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RESTORING THE PRUDENT PART OF JURISPRUDENCE: ARISTOTLE VS. HOBBS

ABSTRACT

The article examines contemporary trends in jurisprudence, particularly the growing interest in the role of phronesis-prudence. Modern legal thought increasingly acknowledges the need for "practical wisdom" (phronesis) in legal practice, challenging the Hobbesian view that lawyers should be mere executors of sovereign will. Through a historical perspective and a critical comparative analysis of Aristotle's and Hobbes' theories, we argue that the Aristotelian concept of phronesis – integrating ethical and political dimensions into legal reasoning – offers a model for addressing the increasing complexity of legal and moral ambiguities in democratic societies. While Hobbes dismissed prudence as a politically hazardous form of subjective reasoning, Aristotle viewed it as a necessary supplement to legal techne, enabling legal practitioners to navigate the relationship between law, justice, and societal expectations. Furthermore, phronesis provides a valuable philosophical foundation for anchoring contemporary legal propositions. Reviving Aristotelian prudence into contemporary legal discourse encourages lawyers to engage more actively in social life, rather than hiding behind their techne or serving merely as the "mouth of the law", yet, it does not grant them additional power over others. Instead, it encourages lawyers to cultivate "human" competencies that promote informed judgment and political responsibility and enhances legal practitioners' ability to mediate between legal norms and social justice concerns. Ultimately, this Aristotelian perspective offers a dynamic response to the growing ethical uncertainties of modern pluralistic societies, ensuring that law remains not only a technical craft but also an integral part of civic life.

Keywords: *Phronesis, jurisprudence, Aristotle, Hobbes, judgment*

1. INTRODUCTION

In *Theory of Justice*, John Rawls synthesised what he termed "the Hobbes's thesis,"¹ a concept he then explored in depth in his lectures on Hobbes.² The sense of justice and the will to abide by existing arrangements that all men share, Rawls argued after Hobbes, is not enough to motivate each of them to trust one another, unless they live in a state where there is an effective penal machinery that "serves as men's security to one another."³ Agreeing with this Hobbesian thesis, Robin West proposed to complement it with a second important proposition. In contemporary political culture, she argued, the law is not only expected to deter violence, but it is also expected to protect some "mess" that is necessary in order to let individuals to exercise their individual freedom.⁴ For West such "modified legalist contract" explicitly guides the thinking about the function of law in U.S. legal culture,⁵ but this ideal seems to be characteristic for any democratic state, in which establishing a satisfactory balance between security and freedom is of crucial importance. In Poland, too, since the collapse of the communist system, this ideal has been palpable, influencing not only debates about the law, but also the position of lawyers and their function within the political system and society as a whole. The contract in question works only as long as there is a general agreement on labelling particular actions either as a "violence" or a "mess." At times, however (and according to West, this time is now), there is a growing grey area of actions that are perceived by many members of the society as more than a mess, but less than violence. In such circumstances, it becomes increasingly difficult to make justifiable judgements about them using existing concepts and terms. Pollution caused by industry is more than a mess, but not as yet violence.⁶ Industrial activity confirms the potential of human freedom and is one of the unwelcomed but also unintended results of the human creative powers that have built civilisation as we know and enjoy it. Nevertheless, its consequences are often lethal for human beings, which allows it to be seen as violence that should not be left unattended to by the state. The more acts of this kind there are, the more difficult it becomes to draw a clear line between "mess" and "violence." As a result, West continued:

"[F]amilial legal categories (...) lose their point of reference. The categories themselves then become worse than useless: they obfuscate and distort reality. Law becomes unhinged from the modified legal contract that underlies it; law

¹ Rawls, J., *A Theory of Justice*, Belknap Press, Harvard 2003, p. 211.

² Rawls, J., *Lectures on the History of Political Philosophy*, Belknap Press, Harvard 2008, p. 23–93.

³ Rawls, J., *A Theory...*, note 1, p. 211.

⁴ West, R., *Legal Selves*, In: Messy Self, J. Rosner (ed.), Routledge, NY 2015, p. 147.

⁵ *Ibid.*, p. 148.

⁶ *Loc. cit.*

loses self-confidence. (...) Whenever that line (of division between violence and mess) is lost, we lose the confident inference that either the intrusion of law or the staying of law's hand is a boon to our overall well-being."⁷

It is quite likely that Hobbes would have agreed with the above diagnosis and even accepted the extension of his "thesis" so that it remained consistent with the modified legalistic contract described by West. For all his insistence on obedience, he accepted as a natural fact that citizens need a mess in order to actively pursue their own little visions of happiness. "For the use of Laws," he wrote, "is not to bind the People from all Voluntary actions; bur to direct and keep them in such a motion, as not to hurt themselves by their own impetuous desires, rashness, or indiscretion; as Hedges are set, not to stop Travellers, but to keep them in the way."⁸ Hobbes would also have agreed that from time to time there grows a tension between individual perceptions of mess and violence, and then the very basis of citizens' obedience is threatened. The laws are no longer trusted to provide security, and such a lack of trust is easily generalised, endangering the life of the whole political community. The philosopher was well aware that every Leviathan is a mortal god,⁹ and its mortality becomes apparent when the clear line of division discussed by West is lost. The legal "hedges" are no longer seen as sufficient protection against violence and, worse still, many citizens have the idea that they should be removed and replanted according to a different project.

Hobbes and West would perhaps also agree on another point: that the decision of where exactly to draw the line between the violence and the mess entails political judgement and "becomes very much a function of whose perspective counts as authoritative."¹⁰ This decision is external to the law itself, but it modifies the content of many well-established legal terms and concepts ("murder," "justified homicide," "self-defence," etc.). Nevertheless, Hobbes's and West's views diverge, when it comes to answering the question of whose judgement is to be regarded as authoritative in such cases, and therefore whose opinion should be taken into account by those who deal directly with the law, namely: lawyers. Hobbes is absolutely clear about this. The only subject capable of making political judgements in the Leviathan state is the sovereign, who is the legislator to whose decisions the citizens must submit. West, on the other hand, proposes to listen to the "narrative voice"¹¹ of those who have first-hand experience of the grey area of actions that have not yet been recognised by the law as violence, but which impair

⁷ *Ibid.*, p. 149.

⁸ Hobbes, T., *Leviathan*, Oxford University Press, NY 1998, p. 230.

⁹ *Ibid.*, p. 114.

¹⁰ West, R., *Legal Selves*, note 4, p. 149.

¹¹ *Ibid.*, p. 150.

the well-being of some individuals and groups to an extent that deserves to be called injustice.

West's proposal can be seen as an example of a much broader trend in contemporary legal scholarship to enrich the image of law and lawyers in ways that demonstrate their positive and active contribution to the wider concern to promote a sense of justice in diverse societies and to facilitate political cooperation between individuals and groups. In many of these new ideas and movements in the field of law, one can observe various attempts to revive elements of the very specific practical knowledge known as prudence, with its overtly political and ethical dimensions.

As historians of political and legal thought, we will argue in this article that such attempts reflect a more general need to overcome the rather modest view of the legal profession that modernity owed to thinkers such as Hobbes. We will try to show that a return to the very origin of the concept of prudence - Aristotle's *phronesis* - offers an interesting philosophical perspective that allows certain contemporary propositions to be anchored. Moreover, by understanding both the advantages and the limitations of *phronesis*-prudence, we believe it is possible to complement West's answer to the question of whose judgements should be heard when some perceptions of violence emerge within the natural chaos of freedom. We believe that the narrative voice of lawyers should also play some role here.

The academic literature on prudence and *phronesis* is extensive, as the concept of practical wisdom has been discussed by many thinkers (from Cicero via St. Thomas Aquinas to Martin Heidegger and Martha Nussbaum), and is now attracting the attention of scholars from various disciplines. In the present text, which builds on our previous research,¹² we refer directly to the works of Aristotle.

2. HOBBS VS LAWYERS

According to Hobbes, problems in maintaining social order arise from the proliferation of beliefs and opinions, many of which would fall under the "mess" category, as discussed by West. They are the unavoidable outcomes of individual freedom, but once they enter the public sphere, their subjective and partial character makes them a threat to the common order. What they demand here is no

¹² Barwicka-Tylek, I., *Historia doktryn politycznych i prawnych: refleksja fronetyczna*, *Krakowskie Studia z Historii Państwa i Prawa*, 17/2024, p. 459-484; Barwicka-Tylek, I., Ceglarska, A., *Does la bouche de la loi have anything to say in democracy? An exercise in legal imagination*, *Studia Iuridica Lublinensia*, 31/2022, no 2, p. 85-99.

longer freedom, but power, often masked with ethical references to values such as justice or equality. Under such conditions, rebellion and civil war lurk in the dark, and the state risks dying in violence. The practical test for the Hobbesian sovereign is to be able to make the political judgments necessary to silence competing narratives and capture the minds of citizens in order to restore their confidence in laws and the state. "Capture" is a very apt word here. Since human beings are guided by passions and appetites, the sovereign's judgement should take into account the sentiments of the people, however different they may be. This means that the sovereign should not ignore the "narrative voices" (to return to West's language) that come directly from the citizens and express their sense of justice. Responding positively to them, even if it means manipulating them to reduce their diversity, makes his task easier. At the same time, his own political narrative should first and foremost be consistent with scientific knowledge of human nature. In short, eloquence and reason should come together in the sovereign to make authoritative political judgements exposed as statute law. Hobbes thinks that this is possible, although he admits that they are contradictory faculties, since eloquence is more useful when it appeals to the passions, whereas reason should be "grounded upon principles of truth".¹³ Among such principles of truth which are indispensable for the sovereign to learn before making any judgements, one can find a great deal of knowledge concerning the nature of obligations and law. It is interesting to note, however, that for Hobbes it is not lawyers but political philosophers like him who are in a position to provide such scientific, theoretical knowledge.¹⁴ As for lawyers, or more specifically: for judges, whose function in the state is the most important, Hobbes likened them to "the organs of voice,"¹⁵ which provide the technical support that enables the sovereign to utter his laws.

Hobbes criticised the long English tradition of common law not so much on its merits,¹⁶ but because this tradition assumed that judges possessed a special kind of wisdom that is political and contributes to the welfare of the whole community, and so should also guide the artificial reason of the legislator. The wisdom in question was called prudence and could only be acquired through "long study,

¹³ Hobbes, T., *Leviathan*, note 8, p. 389.

¹⁴ Loughlin, M., *The political jurisprudence of Thomas Hobbes*, In: Hobbes and the Law, D. Dyzenhaus, T. Poole (eds.), Cambridge University Press, Cambridge 2012, p. 5-21.

¹⁵ Hobbes, T., *Leviathan*, note 8, p. 162.

¹⁶ Hobbes does not deny that customary laws can indeed become law, but only if the sovereign so decides. He does not question the content of that law, but insists that only that which is pronounced by the sovereign can truly be called law. Any legal custom cannot constitute a different kind of law, but is subordinate to the statutory law and can only be binding if the sovereign confirms it or signifies its content by not objecting to it. See: Letwin, S.R., *On the History of the Idea of Law*, Cambridge University Press, NY 2005, p. 97-98.

observation and experience".¹⁷ It required an understanding of *ius*, often equated with some pre-existing, natural and normative order. It also involved the ability to relate general norms to particular cases, so that judicial decisions would serve universal justice, even if they varied to some extent because of the different particular circumstances of the case. The reverse was even more useful: if a particular judgement was accepted as just, it acquired universality and could be applied to many other similar cases. It was prudence, which allowed one to mediate between the application of the letter of the law and the fulfilment of the requirements of justice, that made legal activity the *arsboni et equi*.¹⁸ From this perspective, it was the statute law that served as a technical tool to make the administration of justice easier and more efficient.

It was also their presumed prudence that contributed to the high regard in which lawyers were held in public life in the Middle Ages, when the ruler was seen primarily as an *iudex* rather than a legislator¹⁹. For Hobbes, however, *ius* and *lex* are as different as liberty and obligation.²⁰ The state is an artificial edifice built on the latter, and so "it is not wisdom but authority that makes a law", he declared unequivocally, adding: "That the law hath been fined by grave and learned men, meaning the professors of the law, is manifestly untrue; for all the laws of England have been made by the kings of England, consulting with the nobility and commons in parliament, of which not one of twenty was a learned lawyer."²¹ It is well known that Hobbes's criticism was directed at Edward Coke and his idea of jurisprudence.²² But in formulating it, Hobbes undertook a much more general attack on the concept of prudence. Here his enemy was not so much Coke as Aristotle.

The last sentence may sound controversial. Prudence is a Latin term, and the first esteemed *iuris prudentes* were Roman jurists.²³ In ancient Greece there were no lawyers as we know them, and the administration of justice was a political task. Nevertheless, it was Aristotle's *phronesis* (practical wisdom) and his view of human affairs that influenced the further conceptualisation of prudence, also known as practical wisdom. Hobbes seems to have recognised this. He also

¹⁷ Hobbes, T., *A dialogue between a philosopher and a student of the common laws of England*, University of Chicago Press, Chicago 1971, p. 55.

¹⁸ *Digesta Iustiniani*, T. Mommsen; P. Krueger; A. Watson (eds.), D 1.1.1., <https://droitromain.univ-grenoble-alpes.fr/Corpus/digest.htm>, 28 February, 2025.

¹⁹ Ribeiro, G. de Almeida, *The Decline of Private Law*, Hart Publishing, Oxford 2019, p. 124-125.

²⁰ Hobbes, T., *Leviathan*, note 8, p. 192.

²¹ Hobbes, T., *A dialogue...*, note 17, p. 55.

²² Lobban, M., *Thomas Hobbes and the common law*, In: Hobbes and the Law, D. Dyzenhaus, T. Poole (eds.), Cambridge University Press, Cambridge 2012, p. 59-60.

²³ Litewski, W., *Podstawowe wartości prawa rzymskiego*, WUJ, Kraków 2001, p. 27-28.

realised that *phronesis*-prudence, as Aristotle conceived it, was a wisdom directly related to the relational definition of man as *zoon politikon*.²⁴ The definition that had to be rejected in order to construct the impressive project of a state made up of individuals primarily interested in their own preservation (and thus incapable, though not unwilling, to engage in a wider political and ethical discourse about the common good).

3. ARISTOTLE: A HISTORICAL REMINDER

For Aristotle, although human beings are capable of living solitary lives, we are naturally social creatures. Endowed with reason and speech, but also "perception of good and bad and right and wrong and the other moral qualities", we should use all these capacities to build political communities in which it is possible to live well.²⁵ Every *polis* has its origin in (human) nature, but at the same time it is an artificial product of human creativity, or more precisely: of our mimetic capacity, which allows us to imitate nature and to make certain things adapted to our particular desires and needs. The art of making (Greek *poiesis*) is based on the knowledge known as *techne*, which is, roughly speaking, the knowledge characteristic for of craftsmen ("producers") of all kinds. Among these there are carpenters as well as poets. In a way, according to Aristotle, every individual is a craftsman, doing his best to produce his own personal ("private") happiness. And since productive knowledge is concerned "with crafting things and getting a theoretical grasp on how something may come to be that admits of being and of not being and whose starting point is in the producer and not in the product,"²⁶ the result of our struggles is diversity.

Unlike Plato, Aristotle is not hostile to diversity, as long as it is possible to ensure some unity, necessary for *polis* to survive and prosper as one political community.²⁷ Given natural inclinations towards diversity, such unity must be artificially crafted to a certain extent, and so every state needs a kind of political craft that encompasses all the public activities essential to the functioning of the state, including the functions which are nowadays performed by lawyers as part of the legal craft. The task of all such political craftsmen, granted with power, is to ensure that citizens would choose cooperation in spite of all the differences that set them apart. To use the vocabulary applied by West, they would neither do

²⁴ Barwicka-Tylek, I., *Aristotle's concept of zoon politikon: on political benefits of being not too perfect*, Horyzonty Polityki 15/2024, no 50, p. 229-242.

²⁵ Aristotle, *Politics*, transl. C.D.C Reeve, Hackett Publishing, Indianapolis 1998, 1.1253a.

²⁶ Aristotle, *Nicomachean Ethics*, transl. C.D.C. Reeve, Hackett Publishing, Indianapolis 2014, 6.4.

²⁷ Aristotle, *Politics*, note 25, 2.1261a.

violence, nor grow too messy, for that would increase diversity beyond the acceptable levels.

In Aristotle's works there are at least three kinds of means that help to accomplish the task. Two of them are directly related to a craft-like activities that objectivise any material they work upon (human beings included) and so need to be based on power. These are the laws of the state all the citizens must obey, and education in virtue aimed at habituating them to act in a manner publicly approved to the extent possible. In this particular context, both laws and virtues are in fact quite similar, since they serve as tools to shape the character of individual citizens (virtue) or at least to manipulate their behaviour in order to ensure that their actions are neither violent nor too messy according to the already existing standards (laws). "For man, when perfected," writes Aristotle, "is the best of animals, but, when separated from law and justice, he is the worst of all".²⁸ Both craft-like means of producing unity reduce individual freedom and creativity, but improving our cooperative actions they actually stimulate personal development, making us better *zoapolitika*. They force citizens who pursue their particular goals to rely on trained and repeatable rules. Unconditional respect for these rules gives a sense of stability to the common order. But Aristotle does not stop there. He mentions a third way of fostering cooperation that has nothing to do with *technē*, since it concerns actions taken in areas where there is no craft.²⁹ Here the philosopher introduces a specific kind of "practical wisdom" he calls *phronesis*.

As has already been said, *phronesis* is an ambiguous concept and it can be interpreted in different ways. It is a virtue, because it requires an experience that fosters a particular disposition (a habit of acting *phronetically*). At the same time, it is action itself, since it is the practical result of deliberation.³⁰ *Phronesis* emerges under conditions of uncertainty, when there is no algorithm that would allow the course of action to be fully controlled in a craft-like (*poietic*) manner so as to guarantee its ultimate success. As Aristotle explains, some people are called prudent, since they possess a faculty of discerning "what is good for themselves and for human beings".³¹ And this means that *phronesis* is related directly to our political nature (the universally human sense of justice), and not to the artificial order we introduce to make the best of that nature under particular material conditions. As such, it can be judged by others on the same natural basis. An

²⁸ *Ibid.*, 1.1253a.

²⁹ Aristotle, *Nicomachean Ethics*, note 26, 6.5.

³⁰ The first understanding has been particularly emphasised by the Christian tradition, especially by Thomas Aquinas. The second was underlined by Aristotle himself. See: Aquinas, T., *Summa Theologiae*, Aquinas Institute 2020, II-II, p. 47-56; Aristotle, *Nicomachean Ethics*, note 26, 6.5.

³¹ *Loc. cit.*

interesting aspect of *phronesis*, which distinguishes it from any other type of wisdom, is its relational character. In the case of theoretical knowledge or technical knowledge, it is I who has it or not, and I who performs it or not. But for the action to deserve the name *phronetic*, it must be received by others as a credible reflection of human political nature, oriented towards cooperation and justice, which makes it worth being supported or followed. Only then – after such a collective political judgement has been made – would I deserve the name *phronimos* (a practically wise person). Otherwise my action and I would simply pass unnoticed as merely a private act of a private person; an element of diversity and not a public attempt to contribute to the work of unity, using the competences I have as a human being capable of seeking ways of cooperation rather than conflict.

4. *PHRONESIS* AND LEGAL CRAFT: ARISTOTLE VS. HOBBS

Phronesis as a concept may be difficult to define, but the reasons why Aristotle mentions it are relatively clear. In short, the message is that there are crafts in which not only *techne* but also *phronesis* matter. These are the crafts in which the material they work on involve human beings and their relationships with each other. There is an important difference between a skilled craftsman and a good craftsman, just as there is a difference between many Athenian politicians and Pericles, who is the example of *phronimos*.³² No doubt Pericles was a skilled craftsman, which in democratic Athens meant acquiring the *techne* of a dexterous rhetorician. But somehow he was also trusted as a democratic leader, who inspired the citizens to exercise their share of *phronesis* (judgement).³³ As a result, in his times Athenian democracy functioned relatively well.

The concept of *phronesis* is also relevant to the field of law. Unlike a carpenter, who is not expected to create chairs with moral considerations for their future use, legal professionals cannot separate their craft from ethical and political concerns. This does not mean that the chairs cannot be used politically, or that such use cannot be judged ethically as good or bad. In ancient Rome, *curule* seats (*sellaecurules*) symbolized the authority of magistrates. At times, when people believed that this authority had been abused, they called for the destruction of these

³² *Loc. cit.*

³³ This is not the same thing as saying that Pericles was always just or always in the right. In fact, Aristotle questions some of his political decisions. See: Aristotle, *Politics*, note 25, 2.1274a and also: Barwicka-Tylek, I., *Intricacies of Practical Wisdom: Or Why Would Aristotle Vote for Pericles Rather Than Lenin?*, *Krakowskie Studia z Historii Państwai Prawa*, 11/2018, p. 321-341.

chairs³⁴. However, no matter how the chairs were used in practice, the carpenter who made them could not be held responsible for any wrongdoing. Lawyers, on the other hand, are in a different position. Their work is inherently connected to everyday life. Their particular actions are not only judged by the largely (though not entirely) artificial rules of legal craft and the theoretical concepts on which that craft is based. These are internal criteria, many of which are known only to lawyers themselves, because they justify our professional autonomy on the basis of legal expertise. Non-lawyers judge our actions on the basis of a somewhat ambiguous but nonetheless real "sense of justice". For them, the actions of individual lawyers and opinions about them, serve as a litmus paper for judging the whole legal system, and even the whole political order, as facilitators or impediments to living together and living well. As long as there is a large dose of consistency between the rationally designed (crafted) public order and the general sense of justice in the society, *phronesis* is at best a nice human supplement to craft-like activity. Its presence in the public sphere, i.e. the striking observation that phronetic actions are allowed within the artificially designed political system, serves as perceptible proof that this is a system in which natural human impulses, particularistic and yet quite universal, are welcomed. In fact, we expect all those who work in professions of public trust (be they lawyers, civil servants, teachers or doctors) to show some *phronesis* in the exercise of their political skills and in the fulfilment of their duties, especially when we come into personal contact with them. We want them to treat us not as objects to be acted upon, but as free individuals like themselves. When we give examples of good teachers, we tend to focus on their ethical and political (in Aristotle's cooperative sense) qualities. When I go to the doctor, I do not want to be treated merely as a medical case to be treated. The more uncertain the outcome of the therapy, the more important the doctor's *phronesis* becomes - only his empathy, reliable information, commitment, etc. can convince me to cooperate in the continuation of the therapy instead of giving up. In the case of the administration of justice, *phronesis* was given special treatment by Aristotle, who introduced the concept of *epieikeia* (equity), which reveals the spirit rather than the letter of the law.³⁵

For all the advantages of *phronesis*, it also has many shortcomings. It requires flexibility and creativity in adapting one's approach to the circumstances. To persuade a patient to cooperate with a certain therapy, even though there is no guarantee that his illness can be cured, different means have to be used for different patients. Only *a posteriori* it is possible to verify which of them worked (perhaps, if the number of similar cases grows, referring to them should become a standard)

³⁴ Dio Cassius, *Roman History*, Volume III: Books 36-40, transl. E. Cary; H.B. Foster, Harvard University Press, Cambridge 1914, p. 69.

³⁵ Aristotle, *Nicomachean Ethics*, note 26, 5.10.

and which did not. And so the use of *phronesis* to support a craft requires the acceptance of a rather uncomfortable outcome - allowing diversity among craftsmen so that they can better relate to those they serve. There is a danger, however, that if we move away from the standardised bonds of *techne* and the routines it prescribes, we will only make things worse. More diversity is more diversity, and the hope that some of this diversity will work for the common good, guided by a natural sense of what is advantageous or just and reminding everyone of the sociability inherent in our nature, is a vague and risky hypothesis. The hypothesis Hobbes strongly opposes.

In a long paragraph in the *Leviathan* Hobbes discredits Aristotle's concept of *zoon politikon*,³⁶ arguing that there is nothing in human nature that would prompt individuals to choose actions that would not only serve their private interests but also respect some common human criteria of the good life in general. Other social animals (bees or ants) are luckier, Hobbes argues, because in their case there is no difference between the private and the common. By individually pursuing the former (which is characteristic of every living thing), they automatically contribute to the latter. But man understands only too well that there is a discrepancy here, and it never works to the advantage of the common. Natural reason, subjected to the animal part of human nature (appetites and aversions), tends to take shortcuts whenever possible, and that is what makes it dangerous. The private always comes first, for there is nothing like common sense to serve as a point of departure for phronetic deliberation, action and judgement.

Hobbes does not deny that prudence – he uses the Latin term – exists and is useful in one's practical activity, whatever it may be. Prudence (and lack of it) also distinguishes between skilled craftsmen who stick to procedures and well-trained routines (which sometimes requires a large dose of creativity), and those professionals who, with long experience, are sometimes encouraged to give priority to the complicated nature of reality and to go beyond the rules of their craft when faced with a new problem to solve. What Hobbes strongly rejects, however, is the suggestion that *phronesis* – prudence – can be called upon to serve the common good. For him, it is strictly private wisdom, politically dangerous. Political judgement applies not natural, but artificial reason, and here relying on anybody's experience is hazardous. "Where men build on false grounds, the more they build, the greater is the ruine;" he writes, and adds: "therefore it is not that jurisprudentia, or wisdom of subordinate judges; but the reason of this our artificial man the commonwealth, and his command, that make the law (...) the subordinate judge, ought to have regard to the reason, which moved his sovereign to make such law, that his sentence may be according thereunto; which then is his sovereign's

³⁶ Hobbes, T., *Leviathan*, note 8, p. 111-114.

sentence; otherwise it is his own, and an unjust one.”³⁷ Again, Hobbes refers here to the common law tradition, but in fact his critique is much broader. He portrays lawyers as craftsmen who have no right to engage in a wider political and ethical discourse. If they attempt to do so, they should be judged as seeking power, not justice.

Even when the idea of a great monster-state was replaced by the liberal idea of a republican and a democratic political order, the perception of the legal professions as crafts, and judges as “organs of voice” (Montesquieu’s “mouth of law”) persisted. Or even grew stronger: as professionals, we were expected to shed our humanity and merge with the law so that it could rule in a fully rational and impartial manner. The replacement of the *iurisprudentes* by craftsmen was important for the production of a new legal reality, adapted to new social and political ideals. This production was particularly successful in the nineteenth century (Ribeiro: see note 19), all the more so as the modest “theoretical grasp” needed by any craftsman developed over time into a full-fledged, rational and objective legal “science”.

5. CONCLUSION

According to Hobbes, law is the only effective means of achieving the political unity that is essential for mutual cooperation in pluralistic societies. When increasing diversity (especially diversity of ethical and political judgements, beliefs and opinions) cannot be adequately managed within existing legal frameworks, it is the responsibility of the legislator to step in and make decisions that all citizens and legal practitioners must abide by. And sometimes, as Hobbes vividly states, there is no other way “to mend an ill game, as by causing a new shuffle.”³⁸ This suggests that, during periods of significant ethical and political disagreement, legal professionals should keep quiet to reduce the risk of becoming “the organ of voice” used (or rather: abused) to increase political conflicts. The law is expected to serve political unity, and so the task of lawyers is to remain united and faithful to law as it is. They should not try to judge diverse proposals, but wait until an authoritative political judgment - whatever its origin or content - dominates the public sphere and acquires sufficient legitimate power to offer a substantially revised version of the legal contract to which West refers. Once such a shift has occurred, the expertise of lawyers is called upon to facilitate and consolidate the change. The spread of modern liberal trends in the West would not have been as steady as it has been without the contributions of generations of

³⁷ *Ibid.*, p. 179.

³⁸ *Ibid.*, p. 66.

lawyers who have dedicated themselves to their roles and constantly improved the technical means of fulfilling them (whether in promoting the rule of law or in developing the field of private law).

Equating lawyers with carpenters captures the imagination and has important practical advantages. Law is largely a craft, working on and with the existing legal order. There is good reason to believe that as long as this order is binding, it is useful to society, which is roughly equivalent to saying that it is also just to a reasonable (producible) extent. Nowadays, such a rigidly positivist view of the legal profession has lost its appeal, all the more so as it has been negatively tested by history. And so, in analogy to Gustav Radbruch, contemporary jurisprudence admits that separating the legal profession from a broader discourse on justice is an all too simplistic, and sometimes simply bad, choice.

What is more, contemporary legal science (or sciences) proved wrong Hobbes's assumption that the practical wisdom of lawyers is somehow inferior to the scientific knowledge that any legislator needs to rationally govern society in order to fulfil the modern legal contract West discusses. Today's legal scholars are as much interested in the society as the representatives of other social sciences, with whom they gladly cooperate in order to scientifically describe and explain, as far as possible, the nature of human affairs. The social sciences themselves have undergone a significant paradigmatic change, moving more and more in the practical direction suggested by Aristotle.³⁹ The credibility and usefulness of a particular social science lies less in its explanatory potential (which is crucial in the case of the natural sciences), but increasingly in its ability to carefully examine and advise on possible ways of ensuring artificial political unity in societies so diverse that their constant dynamism cannot be captured in a fully rational matrix of well-defined concepts. The task is all the more difficult because there seems to be no authoritative political judgement available. It is not even possible to point to some ideals - analogous to those born within the modern social imaginary, which over time have favoured the construction of liberal democracies - that would have the potential (either natural or artificially crafted; directly political) to win in the competition to become authoritative in any way other than by direct recourse to force.

Diversity is the new normal, one might say, and if so, also lawyers will confront more and more "hard cases", in which ethical and political disagreements that stem from our naturally messy lives come to the fore and demand being taken care of.

³⁹ See: Salkever, S.G., *Aristotle's Social Science*, Political Theory, 9/1981, vol. 4, p. 479-508.; Sayer, A., *Why Things Matter to People*, Cambridge University Press, Cambridge 2011.

It may be more and more difficult to deal with them in a strictly craft like manner. Legal philosophy admits that, and there is a growing number of proposals which try to make the situation cognitively easier for lawyers. These proposals vary in their specific recommendations, yet many of them emphasise the importance of various aspects and elements of *phronesis*-prudence. The concept of "practical reasoning" and the value of dialogue are emphasised. Also, the role of empathy and a desire for justice are identified as crucial components of the professional competencies of good lawyers. This aligns with the Aristotelian ideal of professionals who can perform their public function while maintaining their *zoopolitika* humanity. The list of particular proposals or movements in jurisprudence which resonate well with *phronesis* is extensive and open-ended, and it is subject to constant review and refinement, as evidenced by the evolution of the Critical Legal Studies and Law and Literature movements, the latter of which has paved the way for Law and Humanities.⁴⁰

In the context of this much-needed rejuvenation of jurisprudence, a key concern pertains to its theoretical orientation, which appears to predominate over a truly phronetic approach. Instead of fostering (in this case intellectual) cooperation between legal scholars, it sets new divisions among them, as every new trend does its best to expose its innovative character. Furthermore, various new proposals do not seem to pay enough attention to discuss their relation to traditionally conceived (and practiced) legal craft. It is "practically wise" to broaden the cognitive framework to encompass the law and legal activity as integral components of our collective existence (politics) and well-being (ethics). However, Aristotle advises caution against equating phronetic knowledge with "theoretical grasps" that a craft relies on. As with any craft, the legal one is also founded on cumulative experience, leading to a conservative and sceptical stance towards speculative proposals that lack, at least for now, empirical testing and integration with existing practice. Lawyers are professionals in law, and the foundation of legal craft is legal dogmatics. Its methods, as underlined by Jerzy Leszczyński,⁴¹ are fundamentally positivist in nature as their primary focus is on legal texts rather than the dynamic realm of human affairs. *Phronesis* seems to be a kind of wisdom tailored for challenging times that can never be fully integrated with the craft it serves to supplement. Rather than reducing the challenges or controlling them, the aim of *phronesis* is to reduce the risk that ignoring them would worsen the situation.

Returning to Aristotle's concept of *phronesis* and recovering the prudent part of jurisprudence may be one of the answers to the lack of clear criteria for

⁴⁰ Stern, S., *Law, Literature, and The Legal Imagination*, Yale Journal of Law & the Humanities, 35/2024, no. 2, p. 211-224.

⁴¹ Leszczyński, J., *O niezmienności uprawiania dogmatyki prawa*, Studia Prawno-Ekonomiczne, 81/2010, p. 115-129.

distinguishing between the aforementioned violence and mess. Rather than keeping lawyers separate from it, safely hidden behind the walls of their craft, it encourages them to step into this mess to try to minimise certain harms that are being done, even if such harms are not legally defined as violence (or perhaps not just yet). It also encourages them, as they engage with the mess, not only to serve as "organs of voice" for different individuals and groups seeking justice, but also to speak for themselves. Like other citizens, lawyers have a voice, and they should use it to contribute to actively choosing the future of our common "human affairs." At the same time, in using that voice, they should remember that they have just left the safe ground of their strictly legal competence, based on solid "theoretical grasps" integrated with their craft. *Phronesis*-prudence does not make legal knowledge better in the sense that it allows *phronimos* to solve problems that "craft lawyers" could not solve. It does not turn anyone into a Judge-Hercules from Dworkin's theory, a half-god of the law for whom no hard case is really hard. On the contrary, the desire to remain such a demigod, capable of solving every case, tends to isolate him from the human world, requiring an even greater concentration on the craft-part of his profession. The Judge-Hercules must be able to, if necessary, put aside, his own views as well as possible social expectations or consequences, in order to focus above all on the coherence of the legal system, and therefore to accept an interpretation that tends to strengthen and maintain this artificial order, protecting it from any possibility of "mess".⁴² Nor does the turn to *phronesis* justify a possible "juristocracy" that would protect democratic society from itself. Our (legal) narrative voices inspired by our sense of justice are no more powerful than other narrative voices. What can make them more audible is action, because lawyers are entitled to act in ways that other citizens cannot. It should not be just any action, not even a successful one, but first of all a *phronetic* action – human enough to evoke a positive response of those who see and judge it. "Human" in the cooperative sense of Aristotle, not Hobbes.

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