PREFACE BY SLOBODAN DIVJAK
THINKING AGAINST THE CURRENT

Before the Serbian readership there is an extraordinary book, *Human Rights and Empire*, by Costas Douzinas. This, in my opinion, is certainly one of the most important books of the decade. On the one hand, it is characterized by bold statements that resolutely call in question the main postulates of the still dominant tendencies within the world's thought and encourage us to think against the current. On the other hand, starting from certain assumptions, Douzinas presents his thesis in a precise and logically coherent manner, demonstrating unusual erudition and superior knowledge not only of philosophy, but also of psychoanalysis, political science, law, and other disciplines. Costas Douzinas breaks new ground in rethinking the meaning and consequences of justice in a globalized world. He makes his case originally, provocatively, lucidly, and persuasively. It is not often that an author addresses such abstract topics with such conceptual clarity and intellectual intensity. The author of this preface does not share some of Douzinas's important assumptions, which only gives this praise added weight.

The central theme of this work is human rights. As Douzinas himself states, the aim of this book is to answer the following questions: "Is there an internal connection between discourse and practice of human rights and the recent wars carried out in their name? Are human rights an effective defensive tool against domination and oppression or are they the ideological gloss of an emerging empire"? To answer these questions, Costas Douzinas first attempts to rethink the historical development of human rights, primarily seeking to explain the reasons why human rights have, in a paradoxical way, transformed themselves from a means of resistance and struggle of the disenfranchised, humiliated,

and oppressed into a tool with which the power-wielders seek to mask their attempts to reproduce the order of domination, humiliation, and oppression of others.

The point of departure of this process, in Duzinas's view, is a transformation of natural law and natural rights into positive law, through which the ideal and transcendent concept of natural law loses its revolutionary potential. It would be wrong, however, to interpret this approach as Douzinas's utopian rejection of positive law. With his critical attitude toward the doctrine of legal positivism as formalistic and abstract in its nature, he just rejects its fetishization, since through it, might instrumentalizes law. By fetishizing positive law, people forget that there may be legal injustice, i.e., that the law can act unjustly according to its own internal criteria (when it violates its established procedures, when it does not recognize rights that are already given, when it breaches the fundamental principles of equality and dignity). Due to its abstract and formalist nature, positive law conceals the fact that each individual is a cosmos in themselves, a universe of unique meanings and values and, accordingly, that the axiom of cosmopolitan justice has to be: "Respect the singularity of the other"! No right can provide full recognition and love of others and no Bill of Rights can complete the struggle for a just society. A fully pozitivized right and legalized desire themselves extinguish the self-creating potential of human rights.

Therefore, Douzinas admits that positive law allows for partial human emancipation and recognition. But it can also, in the absence of insight into its limitations and imperfections, pacify emancipatory social movements and petrify unjustified material inequality, the gap between the rich and the poor developed within it.

On the other hand, mystification of positive law obscures the fact that there is another type of justice – transcendent justice to which the law in its entirety has to be accountable. Douzinas rediscovers this type of justice in ancient cosmopolitanism, where the laws of the polis had been judged from the position of cosmos, with its universal, but absent and desirable principles. This type of justice is genuine cosmopolitan justice.

Thus, Douzinas's approach to positive law is associated with utopian tradition, which has to be distinguished from unrealistic utopia. "Utopia is the name of the power of imagination, which finds the future latent in the present, even in the ideologies and artifacts it criticizes... the present foreshadows and prefigures a future not yet and, one should add, not ever," says Douzinas. The words "not ever" imply that this type of utopia can never be institutionalized: "We must invent or discover in the genealogy of European cosmopolitanism or discover whatever goes beyond and against its institutionalization, the principle of its excess."

From the point of view of "cosmopolitanism to come," a concept that relies on Derrida's concept of "democracy to come", Douzinas criticizes formalistically and pragmatically directed cosmopolitanism as a contemporary ideology of the new international institutional order, whose objective – banishment of violence and the achievement of eternal peace as a Kantian ideal -- becomes a mere moralistic declaration, since the *modus operandi* of this order is wars, violence, and torture. Thus, instead of being a means in the struggle against the concentration of power, human rights become the normative sources of the establishement of empire, domination, and oppression.

As one knows, many contemporary Kantian advocates of cosmopolitanism would like to expand the United Nations into a "cosmopolitan democracy." These reform proposals focus on three points: the establishment of a World Parliament, the construction of a global judicial system, and an extensive reorganization of the Security Council. Thus, cosmopolitans aim to subordinate state sovereignty to international courts, to have global human rights legally enforced, and to allow, in worst-case scenarios, for humanitarian interventions. Indeed, the principle of humanitarian intervention is the most controversial one, since it modifies the Westphalian world, which is based on the principle of non-intervention, i.e., non-interference in the internal affairs of independent and sovereign states. Namely, since moral reasons are offered as primary justification for humanitarian intervention, the question arises as to whether such an intervention radically threatens the greatest achievement of modern law,

which is its separation from morality. There are authors, such as Michael Valzer, who believe that an intervention can be justified even without UN approval where a situation requires an urgent response, because it is obvious that gross human rights violations are taking place.

Costas Douzinas is right when he says that the introduction of humanitarian intervention at the international level is overarched by the risk of moralization of politics, which would lead to the relativization of legal standards, i.e., the domination of arbitrary voluntarism in dealing with international problems at the will of the world's strongest power today. Moralization of politics, i.e., the blurring of clear distinctions between morality and law, opens wide the door to the "right is might" principle, where the stronger power, under the guise of its lofty moral goals, seeks to attain its narrow national interests, strengthening the new configuration of political, economic, and military power in the world. These claims are confirmed by past humanitarian interventions, which are the subject of Douzinas's analysis as well. There, the author provides so far the most persuasive arguments in favor of the position that these humanitarian interventions were not only illegal but also illegitimate.

Kosovo is being treated as a unique case, but one cannot draw a general rule or policy on the basis of an exception. Even the ardent advocate of an intervention in Kosovo, Michael Ignatiev, sobered up over time: "Humanitarian intervention in Kosovo was never exactly what it appeared. It was not just an attempt to prevent Milosevic from getting away with human rights abuses in the backyard of Europe. It was also the use of imperial power to support a self-determination claim by a national minority... that used violence in order to secure international notice and attention."

The war in Iraq was the culmination of Bush's and Blair's persistent undermining of international rule of law. Kosovo and Iraq have indicated that international law is only a peripheral domain of the textualists and legalists. The United States and Great Britain made a simple decision to wage the war irrespective of whether it was treated as legal or illegal, moral or immoral, legitimate or illegitimate. Empirical evidence indicates that,

in the course of the last ten years, US policy has consistently violated international law, re-fashioning and subordinating it to its own strategic goals. International law is just one in a series of devices in the pragmatic calculations of the great powers of our era. It can be wheeled out whenever it supports their interests and it is easily discarded if it creates a real or imaginary constraint on them. Law functions as a means of neutralizing or resolving conflicts until one of the parties decides that no peaceful solution is possible. When *raison d' etat* or *raison d' empire* speaks, the law is silent. When the United States was weak, it relied on rules to protect its interests. Now, at the height of its might, the United States has turned to unilateralist logic and abandoned international law. The ultimate goals of the new world order are emplaced by a hegemonistic power and are, therefore, not subject to refutation.

Technical definitions based on the UN Charter and international agreements have been replaced by moral standpoints, compassion, and demands for justice.

If the *eminences grises* of international law believe that the war in Kosovo *was* unlawful, but, on the other hand, that it was also moral, just, and simply legitimate, then the very existence and status of law becomes extremely problematic. Assuming that it is cosmopolitan law that establishes the symmetry between the juridification of social and political relations both within and beyond a state's borders for the first time, cosmopolitans of formalistic bent believe that a world constitution is under construction. They emphasize that the UN Charter is a constitution for the world community; that it "constitutes a self-contained system which claims priority over other agreements"; that the weak link in the global protection of human rights remains the absence of an executive power that could enforce the Universal Declaration of Human Rights, if necessary, by curtailing the sovereign power of nation-states (according to their opinion, the Security Council should be the executive of the international community and its resolutions could be perceived as law on the global level); that the General Assembly must be transformed into a kind of House of Lords and share its competences with

a House of Commons: in this parliament, people would be represented as the totality of world citizens not by their governments but by directly elected representatives. Cosmopolitan law must be institutionalized in a way that would be binding on individual governments. The community of peoples must be able to ensure that its members act at least in conformity with the law through the threat of sanctions. Only in this way would the unstable system of states that assert their sovereignty through mutual threats be transformed into a federation with common institutions that assume state functions, that is, which legally regulate relations between the members and monitor their compliance with these rules. Formalists think that the United Nations does not yet have its own military forces; that it does not even have forces it could deploy under its own command, let alone have a monopoly over means of coercion. The United Nations can be viewed as the repository of an emerging police power that might be used to authorize an intervention if it is consistent with the principles of the Charter and the new humanitarian laws. The point of cosmopolitan law is that it bypasses the collective subjects of international law and directly establishes the legal status of individual subjects by granting them unmediated membership in the association of free and equal world citizens.

In contrast to this, Douzinas concludes that neither a constitution nor a supranational norm emerge on the international level. "The constitution is," according to him, "the plinth, the base upon which a community stands, the expression of its members coming together." It expresses the co-presence and concord of a people in their common space where they would live in conditions of a political system that they chose for themselves. But on the world level no community or *demos* exists and no principle or ground unifies peoples across the globe. But even if a world constitution or a world community does not exist, this does not mean that there is no hegemonic power and that we have not embarked on the creation of an empire. Douzinas's "cosmopolitanism to come" questions the theological mask of sovereignty, represented today by hegemonic power, rather than its pale homonymic imitations.

The Absolute, omnipotent sovereign of modernity was born in order to protect the existing political balance of power and to reproduce the world's social order.

On the basis of Douzinas's views on formalistically oriented cosmopolitanism, I would like to raise several questions that are connected to current theoretical and political debates.

Douzinas is undoubtedly correct when he indicates that erasure of the difference between law and morality has totalitarian implications; that this erasure is not in accordance with modern law whose internal (procedural) logic is different from moral, political, and ideological logic. Unmediated moralization of politics would be just as harmful in the international arena as in the conflict between governments and their internal enemies. But does this mean that the above-mention moralization can only be prevented by keeping international politics free from morality? The distinction between law and morality does not imply that positive law has no moral content (if the moral is understood as a deontological category). During the democratic procedure of political legislation, moral arguments also become part of the justification process of enacted norms and thereby of law itself. Formal properties of legality are that which differentiates law from morality. Viewed from that standpoint, the correct response to the threat of an unmediated moralization of politics does not consist of purging politics of all moral content, but of a democratic transformation of morality into a system of positive laws characterized by legal procedures for their adoption and implementation. Introducing human rights in positive law in this way, we would not have the difference between law and those moments of morality that are not subject to legal regulation erased. Thus we could avoid the moralistic fundamentalism of human rights and the moralization of politics that necessarily introduce double standards in decision-making processes concerning international and internal conflicts. It is obvious that such a system of positive laws would not allow for the possibility of existence of "unique cases" or the possibility of playing tricks with procedures, since direct application of morality would not be possible, i.e., because morality on its own basis could not be a criterion for decision-making.

Some authors underline the dual nature of human rights: as constitutional norms they enjoy a positive validity, but as rights possessed by each person *qua* human being they are also accorded a suprapositive, transnational, and universal validity. This dual character of natural rights is manifest in the difference between declarations on human and civil rights and concrete constitutions. It is a well-known fact that Lincoln, when advocating the process of emancipation of the enslaved Blacks, was not referring to the existing American Constitution, but to the American Declaration of Independence, namely to its principle that people are born free and equal and should continue to live as such; the *spiritus movens* of the long process of the black struggle for equal rights with the whites has been mentioned above as well as other declarations on human rights. From this point of view, it appears that the transformation of natural law into positive law does not extinguish the emancipatory potential of natural law, because there still remains a difference between human rights as constitutional norms and the human rights of every individual as a human being: from the standpoint of this difference, one can criticize each of the concrete constitutions and constitutional practices.

It is true that America, with its humanitarian interventions, disrupted the international rule of law and used moralistic rhetoric in order to justify the implementation of its own strategic interests – the spread of its zone of influence. But this fact confirmed that American imperial appetites could not be realized within the framework of international law, because international law had the power to limit these appetites.

Similarly, the placement of prisoners in Guantanamo Bay, which is formally located outside US jurisdiction, confirmed that America had to abandon the existing law in order to treat detainees without regard for the rules of domestic and international law. The United States did those things because it knew, firstly, that the might-is-right principle comes to full expression only if the mighty flout the accepted rules that constrain their might and, secondly, because it was sure that it would not be punished for the breach of procedures because of the great imbalance of power in international relations. But the imbalance of power at the

international level is not something that is unchangeable, but something that may vary over time. At the beginning of the "war on terror," public opinion polls recorded a very high popularity of George Bush Jr. However, at the end of Bush's rule, his popularity was so low that no Republican candidate for US president had a real chance of victory against Barack Obama, who was offering a discontinuity in relation to the former US policy, internal as well as external. Failures of Bush's arrogant and aggressive foreign policy, particularly in Afghanistan and Iraq, had convinced a hefty proportion of American voters that no power, however great it could be, was omnipotent; also, reports about the brutal torture of prisoners in prisons outside the United States had left its mark. Therefore, voters had been looking for change. Of course, Obama will hardly be able to make a radical turn in foreign policy: US strength has a great influence on the direction of its foreign policy, whoever is at its helm - a major power can never act as a small country. Nevertheless, we can now conclude that US foreign policy will be prone to conciliatory negotiations to a greater extent than during Bush's rule: Obama will hardly resort to unilateral actions, i.e., to open violations of international law.

Of course, citizens all over the world should be fully aware of the fact that international law is far more fragile than domestic law and that it is able to limit the right-is-might law to a far lesser degree than intrastate law can. It is worthy of notice that in antiquity, only the sphere within a polis was treated as a regulated one, while the sphere outside a polis, the area of relations between antique city-states, was considered an unregulated domain where the only law that obtained was that of might and force. Douzinas is right when he says that there is no world constitution today, because there is still no world state in sight, and who knows whether there ever will be one. And when there is no global state, there cannot be any separation of powers, etc. However, we should be aware of the fact that the law of "right is might" would be unlimited if there were no rules at the international level, i.e., no juridification of natural state among states. There is a grain of truth in Nietzsche's claim that moral and legal norms are the revenge of the weak and the powerless. For what else is there for the weak and the powerless when confronted with the unruly

expansionist logic of the great powers other than the establishment of strict universal rules of conduct? Of course, those who are weak and powerless should not ascribe to these rules any mystical attributes and should, instead, be fully aware of their limitations and imperfections.

I warmly recommend the book of Costas Douzinas to our readers as an exciting text that seeks to uncover the deepest causes of the crisis in today's world as a world without values. In it, Douzinas tries to provide a rich critique of both formalists and pragmatists and offers a challenging alternative built on his rethinking of ancient cosmopolitanism. Douzinas appeals for the renewal of the philosophical tradition that tried radically to question the *status quo*, to strike at the root of the very thing, carefully avoiding the pitfalls of an abstract, unrealistic utopia. Discovering what tends to transcend the present (the existing) in the very immanence of the world, not in utopistic concepts that have no foundation in what is already occurring within the existing - is the leading methodological principle of Douzinas's thinking. The coexistence of the present and the future in the structure of the promise unsettles, disjoins linear time. In fact, he does not give up every universalism, but remains open to "the universalizing impetus of the imaginary 'polis in the sky' of Diogenes and Zeno, of a cosmos that uproots every city, disturbs every filiation, contests all sovereignty and hegemony... The 'Polis in the sky' can and must be achieved here and now, indeed it is already a part of extant experience. His message takes the form of an injunction: 'make your own city, with your own friends, now, wherever you happen to live... Human rights can reclaim their redemptive role in the hands and imagination of those who return them to the tradition of resistance and struggle against the advice of the preachers of moralism, suffering humanity, and humanitarian philanthropy."

We would add that Augustine as a Christian thinker has also pointed out the uprooted character of the haevenly city. In his *City of God*, Rome is the earthly city founded on a murder. On the other hand, the city of God is a nomad city without a cite, walls and gates. It calls people from all other cultures and ignores the differences between various particular *nomoi*.

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