

MIRA MILADINOVIĆ ZALAZNIK – DEAN KOMEL
(Eds. | Hrsg.)

EUROPE AT THE CROSSROADS OF CONTEMPORARY WORLD
100 Years after the Great War

EUROPA AN DEN SCHEIDEWEGEN DER GEGENWÄRTIGEN WELT
100 Jahre nach dem Großen Krieg



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Europe at the Crossroads of Contemporary World
Europa an den Scheidewegen der gegenwärtigen Welt

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INSTITUTE NOVA REVIJA
FOR THE HUMANITIES

The work is published within the research program P6-0341, the research project J7-8283, and the infrastructure program I0-0036 executed by the Institute Nova Revija for the Humanities (INR; Ljubljana, Slovenia), and financially supported by the Slovenian Research Agency (ARRS; Ljubljana, Slovenia).

Die Publikation erscheint im Rahmen des Forschungsprogramms P6-0341, Forschungsprojekts J7-8283 und Infrastrukturprogramms I0-0036 des Instituts Nova Revija für Humanwissenschaften (INR; Ljubljana, Slowenien), die von der Slowenischen Forschungsagentur (ARRS; Ljubljana, Slowenien) finanziell unterstützt werden.

CIP - Kataložni zapis o publikaciji
Narodna in univerzitetna knjižnica, Ljubljana

316.7(4)(082)

EUROPE at the Crossroads of Contemporary World : 100 Years after the Great War ; Europa an den Scheidewegen der gegenwärtigen Welt : 100 Jahre nach dem Großen Krieg / Mira Miladinović Zalaznik and, Dean Komel (Eds., Hrsg.). - Ljubljana : Inštitut Nove revije, 2020. - (Zbirka Forum)

ISBN 978-961-7014-23-5
I. Miladinović Zalaznik, Mira
COBISS.SI-ID 33180675

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Is European Constitutionalism an Answer to the Problem of Violence?

Abstract: A hundred years after the Great War, could we disregard the role of violence in the constitution of the core values of Europe? Taking into account recent contributions on the phenomenology of violence, I will in this paper examine to what extent the European Union's constitutional order is able to fulfill the double exigency of enhancing freedom and preventing violence. In the final part, I will discuss the possibility and the desirability of a "post-state constitutionalism." More than to the need for socio-economic interdependence, the European project has to be related to the (moral, political, philosophical) imperative to avoid "the worst violence." European integration may be considered, therefore, the outcome of a "constitutionalist ethos."

Keywords: European Union, constitutionalism, post-state, violence, meaning, the worst violence, Michael Staudigl, Leonard Lawlor¹

A hundred years after the Great War, could we disregard the role of violence in the constitution of the core values of Europe? Could we have forgotten the amplitude of the violence and the role it played in our lives? In fact, this is what Anton Blok suggests when he states, in his analysis of modern societies, that in these societies the means of violence have long since been monopolized by the state and any form of violence outside that of the state appears therefore as irrational, as an antithesis of "civilization."²

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- 1 This paper is an outcome of the project The Structures of Conflict: A; Phenomenological Approach to Violence, Grant Number: PN-III-P4-IDPCE-2016-0273, carried out at the Research Institute of the University of Bucharest (ICUB).
 - 2 Anton Blok, "The enigma of senseless violence," in *Meanings of Violence: A*

We can already notice that the modern state is using violence against violence. However, the nature of these two forms of violence has not been investigated sufficiently. What does it mean to use violence against violence? Is the state able to address violence when one form is replaced by another, when one mode of violence is only pushing the other outside the realm of the “rational”?

Constitutional crises have abruptly irrupted in the last years in some European countries, like Poland, Hungary, and Romania, raising questions over the foundations of the European political setting. Are these crises a manifestation of a weakening of fundamental values and principles, or just a matter of the compliance of some state with EU fundamental rights and values? In any case, there is a sense of urgency about answering these challenges of democratic society.³ Authors still wonder “whether it is possible to target the crises of *European constitutionalism* without addressing and clarifying the meaning of the term itself [...]”⁴

The first question I try to answer in the following paper will be: How could we describe violence phenomenologically? I will then discuss violence in connection with the sphere of experience and meaning. If it is intrinsic to the structure of experience, can we still see it as irreducible? The second question cannot be but: Which is the appropriate answer to violence? Keeping violence away or fighting violence with violence? By this path, I will arrive at the idea of a (transcendental) conversion of violence, in connection with that of the affect.

Cross Cultural Perspective, ed. Göran Ajimer and Jon Abbink, 23–38 (Oxford: Berg, 2001), 23, <https://hdl.handle.net/11245/1.192914>.

3 Armin von Bogdandy and Pál Sonnevend, eds., *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Oxford: Hart Publishing, 2015).

4 Katarína Šipulová, review of *Constitutional Crisis in the European Constitutional Area*, ed. von Bogdandy and Sonnevend, *Středoevropské politické studie / Central European Political Studies Review* 18, no. 1 (2016): 101–9 at 108, <https://journals.muni.cz/cepsr/article/viewFile/6018/5185>.

In the second section of the paper, I will briefly answer the question: Is Europe—as a political, cultural, and juridical (constitutional) project—able to address the fundamental problem of violence? My answer will be generally affirmative, but we still have to show how this project can fulfill its aim. Again, should violence be actively kept away? Should it be fought with more violence? Or should we rather think about converting violence, and keep in mind the concept of vulnerability?

Describing Violence Phenomenologically

One major way in which the experience of violence can be analysed is that of phenomenology. However, it seems that the experience of violence takes phenomenology beyond its common understanding, towards an approach which goes from the mere description of violence to the uncovering of fundamental aspects pertaining to responsiveness.

From the standpoint of classic phenomenology, there is no violence per se.⁵ We can speak of violence only in the sense that “there are (historically and culturally) constituted—and thus irreducibly contingent—orders, within which the meaning ‘violence’ is ascribed to a given social event.”⁶ The advantage of this view—at least apparently—is that it allows us to define and to debate what a violent event is and what not. But does it allow us to really negotiate with violence, to address its core? Finally, we have to admit that the analysis of the orders of violence pertains to the “sovereign,” who is the one who defines what violence is and what not. But the figure of the sovereign is rather an obstacle to bringing violence to light, and also withdraws from individuals the right and the capacity to deal with it.

5 Michael Staudigl, “Introduction: Topics, Problems, and Potentials of a Phenomenological Analysis of Violence”, in *Phenomenologies of Violence*, ed. Michael Staudigl, Studies in contemporary phenomenology 9 (Leiden and Boston: Brill, 2014), 1–32.

6 *Ibid.*, 1.

The constructivist view of violence, apparently endorsed by classic phenomenology, fully acknowledges a variety of orders of violence which are in fact cultural variations on our understanding of violence, but it fails to understand the experience of violence as such, which is relegated to the marginalized status of “brute fact of ‘physical violence.’”⁷

Can we do that while the explicit aim of the phenomenological investigation is the development of a phenomenology of violence suffered, as in the studies of Delhom,⁸ for example, or an analysis of violence in terms of being “destructive of sense”?⁹ Staudigl is undoubtedly right when he questions the capacity of the perspectival approach to bring the phenomenon of violence to the fore,¹⁰ but he eventually refuses to see it as anything but a break in our inter-subjective fabric.

It would in fact be difficult for a phenomenological approach to move away from the idea that the subject has to be at the center of a theory of violence. Subject-centric approaches are not only dominant in the phenomenological literature on the topic of violence, but also grounded in the core concepts and theories of phenomenology. It is obvious that the understanding of violence requires the description of the levels of experience and of the layers of meaning that are constitutive for it. However, as Michael Staudigl acknowledges, that should not forbid us to “place ourselves in a position to articulate as violence something that in a given context has not yet been (or is not any longer) acknowledged as violence.”¹¹

7 Ibid., 2. Staudigl takes the expression from Maren Lorenz, “Physische Gewalt—ewiggleich? Historische Körperkontexte contra absolute Theorien,” *Wiener Zeitschrift zur Geschichte der Neuzeit* 4, no. 2 (2004): 9–24.

8 Pascal Delhom, “Verletzungen,” in *Gewalt. Strukturen. Formen. Repräsentationen*, ed. Mihran Dabag and Bernhard Waldenfels (Munich: Fink, 2000), 279–96.

9 James Mensch, *Embodiments: From the Body to the Body Politic* (Evanston, Ill.: Northwestern University Press, 2009), 72.

10 Michael Staudigl, “Towards a Relational Phenomenology of Violence,” *Human Studies* 36, no. 1 (2013): 43–66.

11 Staudigl, “Introduction,” 2.

Nevertheless, Staudigl takes the different path of building a phenomenological theory of violence, one that I would call “descriptive.” In describing the multifaceted phenomenon of violence in a detailed manner, he hopes to find the “subtle ways—beyond the physically tangible or visible—in which violence makes its way into human life forms, shaping them and settling in these, oftentimes undetected.”¹² This approach entails a preliminary decision on what counts as violence or not, i.e., on the meaning of violence. That decision led him to emphatically state that “violence *exists* (but not violence *tout court*) and that it must always be considered within the horizon of its particular orders.”¹³

Summing up the position of Staudigl, violence is an irreducible social phenomenon, in the sense that we are not allowed to interpret it as a non-social phenomenon. Violence is therefore the most outstanding form of a “negative sociality”¹⁴ and, as such, it has to be eliminated or reduced.

But what if we adapted the phenomenological method so that it pertained to a region beyond the construction of meaning? The epoché would instead lead us to “a ‘field of experience’ that is neither strictly subjective nor strictly objective.”¹⁵ As Leonard Lawlor put it, at this level, which he calls “transcendental immanence,” we shall necessarily encounter “the foundation of the problem of the worst violence.”¹⁶

Thereby, we realize that violence is not only describable as the socially irreducible integrality of the levels and layers of meaning, but also—and this is its most striking and paradoxical aspect—as a trans-individual trans-subjective phenomenon. Its embeddedness in the fabric of sociality can hardly be denied.

12 Staudigl, “Towards a Relational Phenomenology of Violence,” 46.

13 Ibid.

14 Christian Sternad, review of *Phänomenologie der Gewalt*, by Michael Staudigl, *Studia Phaenomenologica* 17 (2017): 422–6.

15 Leonard Lawlor, *From Violence to Speaking Out: Apocalypse and Expression in Foucault, Derrida and Deleuze* (Edinburgh: Edinburgh University Press, 2016), 5.

16 Ibid.

The term “worst violence,” as well as “transcendental violence” or “fundamental violence,” was introduced by Derrida in his famous paper on Levinas from 1964.¹⁷ Fundamental violence is located right in the foundation. As Derrida shows, in order for me to experience a being, it has to enter my sphere of experience and thus to be endowed with a meaning. Accordingly, when anything new enters into my sphere of experience, it has to be connected with past experiences in order to be understood. If a person enters my sphere of experience, she/he can be understood only through my prejudices and formed ideas. The use of language already constitutes a form of violence. As Lawlor synthesizes this situation, “transcendental violence is fundamental because it appears in the fundamental structure of experience” and it “cannot be eliminated.”¹⁸

This does not mean that we cannot in fact try to eliminate it. A complete (and reiterated) phenomenological epoché will suspend not only “the world” (for the subject), but also the mundane reaction (of the subject), particularly her/his attempt to reject violence. What motivates such a renewed suspension is the fact that we would be required to use “more and more violence to repress and control what is fundamental in experience.”¹⁹ This is what Lawlor calls “the worst violence.”

We receive this new insight on the worst violence as a painful discovery. In fact, the phenomenological method, in the radical sense used here, helps us to uncover a level of affectivity in the description of violence.²⁰ This new level will prompt us to effectuate a conversion

17 Jacques Derrida, “Violence and Metaphysics,” in *Writing and Difference*, trans. Alan Bass (Chicago: University of Chicago Press, 1978; Bloomington: Indiana University Press, 1992), 79–102.

18 Leonard Lawlor, *From Violence to Speaking Out*, xi.

19 Ibid.

20 For the relationship between violence and affectivity, see Cristian Ciocan, “Violence and Affectivity,” *Human Studies* (2019), <https://doi.org/10.1007/s10746-019-09507-5>. Ciocan underlines that “the affectivity is differently constituted each time, depending on the various situations of symmetrical and asymmetrical violence that the third witnesses.”

and to open the path for a phenomenology of non-violence.²¹ In Lawlor's terms, a new mode of existence, i.e., an ethics for humans, will consist in the reversal of the idea of the worst. This reversal comes about through the emergence of the idea of transcendental powerlessness.²² We are powerless in the face of violence, yet we maintain a special kind of power: the power of letting the other be free. The problem will then be that of minimizing the irreducible violence. For that, we have to produce a speech act that is concomitantly an actuality and a potentiality.²³

The irreducible violence, which can be found in the fundamental structure of experience, motivates reactions. One of these reactions is that of using more and more violence to repress and control the fundamental in experience. The problem with this reaction is that it is more violent than the fundamental violence that it tries to eliminate. Once we recognize that the worst violence is a reaction, we are able to recognize its nihilistic character: "it wills the end *as such*."²⁴ However, the "phenomenological reasons imply that the end is always the end *as* something other than the end. The end is always related to something that remains. Even when we approach the end of something, there is always something heterogeneous to the end."²⁵

Therefore, Lawlor proposes that we should think of a reaction to "the least violence."²⁶ In the footsteps of Derrida, he outlines a "new way of speaking," a friendlier way of speaking. Moving from the concepts of reversal and overcoming of violence to that of conversion of violence requires, on the one hand, a deeper understanding of the idea

21 See Robert J. S. Manning, "Emmanuel Levinas and René Girard: Religious Prophets of Non-Violence," *The Philosophical Journal of Conflict and Violence* 1, no. 1 (2017): 22–38.

22 Leonard Lawlor, "A New Possibility of Life: The Experience of Powerlessness as a Solution to the Problem of the Worst," *Studia UBB. Philosophia* 53, no. 1–2 (2008): 17–28.

23 Lawlor, *From Violence to Speaking Out*, 6.

24 *Ibid.*, xi.

25 *Ibid.*, xi.

26 *Ibid.*, 3.

of subject and, on the other hand, a critical re-examination of order. A phenomenological inquiry will lead us to the order before the order, to the pre-constitutive (passive) “order” of the genesis of the politico-legal order, both in the historical-constitutive and the transcendental perspectives. Against the reification of a particular political-judicial order, we may recognize the advent of a new one, not one which reinforces violence, but a truly “friendlier” one.

Addressing Violence: Is That Enough?

Mainstream constitutionalist theories have barely taken violence into account. In the best case, we can find a reference to domestic violence.²⁷ In the light of the preceding section, it is legitimate to ask ourselves: Is the European “constitutionalist ethos” able to convert fundamental violence and provide an adequate answer to the problem of worst violence? The draft of an answer that we present in this section of the paper hypothesizes that the European constitutionalist ethos needs to be widened.

Since constitutionalism is founded on the idea of justice, an adequate approach to the current crisis of European (constitutional) values should re-consider and eventually enlarge the scope of justice. Given the particularity of the European Union, this approach has to take into account both the supranational and the national components. The current approach focuses on the latter ones, on the grounds of the urgency of the crisis and the idea that this crisis is due to the lack of compliance by the member states.²⁸ However, if we take into account the mid- and long-term-perspective, the “supranational” component will probably

27 This may in fact be highly significant. We may speculate that domestic violence is the only way in which fundamental violence emerges in contemporary society.

28 Dimitry Kochenov, “On Policing Article 2 TEU Compliance—Reverse *Solange* and Systemic Infringements Analyzed,” *Polish Yearbook of International Law* 33 (2013):145–70 at 153.

prevail. In the following lines, I will briefly discuss some proposals for the strengthening of the “supranational” level, paying attention to the ways in which they tackle the problem of violence.

Jan-Werner Müller acknowledges that the starting point of the European construction has not been the need for socio-economic interdependence, but the imperative of avoiding political violence. After the political collapse before the World War II, European states found a way of avoiding unrestrained parliamentary power. They hit on the idea of delegating the national (sovereign) power to nationally unelected actors and to supranational bodies in order to prevent authoritarianism. As a response to fragile nation-state democracies, “co-guardians” of human rights were created. They took the form of “supranational” components of constitutionalism. Something like a conceptual impossibility emerged, namely the idea of a “post-state constitutionalism.”²⁹

The European Union already represents, for some authors, a new model of constitutional rule. Turkuler Isiksel, for example, proposed the term “functional constitutionalism.”³⁰ Besides democratic self-rule and individual liberty, it appears that the authority of the European Union is based on a logic of effective government, which consists in the delegation of governance tasks to supranational institutions as a way of responding to policy challenges and systemic imperatives to which individual member states would not have an adequate answer.

Another attempt to articulate the jurisprudential foundations of the state in a way that accommodates the supranational component is that of making domestic constitutionalism a welcoming host to cosmo-

29 Jan-Werner Müller, “Three Constitutionalist Responses to Globalization,” in *The Limits of Constitutional Democracy: Festschrift for Walter Murphy*, ed. Jeffrey K. Tulis and Stephen Macedo, The University Center for Human Values Series (Princeton: Princeton University Press, 2010), 239–55.

30 Turkuler Isiksel, *Europe’s Functional Constitution: A Theory of Constitutionalism Beyond the State* (Oxford: Oxford University Press, 2016), Oxford Scholarship Online, <https://www.oxfordscholarship.com/view/10.1093/>.

politan attitudes and sensibilities.³¹ Vlad Perju finds traces of these foundations in constitutional adjudication. He mentions *Lawrence v. Texas*, which is a decision about the right of adults to engage in homosexual conduct. On that occasion, Justice Kennedy referred clearly to a supranational dimension of law when he wrote that the right the petitioners sought in this case was an integral part of human freedom in many other countries.

Constitutional pluralism is another trend of today's constitutional theory which enlarges the constitutional ethos. It recognizes that there exists "a range of different constitutional sites and processes configured in a heterarchical rather than a hierarchical pattern."³²

The "supranational" constitutional law risks renewing and reiterating features of the national one. A better approximation to a type of constitutional authority, which is not necessarily connected with a nation-state, i.e., with a holder of a monopoly on violence, is Transnational Constitutional Law (TCL), which emerged out of constitutional law in a transnational legal context.³³ Based on Zumbansen's concept of Transnational Law as a methodological framework, TCL reassesses basic concepts such as the rule of law, equality, and access to justice in an attempt to engage *lived experiences* of constitutional law in local and transnational contexts.

In the same vein of enlarging our sensibilities, both toward violence and toward justice, Samuel Moyn takes into account the idea of distributional fairness.³⁴ Indeed, equality may require much more of

31 Vlad Perju, "Cosmopolitanism and Constitutional Self-Government," *International Journal of Constitutional Law* 8, no. 3 (July 2010): 326–53, <https://doi.org/10.1093/icon/moq028>.

32 Neil Walker, "The Idea of Constitutional Pluralism," EUI Working Paper LAW 2002/1 (Florence: European University Institute, 2002), <http://hdl.handle.net/1814/179>.

33 Peer Zumbansen and Kinnari Bhatt, "Transnational Constitutional Law," Legal Studies Research Paper Series 2018-05 (London: King's College London Dickson Poon School of Law, 2018), <https://ssrn.com/abstract=3117352>.

34 Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Cambridge, Massachusetts: Belknap Press, 2018).

generosity than human rights. Majorities usually defend the rights of others in a satisfactory manner, at home or abroad, only if they feel that the entire society is a fair one. For them, human rights are not enough if not connected to an egalitarian agenda.

It may belong to these new sensibilities, as well as to a post-modern imaginary, that sovereignty, together with cosmopolitanism and the rule of law, are in fact preambles to nihilism.³⁵ Being manifestations of nihilism, the considerable violence they still wield makes them unsuitable to a fair society. In a nihilistic society, violence is not “constitutive” of the political, as embedded partisanship, but is directed towards the members of the same political body. As such, it is a reaction rather than a constitutive component of society. This kind of violence is different from any modern form of politics, where the state has a monopoly on the legitimate use of violence.

But what is a “good” reaction to violence? That would arise from a new kind of sensibility, a sensibility which would not negate pain actively (the pain produced by violence), but which would be powerful enough to tolerate it. It would be a passive reaction which would transform pain from entry to exit. This passive reaction, according to Lawlor’s reading of Nietzsche, “is strong enough to allow an injury to happen without seeking vengeance. And if it seeks anything, the passive reaction seeks to give itself over to those others who enter in and those others who escape. It seeks generosity.”³⁶

35 Itamar Mann, “What is a ‘Manifestly Illegal’ Order? Law and Politics after Yoram Kaniuk’s *Nevelor*”, in *The Politics of Nihilism*, ed. Roy Ben-Shai and Nitzan Lebovic, 177–204 (Bloomsbury, 2014), 177, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2410744.

36 Leonard Lawlor, “Vulnerability and Violence: On the Poverty of the Remainder (or Beyond Kant)”, *Journal of the British Society for Phenomenology* (2018), <https://doi.org/10.1080/00071773.2018.1434967>.

Conclusion

I noted at the beginning of this paper that the modern state uses violence against violence and that this new form of violence has not been investigated sufficiently. The fact of using violence against violence is a good indicator that the state is not able to address violence. Starting from the philosophical problem of violence, which ultimately takes the form of the transcendental violence and of the worst violence, I went on to focus on the constitutional crises that have irrupted in the last years in Central and Eastern European countries. They raise questions regarding the foundations of the European political setting, since they appear to be the manifestation of a weakening of fundamental values and principles of the European political-juridical project.

My answer to the question from the title of this paper is affirmative, but only if the analysis extends to the “fundamental violence” and the problem of the worst (violence) is raised. Should violence be fought with more violence? My answer to this question will be, with Leonard Lawlor: certainly not. Ways of converting violence are still waiting to be found. In the light of these considerations, I think that, more than to the need for socio-economic interdependence, the European juridical project has to be related to the (moral, political, philosophical) imperative to avoid “the worst violence.” Therefore, only in these conditions may European integration be considered the outcome of an authentic “constitutionalist ethos.”

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EUROPE AT THE CROSSROADS OF CONTEMPORARY WORLD
100 Years after the Great War

EUROPA AN DEN SCHEIDEWEGEN DER GEGENWÄRTIGEN WELT
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Edited by: | Herausgegeben von:

Mira Miladinović Zalaznik and | und Dean Komel

Scientific review: | Wissenschaftliche Rezension:

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Erfurt; Germany | Deutschland)

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Proofreading: | Korrekturlesen:

Andrej Božič, Mira Miladinović Zalaznik, Christian Moe

Design and layout: | Gestaltung und Umbruch:

Žiga Stopar

Cover image: | Umschlagabbildung:

© **Vecteezy**

Print: | Druck:

PRIMITUS d.o.o.

Publisher: | Verlag:

Inštitut Nove revije, zavod za humanistiko
www.institut-nr.si; institut@nova-revija.si

Price: | Preis:

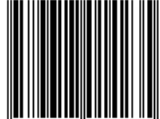
28 EUR

Ljubljana 2020

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INSTITUTE NOVA RENJIA
FOR THE HUMANITIES

ISBN 978-961-7014-23-5



9 789617 014235