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The Deadly Game. Deciphering Duel and its Impossible Legal Prohibition through Nietzsche and Hegel

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Abstract: The duel may be understood as a modern European practice, essentially private, of aristocratic origins, through which the parties entered knowing that they were risking their lives in order to prove their honour. Each attribute of the duel, the private, the modern, the European and the aristocratic origin is subject of debates and the article intends to provide arguments in favour of a definition as such. The duel is difficult to decipher in the contemporary mindset – the present-day individual would qualify it either in a radical disapproving manner as barbaric or, in a romantic light, as a noble or naive pursuit, but in any case as a reckless, wasteful and hazardous affair. As such, the duel was subjected to multiple legal prohibitions during history, interdictions which it survived only to find its general natural dissolution at the beginning of the First World War. The article also intends to shed a light on the meaning of the duel through the distinct Nietzschean and Hegelian understanding of the master/slave conceptual couple, thus providing a justification for both the resilience against legal prohibitions and the incomprehensible dimension of the duel for the contemporary world.

Keywords: *Duel; master-slave; non-patrimonial rights; Nietzsche; Hegel.*

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1. The contemporary legal *nec plus ultra*

The easiest way to point to the general fragrant inability of the contemporary individual to grasp the meaning of the duel or any other non-legal and non-judiciary means of settling disputes for that matter is to observe a scene, from a comfortably distant and neutral place, in which he/she is exposed to an act by another which scratches the self, and then to observe the consecutive explanations, confessions and turmoil of that scene and of the course of actions that follow.

He/she would place him/herself or would be placed in the position of a victim of an offense against his/hers non-patrimonial rights. It is not the case that he/she would not feel a similar intense rage or frustration, or that he/she would not be able to conjure an entire web of reasons for the personal impact of the offense as someone who would have demanded a duel; it is not, therefore, an issue about the lack, dilution or disavowal of the sensitivity on these matters. But all that sensitivity about the self and all which is intimate and inherent to it, even when it is painfully disturbed, would find an almost instinctive path for a resolution in the means that the European contemporary culture offers in matters of sublimation: a legal, judiciary path, a judge, a juridical language that reorganizes both the self and the facts in such a way that there is no alternative to step outside of it.

The embittered sensitivity goes through a profound overwriting, the self can only understand itself within the legal language as a victim whose rights were violated and who can only find Justice, compensation, a legal restitution of integrity from a Judge. With no risks to take but economical costs of the legal procedure, the individual is recognized the only way of having to convince a judge that the self was bruised by another.

The same legal language that allows for such an internal recodification of the relation amongst the self and outside facts is the one that arranges a comfortable space for the sensitivity itself. There are a series of European legal documents, international and also internal to each state, which recognizes to each individual an equal virtual legal sensitivity through the affirmation of non-patrimonial rights. The most notable one is the European Convention on Human Rights whose consecrated rights are usually covered at the constitutional level of the member states and deeply legally articulated within the internal legislation of the European states. Such a legal framework guarantees not only that each individual has an identical potential sensitivity for breaches of his/her non-patrimonial rights, but also that he/she can actualize that potential through an effective recourse to a court of law. The conditions for the legal recodification of the initial objective scene at the

beginning of the article, which reorganizes the way in which the self understands him/herself, the outside facts and his/her relation to it, consist in: the prohibition of the duel and the exclusion of any alternatives other than legal or judiciary; the recognition of a virtual legal sensitivity to each individual through which acts can be perceived as offences against the self; the inevitable, almost mechanical act of placing the self in the position of a victim of an offense against non-patrimonial rights; the appeal to a third party, the judge, as the only form of obtaining a remedy, with the consequence of the judge being the only one who can decide on the alleged violation of the self, and who has to be convinced of that by the victim; the extension of the acts which can qualify as an offence, which can reach and scratch the surface of the self and cause some sort of disturbance perceivable by the legally enhanced sensitivity which guarantees that a judge will listen, consider and decide; the guaranteed access to a court of justice which allows for each individual to demand a legal reparation for any act perceived as an offence, without assuming any risks other than patrimonial costs.

Therefore, deciphering the duel with contemporary means has become an increasingly difficult task, since there is no way to escape the legal language. The objective scene at the beginning of the article would find its actual relevance only if the person who was subjected to an act which bruises the self is identified or identifies him/herself as a victim and automatically places or has to be placed in that position from which he can only demand Justice, some sort of compensation from a judge who has to be convinced, who is the only one who can recognize the offence. The duel uses a different language to codify the same initial scene without the entire semantic specter of the victim, it offers a different remedy without any need for proofs and without subjecting the case to a *tertium*, while at the same time it makes the radical demand that the participants confront the possibility of death which requires a particular interrogation of one's sensitivity.

2. Defining the duel

The duel was never subjected to a systematic definition which would encompass all of its characteristics. However, for the purpose of this article, it could be defined as a modern European practice, essentially private, of aristocratic origins, through which the parties entered knowing that they were risking their lives in order to prove their honor. For the contemporary mind, the simple mentioning of the word *duel* activates the medieval imagery, thus placing the practice in a premodern period (Nye, 1998: 84). However, although the practice has aristocratic origins, the rules of the modern duel

were developed in the 16th century by the Italian military elite, along with the technical doctrine regarding the duel, the treaties on the skills required for duelists, the art of fencing and the codes of duel which regulated the conditions for demanding and offering satisfaction through duel, and it was practiced, in spite of the successive legal attempts to prohibit it, until 1914, at the beginning of the First World War. If the duel is connected with other medieval practices it is only through its aristocratic origin, hazardous nature and its incongruity with any form of symmetrical justice. It is significantly different from other forms of duels, competitions or forms of private revenge such as *vindicta*, the duel practiced in Antiquity, the judiciary duel, the trial by ordeal or the tournaments (Codrea, 2015: 105-109). The modern characteristic of the duel can be profiled through all the distinctions from those practices used in Antiquity or Premodernity.

The duel is distinct from *vindicta*, since its purpose is not to punish the opponent through a duel, neither to obtain some sort of revenge against him, but to gain satisfaction. Through a duel, the offended is interested in restoring his self respect, in his eyes and the eyes of the others. Also, a fundamental distinction from *vindicta* is that in a duel, the one who demands satisfaction is equally exposed to the threat of death, just like the offender. Moreover, the codes of duel (honor) generally prohibit the relatives of the one killed in a duel to initiate a new duel in order to obtain revenge (Frevert, 1998: 45-46).

The duel is also different from the one practiced in Antiquity. Gabriel Tarde is even claiming that in the Greek or Roman Antiquity there was no equivalent notion of duel whatsoever, and he illustrates his interpretation referring to a passage of *Illiad* in which, after the conquest of Thebes, Agamemnon and Achilles take Chryseis and Briseis captive. After Achilles convinces Agamemnon to release Chryseis, Agamemnon takes Briseis from him as a form of compensation. Since Achilles fell in love with Briseis, and since Agamemnon took her away from him, the impetuous Achilles simply intended to retreat from the war with his Myrmidons. The point Gabriel Tarde is making interpreting this scene is compelling: such an act of dishonor to Achilles could not have found a resolution in the simple abandonment of the war in a world where a practice such as the deadly duel was in place, comparing this scene with the much lighter offences that were settled through deadly duels at the Court of the French Kingdom (Jeanneney, 2012: 56-57).

The duel diverges from the judiciary duel, ordeals or tournaments as well. The distinctive feature of the duel is that it does not adhere to the whole narrative of a competition which is centered on the goal of winning or

defeating the opponent. It is also unrelated to the idea of proving the guilt of the accused, of establishing any prior factual situation which led to the duel, or of establishing some sort of judicial truth. The duel is not a practice in which the parties engage to obtain a specific result, but to prove their sense of honor.

It is a modern and a European practice since, chronologically, from its development in the 16th century Italy, it spread through all European states. In Italy it was continuously practiced until Modernity, being associated with specifically modern political movements, such as the 19th century Risorgimento, the movement for national unification. In the Germanic and Scandinavian cultural spaces, there was a continuity between the 17th-18th century tradition and the Wilhemine Period which corresponds to the reign of Emperor Wilhelm II, from the resignation of Chancellor Otto von Bismarck until the end of First World War and the abdication of Wilhelm. In Spain, Great Britain and Ireland, the duel was adopted during the 16th and 17th centuries and was at first exclusively associated with aristocratic habits, while during the 19th century it was adopted by the middle classes as a means to certify honor. In France under *Ancien Régime*, it was also a practice reserved only to noblemen, which was generally adopted by the masses after the 1789 French Revolution (Chiper, 2016: 9-15).

3. Legal prohibition

In France, Cardinal Richelieu in his 1688 *Political Testament* confesses that he tried to figure out a way to control and eventually put an end to the practice of duel, through the introduction of a royal permission which the French aristocrats ought to obtain in order to participate in a duel. However, he himself admits that analyzing the dynamic and the motives that set in motion this practice, any sort of interdiction or restriction would have in fact contributed to the increase of the duel's fascination and exclusiveness, making it an even more attractive means to settle private disputes (Jeanneney, 2012: 102-104).

After the 1789 French Revolution there were also several failed attempts to prohibit the duel: the most remarkable endeavor was the incrimination of the duel in the 1810 Napoleon Criminal Code, which failed since the parliamentary majority opposed to it. There were also several successive parliamentary initiatives which sought to ban the practice, but which also failed because they lacked the majority support: the initiatives of 1819, 1829, 1848, 1851, 1877, 1883, 1892 and 1895 (Jeanneney, 2012: 118-122). Not only the practice itself could not have been legally prohibited

because it never found the required political support, but neither did the consequences of a duel, such as corporal injuries or even death, were subjected to any form of legal punishment, since all the members of the judiciary system, such as lawyers, prosecutors and judges themselves, were favorable towards duels and even themselves settled their disputes through duels (Jeanneney, 2012: 128-145).

A similar fate had the legal prohibition of the duel in the Romanian legal system: from the 1842 Moldavian *Pravila lui Sturdza* which recognized the duel as a specific aristocratic practice that would attract a punishment only if it took place with disregard to the rules provided in the Code of the duel, to the 1865, 1874 and 1936 Criminal Codes which had the previous 1842 provisions as source of inspiration (Chiper, 2016: 32-35).

In the context of the multiple failures to legally prohibit the practice, of the ineffectiveness of any form of punishment or constraint on dueling, there is to be taken into account the fact that the practice was flourishing at a time where legal remedies were accessible to almost anyone: at least after the 1789 French Revolution, the Codes in force in France, and elsewhere in Europe where the French legal system was considered a source of inspiration, recognized legal remedies for any citizen, either criminal or civil through tort law, against offences that were generally settled through duels. However, the Codes of duel (honor) explicitly requested from the offended to choose between demanding Justice from a judge following the legal procedure, or demanding satisfaction, outside the legal and judiciary system, through a duel (Doyle, 2018: 48-50).

4. Nietzschean master/slave morality and Hegelian master/slave dialectic

All the legal attempts to prohibit the duel in the European states were founded on the reckless, wasteful and hazardous nature of this practice since, regardless of the weapon the duelists chose for combat, sword or pistol, it implied a serious risk on the lives of the participants. What bothered the modern authors of such attempts to legally ban the duel was its fundamentally asymmetrical nature: the fact that the result of the duel could not have been suitable, proportional in any way or corresponding to the gravity of the offence, the fact that both the offended and the offender were equally exposed to the possibility of death, regardless of any inquisition on guilt, investigation of facts or any rational evaluation of evidence, or the fact that the result did not and could not have provided any form of symmetrical compensation for the offended. For the modern, legally oriented mind, the

duel was, indeed, a radical, absurd gesture, which was conflicting with the most intimate reflexes regarding the fearful respect towards human life, either in the form of an almost paralyzing self-preservation instinct or in the form of the religious and moral over-arching commandment of the interdiction of murder.

The 25th aphorism of the first part of Nietzsche's *Human, All Too Human* can shed a light on the gap between the realm of the duel and the realm of the judiciary, between the asymmetrical and the symmetrical forms of settling private disputes. Distinguishing between the private morality and the world morality in the context in which man no longer believes that God governs the welfare of the world as a whole, Nietzsche refers to Kant as the patron of the *old morality*, the one in which the actions of the individual should be those the individual desires from all men. Since no one can anticipate which action would benefit the whole mankind, Nietzsche simply considers it a *nice, naïve idea*, but he continues by connecting this idea with the economic perspective of the free trade (Nietzsche, 2008: 27). The judiciary, the legal, the symmetrical justice are precisely built on this junction of the economic with the moral, of the utility, which is here an economic notion, with the rational adequacy of human action to the whole mankind. The general adherence of the European culture to those economic and moral principles, fortified by a legal and judiciary frame, makes it impossible for the contemporary mind to understand the duel other than a practice in fragrant contradiction to all of the above, as wasteful and immoral. But following Nietzsche, all that is called immoral and wasteful is as such only through a certain perspective, deeply rooted in a specific psychology and shared by a particular type of men.

In the 45th aphorism entitled *Double prehistory of good and evil* Nietzsche elaborates on the notion of two distinct moralities, originating in very different types of men: the one of the masters and the one of the slaves. Each morality operates with binary opposing notions of good and bad, but these notions get their distinct meanings through the contrasting reflection in the eyes of the other. The master is the powerful and considers to be good all that is alike him, consequently assuming the slave to be bad not because he could bring any harm to him, but because he is worthy of contempt. For the slave, good means whatever resembles him and bad is whatever resembles the master who becomes *evil*. The division between the two morals is fundamentally irreconcilable, since whatever is good and moral for the master is automatically bad for the slave and, the other way around, whatever the slave holds as virtue is, in the eyes of the master, a symptom of servitude (Nietzsche, 2008, p. 42).

Nietzsche assumes that in the beginning the man was master-like, a strong-minded, arbitrary, authoritative and an unpredictable individual who acted according to his own will. This state of apparent amorality was in itself constituting the morality of the master. Somehow during history, the meaning of being moral shifted from that amoral state in which one could and should have acted according to his own will to a state of obeying and following laws prescribed by the ancestors, leaving the master with the only option of rising above the laws and acceding to the position of the law-maker. However, Nietzsche shows that whoever rises above the law in an attempt to overcome it becomes inevitably bad through the moral grid of the slave morality (Nietzsche, 2016: 12-13).

The ideas of the two moralities that Nietzsche only loosely develops in the 45th aphorism will be resumed and elaborated in detail in the *Genealogy of Morals* and *Beyond Good and Evil*. The balance between the two distinct and mutually exclusive moralities articulated on the profiles of the master and the slave also reflect in the legal sphere from which the master morality was gradually excluded. The law which is utilitarian and socially oriented is the extension of the slave morality insofar as it demands that the offended assumes the status of the victim and that he appeals to a third party to whom he has to convince that he deserves Justice. The duel with its asymmetries, with its aristocratic origins and which situated itself outside the legal and judiciary frame promising not Justice, but satisfaction, can only be rejected by the law as immoral, wasteful, reckless especially when law itself guarantees effective, rational legal remedies for the same offences. In this line of thought, the successive modern attempts to legally prohibit this practice are nothing but expressions of the slave morality (which Nietzsche generally equates to the mass morality), disapproving and condemning anyone trying to overcome or step outside the law. The fact that even after the 1789 French Revolution and long after the demise of the *Ancien Régime* and the fall of aristocracy all over Europe the practice was enthusiastically adopted by the members of the middle classes shows that the duel had a specific aura, which equally captivated and frightened the masses but fascinated those who aspired to transcend the condition of what would Nietzsche call servitude, in order to be recognized as masters (Nietzsche, 2015: 46).

In this point and in relation to the role the duel played in gaining recognition, an interpretation of Hegel's master/slave dialectic which he develops in *Phenomenology of Spirit* may reveal a dimension of the duel which is generally obscured for the contemporary, legally-oriented mind. Hegel starts with an idealized scene in which two people meet and they are amazed by

their likeness, by their striking similarity. Beyond this mirror effect, they have the option to either ignore each other, in which case each continues to see the other as an object, or to attempt to assert their own will on the other, which opens the possibility for each to be recognized as a subject by the other (Noica, 2013: 60-62). The imposing of one's will on the other and the possibility of recognition is brought into place by a confrontation to the death through which both risk their lives in order to affirm themselves. It is the essential condition for achieving recognition that they both stay alive, therefore, if one dies in the struggle the possibility of recognition for the other disappears. The only way death is avoided is through an agreement through which the one who fears death consents to servitude in front of the master, assuming the slave status before him. The master emerges as such after the confrontation because he doesn't fear death and he somehow ignores the fact that his identity relies on him being alive (Hegel, 1977: 110-113). The duel replicates the original scene in which the offended demands satisfaction from the offender, which is a form of recognition – of the offence, from the one who produced it; of the offended, as someone who is entitled to expose the offender to the risk of death; and of the offender, as someone who is able to bring an offence and offer satisfaction. If the offender would have already been undeserving of recognition, the one who was subjected to the offense would not have felt offended in the first place, and would not demand satisfaction from someone who cannot give such satisfaction, like someone who has the Hegelian status of a Slave. The entire internal logic of the duel revolves around the parties recognizing each other as equally able to expose themselves to the risk of death as a consequence of their actions and this is the main reason why the result of the duel is irrelevant – the mere acceptance of the exposure to death affirms in the offended the power to bring someone to such a risk, and affirms in the offender, just as the act of demanding a duel does for the offended, the quality of the master who doesn't fear death and whose identity is independent on being alive.

5. What is lost

Contemporary legal, judiciary practices of settling private disputes are articulated on one of the premises of modernity: that the judge, as an impartial third party in relation to the *inter partes* issue, has the means through a "scientific" administration of evidence, to access the objective truth which transcends the subjective conflicting demands and diverging readings of reality of the parties. On this basis the offended will get Justice, which

implies that his narrative will be not only contested by the opposing party, but also evaluated from a neutral point of view by the judge and sacrificed, if necessary. A postmodern perspective should ponder upon all that claims for neutrality and objectivity and should nurture a concerned approach on the situation of the subject in this process. Not only that his most intimate narrative has to be convincing to an external entity, but prior to that, the offended must engage in a laborious self-construction process and filter, direct, reorganize his subjective experiences to fit a legal narrative which operates with an algorithmic language in which any subjective truth must be translated and recoded. What is lost in this process of creating a self which becomes legally relevant or at least which can be integrated in a judiciary practice is the singularity of the self and the very notion that the subjective truth matters enough to be pursued or protected directly, to be nurtured autonomously and to demand recognition from others even if it implies a threat to life. Through the monopoly of legal judiciary practices, life and the subjective truth became separated: you will get justice and you will not risk your life doing so, but you have to give up that which is most intimate to you; the singularity beyond external evaluations from third parties, with its fragile subjective truth and constant exposure to death, was wisely replaced with a robust, judiciary protected serial subject, with a derivative legal coherent story about itself which can be patched any time by a *tertium* through some form or another of symmetrical compensation. This narrative, the one which connects the fidelity to self and the awareness of singularity to the risk of death is irretrievably lost. It is not only a loss as the result of an instantaneous event, like the prohibition of duels or any other non-legal or non-judiciary means of settling private disputes. It is also a loss through a continuous process of concealment, since that which was delivered through a duel is also promised in the legal judiciary practices: give up that which is radically subjective, demand justice, and through justice you will also get satisfaction; in a bitter note, however, one which is never explicitly stated, it can only be the satisfaction suited, adapted, rationed and rationalized for the self you have become and not for the singularity you have abandoned.

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