

Lindahl's greatest merit is to propose a new path for legal theory. In the last decades, legal theorists have been obssessed with judicial reasoning and have focused on the question of separating law from morality. The enterprise has mostly been a kind of casuistry; its passion to comment judicial rulings. The subtlest, cleverest and most astute arguments have been deployed to distinguish an "inclusive" from an "exclusive" legal positivism, and we have been told in the end that the "nature" of law is something that has little to do with how citizens and lawyers use the law and reason about it. A proud philosophical point of view has been claimed as independent from ordinary perceptions of the law and its internal point of view. Ontology has thus been proclaimed superior to phenomenology. But the ontology in question is indeed a very poor one, based on a kind of abridged Aristotelian of Platonic doctrine of "essences". No effort has been done within this debate to refer the "nature" of law to the two most powerful philosophies of late modernity, Wittgenstein's and especially Heidegger's. No effort whatever to cope with the pragmatist reformulation of "essences" or "natures" in terms of existence, doing, or practices. Analytical legal philosophy contents itself with Herbert Hart and not much more, though its mainstream versions give up the core of his method, namely the internal

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point of view, and step back into a pre-Hartian programme of inquiry about the law.

Hans Lindahl is aware – I believe – of this downgrading of an existential and hermeneutical investigation about the law and of the Scholastic blind alley of some Oxbridge jurisprudence. He's not to be rendered satisfied or made content by re-reading and re-interpreting Herbert Hart or by venting still new hostile cleverness against Ronald Dworkin's somewhat subversive "rights thesis". He looks for a more promising alternative and a fresher research programme. And he believes that this could be found by adapting Husserl's venerable phenomenological tradition to the needs of legal theory. Actually this is a path that has been trodden before by distinguished scholars, alas now forgotten and lost in the thick fog of post-Hartian Anglo-American *Begriffsjurisprudenz*. There is a noble tradition of jurisprudential phenomenology, starting with Gerhard Husserl, Edmund Husserl's son, whose two legal philosophical books, *Recht und Zeit* and *Recht und Welt,* are suggestively quoted by Lindahl in his book. But we shouldn't forget either the seminal work by Adolf Reinach or the later research by Werner Maihofer and the intense and intelligent views elaborated in several essays by Paul Amselek. In Italy, Rodolfo De Stefano, an immensely erudite and intelligent legal philosopher, attempted a phenomenological tour too.

Their main idea was to go to the *Sachen selbst*, to the law in its basic appearance to human experience, and this is not prima facie in the form of a rule or a logical piece of reasoning, or in the now ever (and imperially) present "reasons for action". Law is out there for human beings, first and foremost in the form of "things" and "events", and also of "spaces", "lines", "limits", and "frontiers". And of "fault lines"—adds Lindahl. Law is first of all an "order" and after that and eventually a system of "norms" and "rules" (and "reasons"). In our ordinary experience, we do not have to ponder about rules. On the contrary, we are faced with a spatial and phenomenological order and its topography, and this often suffice to instruct us about how to act, and which conduct to avoid. A space or a line can well be used as an implicit reason.

However, Lindahl connects to two further, differentiated perspectives to the phenomenological tradition which are not precisely phenomenologically oriented. On the one side, he makes use of the so-called *konkretes*

Ordnungsdenken elaborated between the two tragic World Wars by Carl Schmitt; this approach to law is a version of institutionalist theory with strong communitarian (and authoritarian) implications[1]. On the other side, Niklas Luhmann's system theory is nearly always present, too. My contention – which I'll try to briefly justify– is that this combination is not very felicitous, and that it does not serve the cause of a revival of jurisprudential phenomenology. I would also like to point out two further shortcomings, especially in Lindahl's approach to citizenship. But this does not mean in the least that most of Lindahl's conclusions should not be shared or recommended.

2. Lindahl's main argument is that law operates through a differentiation and selection of behaviour options that involves a closing down and the opening up of a kind of spatial world. In this sense, limits and borders are quintessential to having a law. Law is constructed and established via a binary code, a strict *aut aut*, legal/illegal alternative. This means that there will always be an outside and inside in the law. "Legal orders are necessarily organized as as an inside over and against an outside by reference to the phenomenological notion of a world" (p. 262). This is a salutary insight, if compared to the grey and thin ontology of most analytical jurisprudence, according to which law's mission is only regulative and its constitutive character is either denied or reduced to a prescriptive function, or just equated with "definitions" without normative purport. So that rules in the proper sense are mostly seen as "regulative", not "constitutive". Here ascriptivism is still a version of prescriptivism, thus losing its normative force and explanatory power.

Lindahl nonetheless does not too clearly differentiate between a coordination role of law and its main (ontological) mission of giving sense. If we stay within the coordination paradigm, i.e. a perspective where the "we" is more or less equated with "each of us", we will be once again be pushed into the regulative model and we'll miss the constitutive character of legality.

[1] See C. Schmitt, *Die drei Arten des rechtswissenschaftlichen Denkens*, Hamburger Verlagsanstalt, Hamburg 1936. On Schmitt's "konkrets Ordungdenken", cf. my *La lucha contra el derecho subjetivo. Karl Larenz y la doctrina jurídica nacionalsocialista*, Dykinson, Madrid 2009, chap. 1.

According to Lindahl's perspective, universalism in law seems to be somehow doomed, since there is no possibility of an all-inclusive strategy and experience of law. Illegality is always an option for law subjects. Nonetheless, Lindahl adds a third option: a-legality. But before we linger a bit on this third "place", a few words should be said about illegality. Lindahl tells us an old traditional story, that illegality confirms and reinstates legality. It is only through illegality that legality becomes aware of itself. But is it so? Perhaps in the ordered and civilized Netherlands this is indeed the case. But I would have some doubts about repeating this story in Sicily or Calabria (or Colombia for that matter). In the *Reine Rechtslehre* (which is not a phenomenological inquiry), Kelsen told us a similar narrative. When a rule is breached, it is reaffirmed. The true law-enforcer – we would thus be tempted to claim – is the the law-breaker. But this could be very little more than an exercise of self-complacency on the part of the legal positivist.

Illegality beyond a certain threshold, a gross number of illegal acts, does not at all reaffirm legality. Gross and widespread illegality simply causes the collapse of legality. It can even project itself as a new legality, as is the case of a revolution or of a country where a region is fully in the hands of a mafia, of an organized criminality with its own rules and sanctions. In this sense, il-legality might in the end be much more connected to a-legality than to legality, and the difference between the two is blurred and in fact disappears.

A-legality –says Lindahl – contests, opposes the binding force of the binary code, and points out to a third space of possibilites. It does not take on itself the burden of illegality of breaching the law. It is "strange" to the law in force, not "foreign" to it (as is illegality). In this sense it is an experience closest to Husserl's "strangeness": "the verifiable accessibility of what is not originally accessible". So far, so good.

However, there is here an overconsideration of the first plural perspective. There is a "We" – we are told – only through representation of a whole, only through spoke-persons that in the mode of a constituent power starts speaking of, and invoking, that "We". Il-legality and a-legality are asserted from this particular perspective. We are a "together" and I am one of us and only from this vantage point can I see and feel that I am behaving legally, il-legally or a-legally. This means, however, forgetting the extent to which law is an experience

of the self, and how much judgment is a matter of a mind that is engaged in a debate with itself. Phenomenology takes good care of this. The step into a collective self is barely made by Husserl, not to speak of Heidegger, for whom *Dasein* is a subjective dimension, though related to a collective context and sociality that is however labelled as the "Man" that *Dasein* should overcome to find its own authenticity. "We" from the point of view of an "I" can easily be converted into a "They". "Rede" is ever threatened by "Gerede"[2]. "We" thus is becoming a "Man", if it is not reshaped as an intersubjective dimension or at least as a collective that is open to an *Ich-Du, I-Thou,* relationship. A too strong "We" is again a monological perspective that can hardly do justice to the fact -- which is indeed taken into account by Lindahl – that "concrete behaviour never fully conforms to normative expectations". The Self artfully dodges the control of "We together".

The overstress given to the plural subjectivity and existential representation has consequences for the idea of constitution defended by Lindahl. There are important affinities between Lindahl's position and the existentialist Schmittian *Verfassungslehre*. Thus, for example, he states that "a constitution is a first-person plural concept". This is an idea that indeed is plausible from a communitarian institutionalist perspective, which was staunchly (and viciously) defended by Schmitt, though less from a phenomenological stance, where the individual experience cannot all of a sudden be reduced or replaced by the practice of a collective One. A "We" is always a plurality of selves and this means fundamentally acting in concert (as Hannah Arendt never tires of repeating), which necessarily refers to a *Ich-Du* relationship. A "We" experience in this way needs the counterfactual chance for the people concerned to take up the other's place as one's own. "We" cannot annihilate the several "Thous" it consists of. (Vertical) representation without a previous (horizontal) deliberation, but which mainly springs from an avantguardistic act of "seizing", is likely to be a platform for (charismatic) "leadership". In this mode – I am afraid -- a "represented" collective will end up being not much more than a "commanded" unity.

[2] See for instance M. Heidegger, *Sein und Zeit*, 19th ed., Max Niemeyer, Tübingen 2006, p. 175.

This Schmittian inclination is revealed in the following claim made by Lindahl when citing and using Cornelius Castoriadis' social ontology: "Although Cornelius Castoriadis does not mention Schmitt by name, there can be little doubt that he had this passage in mind when describing 'the social' as what 'is given as the structure -- indissociable form and content – of human ensembles, yet which goes beyond any given structure, an ungraspable productive element (*un productif insaisissable*), an unformed forming element, something that is always more and always other'" (p. 186). Here Lindahl refers to Schmitt's idea of "pouvoir constituent" as "das formlose Formende", and believes that this offered the inspiration to Castoriadis' theory of social institutions. Now, Castoriadis very likely never read Schmitt and, if he ever (and reluctantly) did, his theory of social entities has nothing to do with any Schmittian view.

It is however quite telling that Lindahl interprets Castoriadis under Schmittian eyes. This indeed exposes one of the main weaknesses of his approach: a remnant of political romanticism equating social spontaneity and the novelty intrinsic in the fact of acting in concert, the Arendtian "We", with the robust and Teutonic "concrete order" envisaged and dreamt by Schmitt. The two view**s** are opposed, however. There is no strong "We" for Castoriadis, since this is permanently threatened by the magma of social imaginations and by the irreducible wildness of the individual mind. Law does not play a central role in Castoriadis' theory, since law according to him is an "institution seconde"; it is not a "first", primordial order conforming social behaviour, as it is for Schmitt. Law – in Castoriadis' view – is built upon a magma of significations and meanings that institutions only temporarily order and shape or select. "La société n'est ni ensemble ni système ou hiérarchie d'ensembles (ou de structures); elle est magma et magma de magmas" [3].

In this perspective, reality-- and social reality is not an exception -- is in permanent alteration, concrete "disorder", not "order", if you like. Or better, order is only a side of it, and not its motor. And there is no existential decision, since most of this motoring and movement is half conscious, if not fully unconscious. And what is unconscious, "l'inconscient", "n'est pas vraiment un lieu, puisque le lieu implique l'ordre et la distinction"[4]. René Lourau has ably

[3] C. Castoriadis, *L'institution imaginaire de la société*, Seuil, Paris 1975, p. 336.

[4] *Ibid.*, p. 402.

elaborated on this idea of l'"Etat inconscient" in one of his books.[5] Nor does Castoriadis believe that the law, as an order, a "secondary" one, an "institution seconde", does not need or replaces norms fully. The "ensidique" dimension, "l'ensembliste-identitaire", maintains its strong grip on social entities and does not allow for too strong decisionist adventures: "Nous sommes obligés de poser que ce qui est, dans n'importe quel domaine, *se prête* à une organisation ensembliste-identitaire et *n'est pas congru* à celle-ci de part en part et de manière ultime"[6].

3. A further point of disagreement is one concerning citizenship. By stressing a trifle too much *konkretes Ordungsdenken*, and by adopting a "system theory" paradigm as well, it seems that law has very little to do with morality. In this sense, though Lindahl is far from defending an imperativist concept of law, and his prescriptivism is moderate, he seems to remain within the precinct of legal positivism. There is no discussion of the point of having a law, of its *Witz*, to use one of Wittgentein's favourite expressions. Law is an order, with spatial, temporal, subjective and material boundaries. But is it not the same kind of order as chess? Or as football? Or as any other positive normative order? But what is then the difference, if any, between chess and law? What is the point of having that specific normative order that we call law? Or is any order a legal order, in the same vein as Santi Romano, who claimed that any social group or any social entity is a (legal) institution?

Here we are confronted with the limits or the perplexities brought about by a pure "ontological" approach, or perhaps rather with the unresolved narrative of an approch that downplays the interactive purport of the plural first person. This is confirmed, it seems to me, by Lindahl's treatment of the thorny issue of citizenship. "How can I enter into a *moral* dialogue with you about whether you may become a member of our polity, now or in the future? After all, the whole point of the dialogue is political. You request to join '*our* association', not *an* association in general. When providing you with reasons to this effect, I act as a member of the community, not as a human being. Accordingly, our dialogue is asymmetrical: when giving you reason, I claim, explicitly or

[5] R. Lourau, *L'Etat inconscient*, Editions de Minuit, Paris 1978.

[6] *Ibid.*, p. 400.

implicitly, that I and the other members of the community are entitled to determine *among ourselves* whether or not we will allow you to join our association, and on the basis of reasons that we regard as relevant from the point of view of *our* joint interest" (pp. 245-246). Why should human rights evoke a blind spot to the "we" legal order? Perhaps the problem in Lindahl's approach is once again his exaggerated view of law as protection against "chaos", as a reduction of complexity (à la Luhmann), and the forming superimposed on a formless intractable substance (see pp. 186 ff.). Returning to Castoriadis, law for the Greek philosopher would instead mean an increased complexity in the social relationships, an additional "magma" beyond the plurality of "magmas" already active in society.

Moreover: is Lindahl right when he says that citizenship is not a moral issue? Well, it is true, being a citizen is a political bond and it is a question of belonging to a "We", a communal social entity, more often than not a body politic. Does it mean that the "We" are decisionistically free to command who is entitled and who is not to be one of them? In a certain sense they are: citizens are such if they rule about their own being citizens; theirs is a sort of *Kompetenz-Kompetenz*, the other side of a coin that has sovereignty as one of its faces. But being a sovereign is not just a decision founded *ex nihilo*. There must be a reason. Otherwise, it would be like being a player of chess. I can decide to play chess or not, and I am free to choose my mate. But this is so because playing chess usually has no other point than to play it. Nothing too serious is at stake. Is it the same with citizenship?

True, Hannah Arendt says something similar, when she claims that politics is an action for the sake of itself. This – I like to remember – was a thesis that could never convince her closest friend, Mary McCarthy who rejoined as follows: "Speeches can't be just speeches. They have to be speeches about something"[7]. And here again we find a dissenting opinion by Castoriadis, that reminds us that an order, institutions, rules and representations receive their sense from their content: "On ne peut pas non plus comprendre les institutions comme un réseau symbolique. Les institutions forment un réseau symbolique mais ce réseau, par définition, renvoie à autre chose que le symbolisme. Toute

[7] *Hannah Arendt: the Recover of the Public World*, ed. by M. A. Hill, St. Martin's Press, New York 1979, p. 316.

interprétation purement symbolique des institutions ouvre immédiatement ces questions: pourquoi *ce* système-*ci* de symboles, et pas un autre"?[8]

Please, let us for a moment consider what could be the implications of an Arendtian approach on citizenship. If politics is just for the sake of itself, and citizenship is normatively self-sustained, "autopoietic" we could even venture to claim, citizens could then be chosen somehow randomly. Or perhaps not? Now, citizenship could have, I believe, four main shapes. I have discussed these in my book *Cittadinanza e ordine politico* (Giappichelli, Turin 2004) and here I have only very limited space to elaborate on them. One could say that citizens are (i) people that share the same "principles", or that (ii) they share the same "story", or that (iii) they just share the same "law", or that (iv) they share the same "problems". I would choose and indeed propose as more plausible the fourth model. The first two are too exclusive, and the third perhaps too inclusive.

For the first model a Fascist could not be the citizen of a democratic State; or if an Italian does not agree with the Italian constitution in force he could not keep or get Italian citizenship: an outcome that I would declare undesirable and unjust, and even impracticable. For the second, according to which citizenship is the reflex or mirror of an already given impolitical or pre-political homogeneity, an ethnic German could hardly be citizen of an Italian speaking community: again a conclusion that one could find somewhat racist and morally unjustifiable. The third model (actually Kelsen's model) just trivializes citizenship; citizens are those who happen to be subject to a law in force. In this way, the point that citizenship is a status that should make sense for someone is lost. The fourth model is the only one that stresses the togetherness of the relationship between a *Thou* and an *I* which makes the difference.

If we have a more or less permanent practice of living in common, if by living in the same place we have to deal with common problems, and to do so we

[8] C. Castoriadis, *Op. cit.*, pp. 205-206. Actually this is a point that is also stressed by Kelsen, when speaking of the specific character of a legal community's commands, but thereby contradicting the "purity" of the legal ought and his stark thesis that a legal rule could have whatever content: "The legal authority commands a certain human behaviour, because the authority, rightly or wrongly, regards such behaviour as necessary for the human legal community" (H. Kelsen, *Pure Theory of Law*, trans. by M. Knight, University Of California Press, Berkeley 1970, p. 32).

need common rules, there is no clear reason to exclude anyone sharing the same experience from that status, from the competence of deliberating about their common rules. In the same vein, since citizenship means legal protection, we can have moral reasons to grant it to people that ask us to be rescued from intolerable conditions and be accepted among us as equals. It is our decision, it is conventional, it is true. If we were not willing to give them that chance, we would act *unjustly*. This then means that justice somehow transcends the law, a point that Lindahl's book does not thematize and, moreover, which he does not integrate into his social ontology, something which I find a fault, -- indeed a fault line -- in his research programme.

Of course, this fault might be considered a virtue, once we assume that porosity is not a property of legal systems. Law is then a tight system that has intercourse and can communicate only with itself. Said through Luhmann's words: "Es gibt keinen Input von rechtlicher Kommunikation in das Rechtssystem, weil es überhaupt keine rechtliche Kommunikation ausserhalb des Rechtssytems gibt"[9]. But is this so? Or is this but a beautiful metaphor? Should we really consider the claims and demands raised towards the legal system from outsiders (or "other systems") merely as noise that is only apt to "irritate" the law? Is law's regard towards the surrounding lifeworld just given through its "irritable" character?

4. Last things last. Lindahl's conclusions in the book, with all my perplexity about his silence about justice and morality as trascendental perspectives (which as such do not close anything, but open up a lot and cannot be treated nor understood according to Luhmannian autopoieticist categories), are interesting and to me appealing. I am speaking of the dialectics he introduces between universalism and particularism, when dealing with globalization at the end of his thoughtful monograph.

His phenomenology, while at first view leading to a particularist world-view, thanks to the inclusion of "strangeness", "a-legality", and of the notion of "fault lines" (cracks we could watch in the tectonic and formalist, and system theoretical, surfaces of law orders that meet without acknowledging it), at the

[9] N. Luhmann, *Das Recht der Gesellschaft*, Suhrkamp, Frankfurt am Main 1993, p. 69.

end of the day puts aside particularism. “Fault lines”, borders that are not such, and that according to Lindahl should rather operate as sort of bridges could however communicate and integrate between the contrasted and different legal orders only in so far as their being communicative and integrative is a matter of self-observation, and not only of observation through a second order system, as it seems to be the case in a system-theoretical perspective. Indeed, here explaining and observation are not sufficient; we need some room for deliberation and understanding. “Particularism turns a blind eye to the fact that the foreign need not be strange and that the strange need not to be foreign” (p. 266).

Lindahl may thus accept universality as a horizon of legality. With an important caveat, that universalism – as he astutely says – has to start from some place. “There is a decisive detail that universalism tends to pass over in silence: globalization has to begin somewhere” (*ibid.*). It is therefore important to be aware of its starting point, a place that can hide itself under the pretence of a nowhere. Only in this way would we be able to submit globalization to criticism and radical deconstruction. Universalism, then, but *con juicio*…