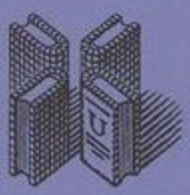
STANDING TALL

Hommages à Csaba Varga

· EDITED BY BJARNE MELKEVIK ·



XENIA

PÁZMÁNY PRESS
BUDAPEST · 2012

STANDING TALL
HOMMAGES A CSABA VARGA

STANDING TALL

HOMMAGES A CSABA VARGA

EDITED BY
BJARNE MELKEVIK

BUDAPEST 2012

A PRE-PRINT EDITION

Contents

Bjarne Melkevik
Standing Tall: Hommages à Dr. Csaba Varga 9

Roberto Andorno
Intergovernmental Declarations Relating to Bioethics: Are they Legal in Nature or merely Ethical? 15

Marie-Eve Arbour
The Role of Comparatists within EU Private Law Making Process 25

Stéphane Bauzon
Brain Death vs. Heart Death 39

André Bélanger
From the Reification to the Re-humanization of the Contractual Bond? 43

Jes Bjarup
The Concept of Validity: Some Remarks on the Theories of Carl Schmitt, Hans Kelsen and Alf Ross 61

Jan M. Broekman
Moore's Law and Law 79

William E. Conklin
Lon Fuller's Legal Structuralism 97

Paulo Ferreira da Cunha
Natural Law & Fraternal Law 123

Franceso D'Agostino
Natural Law, Positive Law, and the New Provocations of Bioethics 135

Michael Fischer
The Cultural Context of Illness, Death and Transplantation 145

Andreas Funke
Felix Somló's Legal Philosophy: Content, Critique, Counterparts 153

H. Patrick Glenn
On the Origins of Peoples and of Laws 165

Yasemin Işıktaç
The Meaning of the Law: Limits and Possibilities 173

Sercan Gürler
The Problem of Legal Indeterminacy in Contemporary Legal Philosophy and Lawrence Solum's Approach to the Problem 183

Bernard S. Jackson
Some Preliminary Observations on Truth and Argumentation in the Jewish Legal Tradition 199

Zdeněk Kühn
Formalism and Anti-Formalism in Judicial Reasoning 209

Maurizio Manzin
Ordo civitatis: The Birth of the City and the Urbanization of the Philosophical Landscape 227

Bjarne Melkevik
Poetry as Resilience: Engaging Silence and Indifference 235

Françoise Michaut
Deconstruction as a Tool in American Legal Theory and Jurisprudence 247

Hayrettin Ökçesiz
Sovereignty in a Seven-Trigeminus Construct Legal Culture Diagram within the Frame of the »Nomos–Physis« (Society–Culture–Nature) 261

Peter Th. Ørebech
The *rebus sic stantibus* Balancing of *pacta sunt servanda*: Are Regional Ethos and Archetypes the only »Essential Basis of the Consent«? A General Problem Considered through the Lenses of the Gabčikovo-Nagymaros and the Questech Cases 267

Assya Nikolaevna Ostroukh
Russian Legal Philosophy 289

Mehmet Tevfik Ozcan
Capitalism and the Rule of Law: The Three Stages of Legal Order in Modern Society 305

Laura Palazzani
Biolaw and Ethical Pluralism 341

Enrico Pattaro
Jus, *ratio* and *lex* in some Excerpts of Aquinas 351

Andrey V. Polyakov & Mikhail Antonov
Leon Petrazycki's Legal Theory and Contemporary Problems of Law 371

Sofia Popescu
Legal Culture: A Key Concept for Research on the European Integration of Law 383

Federico Puppo
A Classical View on Law and Information Technologies 397

Erich Schweighofer
Theory of Legal Informatics 409

Alexander Somek
Integration without Emancipation: Reflections on "Social Europe" 417

Teruji Suzuki
Pluralistic Structure of Social Norms in Asia 435

Gülriz Uygur
Neutral Principles, Justice and Law 441

Alfonsas Vaišvila
Human Dignity and the Right to Dignity in Terms of Legal Personalism: From the Conception of Static Dignity to the Conception of Dynamic Dignity 451

Francesco Viola
Legal Hermeneutics and Cultural Pluralism 465

Jan Woleński
Remarks on Legal Positivism 483

Standing Tall: Hommages à Dr. Csaba Varga

Bjarne Melkevik

One of the strongest memories of my times discussing, arguing, criticizing, agreeing and reflecting with Csaba Varga relates to September 11, 2001. At that time, he happened to be visiting Canada and Québec for research. Several significant papers in legal theory resulted from this trip but more noteworthy is my memory of us, Csaba and me, sitting in front of the television watching the truly horrific events that took place on that day and on the following ones. We both shared the feeling that something bad and evil had taken place. If the 20th century ended on September 11, the turn to the 21th century on the same day felt like the birth of a world without innocence, not only different but even more difficult. The spectacle of this massacre of innocents murdered with indifference just for the smell of blood was there to remind us that neither science with its technologies nor the Humanities helped by diplomacy can save the world, and that in the end they will all come to call for law and decency.

Surely this was only one day in history with endless more to come! As to our friend, colleague and collaborator in legal theory, legal philosophy and legal cultures, he had seen many others; born in 1941, Csaba Varga had witnessed other plagues in history: he came to the world into a Hungary under Nazi boots (both directly under the German Third *Reich* and its Hungarian henchmen); he was raised in a Hungary where the Communist Party (more accurately a Muscovite Stalinist comradehood) staged a coup to monopolise state power illegitimately and form an authoritarian Communist dictatorship. Therefore, the wisest advice for anyone then would have been not to draw attention to oneself.

Varga took his first professional steps as Legal Researcher under conditions where academic freedom and liberty of expression were not recognized; he confirmed himself as a successful and honest researcher during decades when the party-line had replaced the scholarly criteria of truth and certainty; he reclaimed political responsibility after 1989 to contribute to the reconstruction of a modern democratic Hungary whilst continuing to work as hard as ever in his capacity of researcher in legal theory, legal philosophy and legal culture. All this gives experience! It also gives you a perspective on life, on society and on fellow humans and surely, it shapes you solidly as a man of character and of faith. Csaba Varga has been there. He spent the 20th century as a witness and thinker searching for his path in law, philosophy and culture. For almost four decades now, he has been a major intellectual, a law professor and an enlightener in legal philosophy, comparative law and

legal culture, legal history and transitions to democracy, as well as in other branches of this great adventure that we call "Law".

Looking back on his carrier, we find him first earning his law-degree at the Faculty of Law at Pécs in 1965. Between 1965 and 1991, he worked at the Institute for Legal Studies at the Hungarian Academy of Sciences in Budapest as a researcher in legal theory. He continued his education at the *Faculté Internationale pour l'Enseignement du droit comparé* by following its sessions in Strasbourg (1968), Amsterdam (1969) and Perugia (1970). This allowed him to make close contact with Western legal theorising and to get acquainted with Western legal theoreticians. He received both successive grades of scientific qualification available in his Sovietized country from the Hungarian Academy of Sciences: C[andidate]Sc in 1976 and D[octor]Sc in 1991. Since then, he has held the post of Scientific Adviser at the Institute for Legal Studies at the Hungarian Academy of Sciences.

Csaba Varga started teaching legal philosophy at the Eötvös Loránd University in Budapest as early as 1982 but it was not until 1992 that he was appointed Professor in this subject—a position he held there until 2002. After the collapse of Communism, he played an active part in the re-foundation of the Catholic University in Hungary (Pázmány Péter Catholic University, Budapest) and especially in organizing its Law Faculty. As founding professor in 1995, he became Director of the Institute for Legal Philosophy within the womb of the Faculty, instigating one of the most demanding curricula for teaching theoretical subjects in law in Europe! He has excelled in his enthusiasm to build a live workshop around him as the first official "Place of Excellence" in the country and also in preparing new generations for the legal profession, including scholarship and research.

Since his first endeavours in the domains of legal theory, legal philosophy and legal culture, Csaba Varga has always had a firm international perspective. Research in this intellectual field can only be done with openness and dialogue *vis-à-vis* Hungary, Europe and all further continents as well. He understood this well and became in 1975 one of the founding fathers of the Hungarian Branch of the International Association of the Philosophy of Law and Social Philosophy (IVR) and has remainded one of its most loyal officers and contributors to its activities. Furthermore, his travels around the world to communicate, build networks, conduct research in libraries and learn from colleagues whilst also seeking support for exchanges of publications, professors and students, confirms this commitment. However, it is surely in the *desenclavement* of legal research in Hungary that Varga has made his most significant investment: his inspired managing of several TEMPUS projects within the then European Community PHARE program with some thirty Western European universities working in partnership in order to promote the sharing of research in legal philosophy and the rejuvenating of education in Law also helped to revitalise theoretical legal thinking in Hungary.

In the meantime, he has been a founding Board member of several international professional journals, including *Current Legal Theory*, *Ratio Juris*, as well as *Legal Theory*. He has been invited to become an Associate Member of the International Academy of Comparative Law. He has been much honoured by professorships, visiting Lund, Berlin(West), Canberra, Waseda/Tokyo, Yale/New Haven, Edinburgh, Oñati, Münster and Stockholm, as well as being a frequent guest lecturer and conference participant around the world.

However, of all Csaba Varga's many achievements the one I admire the most is his work as editor. Being one myself, I know from experience how difficult this job can be and how it simply steals and consumes all your time—with no one even thanking you for your efforts at the end! Csaba Varga's editorship can only be described as prolific and first-class and of foremost importance in his capacity.

As an international editor, he has completed by himself a vast collection of papers on legal cultures, Marxism and law, as well as law in Europe. In collaboration with others, he has edited publications on cultures in law, legal policy and validity, traditions in law, as well as comparative law, legal philosophy, transitions and other subjects as well. But first and foremost, he should be praised for launching the series of *Jogfilozófiák* and *Philosophiae Juris* in 1988, with the latter's subseries of *Excerpta Historica Philosophiae Hungaricae Iuris*. This series of series, now with some fifty volumes regularly reprinted and widely used in both research and education, covered monographs and collections in Hungarian (sometimes with essays in Hungarian translation of Western classics of the 20th century, or on topics like law & language & logic & anthropology, or rule of law, constitutional adjudication or EU constitutionalism) in its first volumes, and monographs and collections from either contemporary or historical classics in its second set.

We must emphasize that the above mentioned publications provide us with the key to understanding Hungarian legal philosophy. For international audiences, they serve as memento to the fact that historically, Hungary was so-to-speak, a superpower in legal philosophising especially and strikingly from the end of the 19th century up to the end of the Second World War, and there is something inherently wrong in forgetting this.

Effectively, Varga has therefore given us an opportunity to resume contact with such a rich treasure and to open a dialogue with its achievements: it is a scholarly and philosophical pleasure to rediscover the teachings of Felix Somló, Julius Moór, Barna Horváth or of the latter's School of Szeged or István Losonczy—just simply to talk about them. We can only pray that Csaba can one day also find the missing thesis George Lukács once presented to Somló!

The series of Hungarian classics have been re-published in the language they were originally printed in, that is in Hungarian, German, French, Italian, or English. Thanks to his efforts, we can now ponder their major contributions as reflected in our contemporary debates. Since we find ourselves today still discussing the same issues and mobilizing also, more or less, the same arguments, why not learn from these classics?

There was also a political component in Varga's undertaking, which was to help the post-89 Hungary erect a bridge to her past, regain her intellectual and spiritual heritage and step with confidence into the new space opened up by the fall of a sick regime imposed on her for half a century. It reminds us rightly that the infantilism of Communism should not be put forward as excuse for deception nor serve any authoritarian repetition. It also reminds us that any serious political action presupposes a sense of history and an overview of the actuality in order to advance the cause of a people.

Csaba Varga became involved in politics after 1989. As an intellectual, an academic researcher and a man of conviction and faith, he was ready to serve the newly opened political space with all his knowledge and political awareness. He thus served between 1991 and 1994 as a member of the Advisory Board to the Prime Minister of the Republic

of Hungary and as a senior political adviser to the first freely elected Prime Minister of Hungary, Dr. József Antall. At the same time, we find him as an active intellectual, debating the meaning of a "transition" to a democracy and to a regime under the Rule of Law. It is however in the academic field that his heart truly laid and which explains why he returned to that area later on.

I have said nothing up to now about the academic writings of Dr. Varga, although this is certainly where he has earned most of the esteem and admiration of his colleagues and friends. For he has written a lot! More than most of us! To put it simply, he is a passionate researcher in the area of legal theory, legal philosophy and legal cultures, and has been driven there by the same passion to communicate about such topics to others. We can but admire the number of topics he has covered, the research fields he has opened and the variety of so many significant contributions he has hitherto made to the study of legal theory, legal philosophy and legal cultures. Maybe this creative force is expressed by the nearly two thousands references to his works, including a quarter of a thousand overview and review articles dedicated to him, more than half of which are of foreign origin. Notwithstanding the hundreds of articles he has published, I can only emphasize that Csaba Varga has authored some twenty-eight books in Hungarian, English, German, French, Spanish and Russian. Let us mention the books he authored in Shakespeare's language, such as *The Place of Law in Lukács' World Concept* (Budapest 1985, reprint 1998), *Codification as a Socio-historical phenomenon* (Budapest 1991), *Law and Philosophy: Selected Papers in Legal Theory* (Budapest 1994), *Theory of the Judicial Process: The Establishment of Facts* (Budapest 1995), *Transition to Rule of Law: On the Democratic Transformation in Hungary* (Budapest 1995), *Lectures on the Paradigms of Legal Thinking* (Budapest 1999), *Transition? To Rule of Law? Constitutionalism and Transitional Justice Challenged in Central & Eastern Europe* (Pomáz 2008), in addition to three further books now in print on comparative legal cultures, as well as on theorising and philosophising in/on law.

Without going into details about them all, the one on *Lukács* has a special place in my own personal history. At the time it was published I was a graduate student of law in Paris and made huge efforts to obtain this book. I remember that since no bookshop in Paris wanted to help in procuring it, I had to order the book directly from the Akadémiai Kiadó in Budapest, get the invoice sent from there, go to a bank to purchase an international draft and then send the latter to Budapest and wait and wait. However, the miracle happened and the book finally arrived some five months later! It was a wonderful experience to read it through and in depth, and to recognise the intelligence and elegance with which the author—unknown to me at the time—had developed his discourses and arguments about George Lukács' path and reconstructed a legal ontology from the latter's posthumous treatment of social being. Since Lukács was still living under conditions close to a full ban in the late Stalinist Budapest, I was really pleased to note the extent to which the author could preserve his moral and scholarly integrity with an honest attitude and an analysis both solid and sound. Even now, my judgement hasn't changed an iota from what I concluded then.

Today, our apprehension may turn by preference to the synthesis of Dr. Varga's body of work as summed up in his *Lectures*. The book is a clever—monographic—*résumé* with

the density of quite a few research programs he was engaged to carry out, inspired by the passion he has always found in the philosophy of science and the philosophy of language, in addition to the cultural anthropological component which is so active in all his writings. Since the book claims to be a study of "paradigms", it clearly situates legal thought in its methodological context. To put it in other words, the inevitable "fact problem" and "meaning problem" are examined as a transmission between cognition and action, i.e. residing in the interplay of language, logic and culture, with anthropology and history in the background—without, however, being entirely reducible to any of them. Such a methodological anchorage is fruitful as it permits open-ended reflection, a kind of Socratic questioning where legal thinking itself turns out to be the problem but also the medium through which law can be promoted and progressed. For Varga, law is not a mere issue of either "science" or scholarly thought, but a complex web of problems involving politics, culture, history, and institutions, in which the importance of the human component is paramount.

As to the cultural and historical aspects, anyone reading his book will surely be captivated by all the references to be found, be them to Nietzsche (who is mostly appreciated as a deconstructor) or to Dostoevsky, Tolstoy, Darwin or Einstein, to filmmakers and poets, to theologians and historians, to anthropologists and so forth. It is pleasant to find references which may help students situate legal problemata and arguments used by lawyers within an understandable cultural setting. However, once theorised, they serve as genuine scenery for law itself. Law is certainly not an aseptical or "pure" entity (with reference to Hans Kelsen's paradigm) but something human, social and political at the same time, and in this sense it demands a common responsibility and accountability. This is why the fact that Vargas's *Lectures* is introduced as a textbook in his teachings on general jurisprudence is both understandable and laudable.

Csaba Varga has always had a sense of actuality, of what is at stake in law, philosophy, and culture. This surely makes him aware of how legal issues—theoretical or practical—interact with civilisation and history, culture and politics, and primes him to be a well-informed and challenging sparring-partner (to use a boxing terminology). Some personal memories come to my mind about our discussions around legal thinking, legal philosophy and legal culture, for instance, in Budapest (greeted by his wife Ágnes) or at the many IVR-meetings we attended, from wind-blowing Edinburgh (where the World congress was organised by our common friend, the regretted Sir Neil MacCormick) —via cosy New York—to the historical gardens of Granada. Csaba Varga always proved himself to be a gentleman: a man of culture and *Bildung*, undoubtedly, a sparring-partner debating with knowledge, energy, and the passion of someone involved and competent. It is nice to remember I always learned something. Assuming that learning matters more than mere adherence, to have him as a partner in this intellectual sparring helped me open up, broaden my views and invited me to travel further into the immense field of legal thinking, legal philosophising and reflections on legal culture. This surely applies to contributors to this Festschrift as well.

In all settings, Csaba Varga was always a gentleman and a good friend to me and to all of us. He has shown himself to be an eminently learned fellow in legal thinking, legal philosophising and legal culture, as demonstrated by the insights in his many valuable

works. As a colleague and friend, and foremost as a collaborator in this fascinating intertwining between legal thought, legal philosophy and legal cultures, I have had numerous opportunities to experience this commonly-held appreciation. Csaba himself, and his works, have been a source of inspiration and knowledge to us all. We can only be grateful to him for such a tremendous contribution to scholarly legal thought. Maybe, even more than what has already been done, what matters is what is hopefully waiting for us. We wish him good health in the years to come and that our colleague and friend in common thinking will offer us even more papers and books to help us and others through these intriguing puzzles or labyrinths, which indubitably are legal thinking, legal philosophy and legal cultures. Stand Tall, Csaba.

Intergovernmental Declarations Relating to Bioethics: Are they Legal in Nature or merely Ethical?

Roberto Andorno

Do intergovernmental soft law instruments set out minimum standards, with prescriptive force, or do they merely describe standards of behaviour to which states should, in an ideal world, aspire? In other words, are they legal in nature or merely ethical? This article attempts to address this difficult question with particular reference to the three Declarations relating to bioethics adopted by UNESCO [United Nations Educational, Scientific and Cultural Organization] during the last decade. It will be argued that such norms, far from being purely e t h i c a l o r p o l i t i c a l recommendations, as it is often maintained, have a l e g a l nature and, moreover, constitute the foundational core of the emergent international biomedical law or "international biolaw". To this aim, first, the three UNESCO Declarations will be shortly presented (1); and second, some arguments in favour of their l e g a l nature will be advanced (2).

1 The Three UNESCO Declarations Relating to Bioethics

Rapid advances in the biomedical field present new and complex challenges for individuals and society and inevitably call for the development of legal rules to ensure that technologies are used in a way consistent with full respect for human dignity and human rights. But bioethical issues are so formidable and far-reaching that individual countries alone cannot satisfactorily address them. Concerted international efforts are required to establish a common legal framework on the subject and to create appropriate mechanisms to ensure that such norms are effectively implemented. Some intergovernmental bodies have well perceived this need for common rules in this field. In this respect, UNESCO has played a leading role over the last decade to promote a global consensus on some basic standards relating to biomedicine.

It is noteworthy that UNESCO is an intergovernmental organization which is part of the United Nations system and whose mandate includes contributing "to peace and security by promoting scientific collaboration among nations".[1] Since its creation in 1945 it has worked to improve education, culture and sciences worldwide through technical ad-

[1] Constitution of UNESCO, Article 1.

vice, standard setting and innovative projects, capacity-building and networking. In the last decade, through the work of its International Bioethics Committee [IBC], UNESCO has elaborated and submitted to its Member States for approval three global instruments relating to bioethics: the *Universal Declaration on the Human Genome and Human Rights* of 1997; the *International Declaration on Human Genetic Data* of 2003 and the *Universal Declaration on Bioethics and Human Rights of* 2005. These three Declarations have been unanimously adopted by all Member States of UNESCO (at present 191), that is, *by virtually all states.* If one considers that bioethical issues are of a highly sensitive nature as they are closely related to the socio-cultural and religious values of each society, this unanimity constitutes in itself a very significant achievement.

The *Universal Declaration on the Human Genome and Human Rights* was enacted in 1997 with the main purpose of protecting the human genome from improper manipulations that may endanger the identity and physical integrity of future generations. To this end, it characterizes the human genome as "the heritage of humanity" (Article 1), and declares "contrary to human dignity" practices such as "human reproductive cloning" (Article 11) and germ-line interventions (Article 24). In addition, the Declaration intends to prevent genetic reductionism and any use of genetic information that would be contrary to human rights and human dignity.[2] It is worthy of note that through this Declaration, h u m a n i t y a s s u c h is regarded for the first time in history as a common heritage to be protected.[3] Certainly the notion of "crimes against humanity", the clearest example here being genocide, has been part of international law since the end of the Second World War. However, the category of crimes against humanity aims to avoid inhumane acts committed against particular ethnic, social or religious groups and therefore does not cover the protection of the human species as such, or indeed the preservation of its genetic structure, which is precisely the main purpose of the UNESCO Declaration.[4]

The *International Declaration on Human Genetic Data* of 2003, which may be regarded as an extension of the 1997 Declaration, sets out a number of rules for the collection, use and storage of human biological samples and of the genetic data that can be derived from them. It covers, among other issues, informed consent in genetics; confidentiality of personal genetic information; genetic discrimination; anonymization of genetic data; population-based genetic studies; the right not to know one's genetic makeup; genetic counselling; international solidarity in genetic research, and benefit sharing.

The *Universal Declaration on Bioethics and Human Rights* of 2005 has a much broader scope than the two previous documents, as it aims to provide a comprehensive framework of principles that should guide biomedical activities in order to ensure that they are in conformity with international human rights law. The importance of this Declaration lies in the fact that it is the f i r s t i n t e r g o v e r n m e n t a l g l o b a l i n s t r u m e n t t h a t c o m p r e h e n s i v e l y a d d r e s s e s t h e l i n k a g e b e-

[2] Roberto Andorno 'Seeking Common Ground on Genetic Issues: The UNESCO Declaration on the Human Genome' in *Society and Genetic Information* Codes and Laws in the Genetic Era, ed. Judit Sándor (Budapest: Central European University 2003), pp. 105–123.

[3] Christian Byk 'A Map to a New Treasure Island: The Human Genome and the Concept of Common Heritage' *Journal of Medicine and Philosophy* (1998), No 3, pp. 235 et seq.

[4] Bertrand Mathieu *Génome humain et droits fondamentaux* (Paris: Economica 2000), p. 92.

tween human rights and bioethics.[5] In this regard, it should be noted that most international declarations and guidelines relating to bioethics have been issued by non-governmental organizations like the World Medical Association (WMA), the Council for International Organizations of Medical Sciences (CIOMS), and other academic or professional institutions. Some other documents, although adopted by intergovernmental bodies, only cover specific bioethical issues, such as the UN Declaration on Human Cloning of 2005 and the already mentioned UNESCO Declarations of 1997 and 2003, or are regional but not global instruments, like the Council of Europe's Convention on Human Rights and Biomedicine of 1997 ("Oviedo Convention").[6] From the perspective of its broad content and purpose, the 2005 UNESCO Declaration can only be compared to this latter Convention. There are, however, significant differences between these two instruments: the former is global, while the latter is only European in scope. On the other hand, the European document is a convention (or treaty), that is, a binding instrument for those states having ratified it, while the UNESCO declarations make part of the so-called soft law instruments whose legal status is more difficult to perceive at first sight, as it will be explained below.

2 Are International Soft Law Instruments Really Law?

2.1 Is International Law Really Law?

Before entering into the discussion regarding the status of soft law instruments, the first crucial question that will be briefly examined is: Is international law really law? Is it proper to use the same term to describe certain types of rules on the international level that one would use to describe rules in domestic legal systems?

Although in this paper we assume that international law (in particular, treaties and customary law) is really law, we cannot ignore that over the years many arguments have been advanced attempting to deny the legal nature to international law. As Anthony C. Arend points out (though he does not share this view), to some observers, a rule can only qualify as a rule of law if it possesses the "Five C's": Congress, Code, Court, Cop, and Clink.[7] First, the rule must be produced by a centralized legislative body (a "Congress" or Parliament). Second, this legislative body must produce a written "Code". Third, there must be a "Court" (i.e. a judicial body with complete compulsory jurisdiction to resolve disputes about the rules or to determine culpability for violation of the rules). Fourth, there must be a "Cop" (that is, some centralized means of enforcing violations of the rule). Finally, there has to be a "Clink": some kind of sanction that will be imposed on those who violate the common rules.

[5] See Roberto Andorno 'Global bioethics at UNESCO: In defence of the Universal Declaration on Bioethics and Human Rights' *Journal of Medical Ethics* 33 (2007) 3, pp. 150–154.

[6] See Louis Dubouis 'La Convention sur les droits de l'homme et la biomédecine' *Revue de droit sanitaire et social* (1998) 2, pp. 211–221; Roberto Andorno 'The Oviedo Convention: A European Legal Framework at the Intersection of Human Rights and Health Law' *Journal of International Biotechnology Law* (2005) 2, pp. 133–143.

[7] Anthony C. Arend *Legal Rules and International Society* (New York: Oxford University Press 1999), pp. 29–33.

Now, at least at a first sight, it seems to be clear that these "Five C's" are absent from the international system. First, there is no international "Congress." Even though bodies like the United Nations exist, it has very limited legislative authority. Under the provisions of the United Nations Charter, resolutions of the General Assembly are not binding unless they deal with a limited set of internal matters. And while the Security Council has the potential to adopt certain binding resolutions in matters dealing with international peace and security, this is not a true "legislative" authority in the same sense in which we use this tern regarding a national legislative body. The Council only deals with specific cases and does not pass general or abstract resolutions similar to legislative acts adopted by a Parliament. Second, much international law is not codified but, instead, is created through "state practice." Third, there is no international "Court" with complete compulsory jurisdiction. Certainly, the International Court of Justice (ICJ) exists as "the principal judicial organ of the United Nations".[8] But cases only get to the ICJ if states choose to take them there. Unless at some point states have consented to take a case to the ICJ, no decision can be rendered.[9] Fourth, there is also no international police force that can carry out sanctions on violators of international agreements. Of course, it could be asserted that the United Nations Security Council plays this role. The problem with this argument is that under the U.N. Charter, the Security Council is not empowered to enforce all violations of international. Article 48 of the Charter provides that the Council can take action to enforce international law with respect to the maintenance of international peace and security. And Article 94 empowers the Council to take action to enforce decisions of the International Court of Justice. But there is no general right to enforce any other transgressions of international law. Finally, there is no guaranteed system of punishment.[10]

What can be replied to these arguments? Without entering into a detailed analysis of each criticism, we can affirm that, for instance, the objection regarding the lack of codified norms can be easily refuted because in many countries (especially in those belonging to the Anglo-American tradition) much law has developed without the participation of a legislative body. Common law rules emerged over the centuries through the practice of judicial bodies. Concerning the supposed lack of enforcement through adjudication and subsequent sanction, the reality is that, although in a different way, a sanctioning process operates at the international level, as Hans Kelsen has rightly pointed out.[11] According to the Austrian legal philosopher, the international legal order is indeed a decentralized, primitive legal order. Sanction does exist, but it takes the form of s e l f - h e l p . If a violation of a legal rule occurs (an international "delict"), states can undertake forcible reprisals to sanction the delictual behaviour.[12]

[8] See Statute of the International Court of Justice, Article 1.

[9] See Statute of the International Court of Justice, Article 36: "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force".

[10] Arend *Legal Rules…* [note 7], p. 33.

[11] Hans Kelsen *Law and Peace in International Relations* (Cambridge: Harvard University Press 1942), pp. 29–30.

[12] *Ibidem.*

The American international law professor Anthony D'Amato takes a similar approach to the problem of enforcement. He claims that the sanction in international law lies in what he called a process of "reciprocal-entitlement violation."[13] International law, according to him, grants a series of entitlements to states (the right to territorial integrity, the right to claim a territorial sea, the right to diplomatic immunity, etc.). When a state violates a rule of international law, the aggrieved state has the right to deny the recalcitrant state certain of its entitlements. It can, for instance, freeze the assets of that state, with at least the tacit approval by the rest of the international community. Hence, D'Amato concludes, even though there are no centralized institutions for imposing sanctions, "the absence of these institutions does not mean that international law isn't really law; rather, it simply means that international law is enforced in a different way."[14]

An additional and no less important argument in favour of the legal nature of international law is the p e r c e p t i o n that states have of it. From this perspective, it can be argued that c e r t a i n i n t e r n a t i o n a l r u l e s a r e l a w s i m p l y b e c a u s e i n t e r n a t i o n a l a c t o r s r e g a r d t h e m a s s u c h . In this respect, it has been advanced that "the activity of those who are concerned with international law, public and private statesmen and their legal advisers, national and international courts, and international assemblies is carried on in terms of the a s s u m p t i o n t h a t t h e r u l e s w i t h w h i c h t h e y a r e d e a l i n g a r e r u l e s o f l a w .[15]

Similarly, Herbert L. Hart has made the case that, although it is obvious that international law is created and operates in a different way than domestic law, its rules are nevertheless "thought and spoken of as obligatory; there is general pressure for conformity to the rules; claims and admissions are based on them and their breach is held to justify not only insistent demands for compensation, but reprisals and countermeasures. When the rules are disregarded, it is not on the footing that they are not binding."[16] In other words, "no simple deduction can be made from the necessity of organized sanctions to municipal law […] to the conclusion that without them international law, in its very different setting, imposes no obligations, is not 'binding', and so not worth the title of 'law'."[17]

2.2 Is Soft Law Really Law?

We have argued in the previous section that "law" is not a monolithic concept but rather exists in different forms depending on the context (national or international) in which it operates. In particular, we have maintained that the term "law" can be applied to those international norms that are usually regarded by the international community as having

[13] Anthony D'Amato *International Law* Process and Prospect, 2nd ed. (Irvington, New York: Transnational Publishers 1995), p. 25.

[14] *Ibidem.*

[15] Hedley Bull *The Anarchical Society* A Study of Order in World Politics (New York: Columbia University Press 1977), p. 136.

[16] H. L. A. Hart *The Concept of Law* (Oxford: Clarendon Press 1961), pp. 214–215.

[17] *Ibidem.*

a *binding* nature (especially, treaties and customs), and this in spite of the fact that the procedures for the elaboration and enforcement of those rules are very different of those commonly employed at the national level.

But the issue becomes more complicated when we examine the nature of soft law instruments, as we attempt to do in this paper. As it was mentioned above, UNESCO has elaborated in the last decade international standards that are aimed at encouraging and guiding states in their efforts to ensure that biomedical activities are consistent with full respect for human dignity and human rights. To this end, this U.N. agency has opted for the use of "declarations" (soft law) instead of "treaties" (hard law), and this within the framework of human rights. The question is: Can these Declarations be seen as l e g a l instruments? Or are they merely ethical or political recommendations and therefore lack a real l e g a l status?

Some scholars have criticized the UNESCO Declarations on the ground that they pretend to "subsume medical ethics".[18] Others, while recognizing the value of the 2005 Declaration, point out that the mixing of ethics (bioethics) and law (international human rights law) is problematic.[19]

In our opinion, part of these criticisms originates in a misunderstanding on the meaning of the word "bioethics", as it is used by the UNESCO Declarations. This word is indeed extremely ambiguous because, depending on the context, it can be used with a narrow meaning or with a broad meaning. The narrow meaning refers to the purely e t h i c a l dimension of biomedical sciences. From this perspective, bioethics is just a p a r t o f e t h i c s . However, UNESCO usually understands the word "bioethics" with a broad meaning, which includes the l e g a l or n o r m a t i v e r e g u l a t i o n of biomedical activities (or "biolaw"). This is why the UNESCO instruments are not a strange hybrid between ethics and law, but are indeed conceived as an e x t e n s i o n o f i n t e r n a t i o n a l h u m a n r i g h t s l a w i n t o t h e f i e l d o f b i o m e d i c i n e .

In addition to this terminological misunderstanding, the dilemma surrounding the nature of soft law instruments stems from the fact that historically there are only two main sources of international law: t r e a t i e s and c u s t o m a r y l a w . T r e a t i e s are agreements between states which are legally binding, while c u s t o m a r y law is derived from the continuous practice of states insofar as such practice is motivated by the sense of legal obligation. But in recent decades, s o f t l a w has rapidly developed as a new source of international law especially as an instrument to deal with sensitive matters such as human rights, the protection of the environment and bioethical issues. The category of soft law includes a great variety of instruments: declarations, recommendations, charters and resolutions.

Soft law agreements are often defined, by opposition to treaties, as "non-binding instruments". This characterization is not entirely wrong but may be misleading because although soft law does not have *per se* binding effect, it is c o n c e i v e d t o h a v e

[18] Thomas Faunce 'Will International Human Rights Subsume Medical Ethics? Intersections in the UNESCO Universal Bioethics Declaration' *Journal of Medical Ethics* 31 (2005), pp. 173–178.

[19] Judit Sandor 'New Dimensions of Bioethics in the Universal Declaration on Bioethics and Human Rights: A Response to Roberto Andorno' in *New Pathways for European Bioethics* ed. C. Gastmans, K. Dierickx, H. Nys & P. Schotsmans (Antwerp: Intersentia 2007), pp. 139–159.

such effect in the long term. This means that while treaties are actually binding (after ratification by states), soft law instruments are only potentially binding. Soft law is indeed conceived as the beginning of a gradual process in which further steps are needed to make of such agreements binding rules for states. In this regard, it is interesting to point out, as Professor Varga did, that law should be seen as a process-like phenomenon, not as a static reified entity.[20]

It is also worth mentioning that if the binding effect were totally absent from the UNESCO Declarations, then they would indeed not be "law" at all, because one of the classical distinctions between "ethics" and "law" is precisely that law is made up of enforceable norms while ethics is not enforceable. This clarification is crucial in order to avoid the mistake of thinking that soft law just creates moral or political commitment for states. This is only true if we consider the immediate effect of soft law. But the fact is that, in a more indirect and persuasive way, soft law instruments have an influence on states which is not very different from that of treaties. We should not forget that, after all, they are formal intergovernmental agreements, and in this respect they do not differ essentially from the traditional international binding instruments like treaties.

Moreover, there is no doubt that the UNESCO Declarations have been adopted with the intention that in the long run, in a way or another, they will become binding rules for states. This "hardening" of soft law may happen in two different ways. One is when declarations are the first step towards a treaty-making process, in which reference will be made to the principles already stated in the declarations. Another possibility is that non-treaty agreements are intended to have a direct influence on the practice of states, and to the extent that they are successful in doing so, they may lead to the creation of customary law. As some experts explain, declarations may "catalyse the creation of customary law by expressing in normative terms certain principles whose general acceptance is already in the air […] and thereby making it easier and more likely for states to conform their conduct to them".[21] In other words, if the same non-binding standards are reaffirmed in successive declarations, or invoked by international courts, in the course of time they may become binding rules, in the form of customary law, as in fact it happened with the Universal Declaration of Human Rights of 1948.

Why soft law instruments may represent an attractive alternative to law-making by treaty? There are several reasons for this.

First, declarations present the advantage of allowing countries to gradually become familiar with the proposed standards before they are confronted with the adoption of enforceable rules at the national or international level. This gradual procedure leaves more room for discussion and achieving consensus on issues that are particularly complex or sensitive, or exposed to change, like those related to scientific developments.[22]

[20] Csaba Varga 'Paradigms of Legal Thinking' *Acta Juridica Hungarica* 40 (1999) 1–2, pp. 29 et seq.

[21] Paul C. Szasz 'International Norm-making' in *Environmental Change and International Law* New Challenges and Dimensions, ed. Edith Brown Weiss (Tokyo: United Nations University 1992), pp. 41–70.

[22] Noëlle Lenoir & Bertrand Mathieu *Les normes internationales de bioéthique* (Paris: Presses Universitaires de France 1998), p. 47.

Second, it may be easier to reach agreement when the form is soft law because states are usually reluctant to bind themselves to treaties which may restrict their sovereignty and eventually lead to sanctions in case of violation of the treaty provisions.[23]

Third, soft law agreements differ from treaties in that they do not require formal ratification by states and, therefore, can have a more direct and rapid influence on the practice of states than treaties.[24] In this way, soft law may provide more immediate evidence of international support and consensus than a treaty whose impact may be heavily diluted by reservations and the need to wait for a ratification and entry into force.[25] It should be stressed that the relatively short time that is needed to develop a Declaration is of great value in a domain characterized by rapid developments like that of biomedicine. It seems clear that the formulation of global responses to the challenges posed by science cannot wait until governments are able to conclude a treaty, which could take several years of negotiation.

Fourth, the fact is that the difference between the efficacy of a treaty and that of a declaration is in reality not as great as it may seem. Moreover and surprisingly, according to some studies, declarations and treaties are in fact complied with to largely the same extent.[26]

It is interesting to note that during the preparatory work of the UNESCO Universal Declaration on Bioethics and Human Rights it was clear from the very beginning that a soft law approach was the best, if not the only, available option. In 2003, the International Bioethics Committee [IBC] produced a report that expressly recommended the form of a "Declaration". The circumstance that this kind of instruments is especially adapted to achieve a broad and relatively rapid consensus among governments, the scientific community and the public in general played a decisive role in this respect.[27]

3 Conclusion

In sum, intergovernmental soft law instruments dealing with bioethical issues set out legal, not merely ethical standards. They should be seen as an extension of international human rights law in the field of biomedicine, not as a strange (and indeed impossible) hybrid of ethics and law. Such instruments should not be underestimated

[23] Andrew T. Guzman 'The Design of International Agreements' *European Journal of International Law* 16 (2005) 4, pp. 579–612 at p. 592.

[24] This advantage is especially to be considered when legislative support at the domestic level is lacking or uncertain. In this respect, it is interesting to point out that one of the reasons why the Universal Declaration of Human Rights of 1948 took the form of a soft law instrument was the foreseeable perspective of non-ratification by the US Senate. See Mary Ann Glendon *A World Made New* Eleanor Roosevelt and the Universal Declaration of Human Rights (New York: Random House 2001), p. 71.

[25] Alan Boyle 'Some Reflections on the Relationship of Treaties and Soft Law' *International and Comparative Law Quarterly* 48 (1999) 4, pp. 901–913.

[26] Hartmut Hillgenberg 'A Fresh Look at Soft Law' *European Journal of International Law* 10 (1999) 3, pp. 499–515 at p. 502.

[27] [UNESCO International Bioethics Committee (IBC)] *Report on the Possibility of Elaborating a Universal Instrument on Bioethics* (Rapporteurs: L. de Castro & G. Berlinguer) June 13, 2003, paragraph 42 in <www.unesco.org/bioethics.>

by the fact that they do not create *per se* binding rules. They operate in a more indirect way, by persuasion, not by coercion, at least in the immediate future. However, experience shows that they have a real influence on the practice of states, by encouraging them to implement the common standards and by inspiring their legislative efforts. Furthermore, soft law instruments are from the very beginning conceived to create in the long term binding norms, either by leading to a treaty or by being recognized as customary law.

INSTITUTE OF BIOMEDICAL ETHICS
UNIVERSITY OF ZURICH
ANDORNO@ETHIK.UZH.CH

The Role of Comparatists within EU Private Law Making Process

Marie-Eve Arbour

> "Au fur et à mesure que l'unification européenne progressera, l'évaluation de la codification européenne s'inversera, revenant à des tendances, des valeurs et des techniques de régulation anciennes."[1]

Introduction

Within the European Union, economic integration through private law evokes the creation of a common space within which the Law of Obligations would be certain and predictable. Accepting the idea that the network of contracts among individuals materialise the new economy,[2] the necessity of regulating contract law within the supranational sphere appears to be the EU's new paradigm. Indeed, the free circulation of goods (Art. 28-30 EC), the practical difficulties posed by the application of private international law as well as the ideal of a homogeneous normative structure unifying people are but a few motivations for EU institutions to design a *corpus* of norms stemming from a communitarian matrix. Probably since their link with the market is not so obvious, civil liability[3] and property law[4] are to a lesser extent the objects of harmonisation projects. Because it evokes the "free circulation of documents",[5] contract law has undoubtedly triggered more interest. The harmonisation efforts seek to establish equilibrium between too rigid a unification process on the one side, and, on the other, the jungle-like coexistence of

[1] Csaba Varga 'La codification à l'aube du troisième millénaire' *Mélanges Paul Amselek* (Bruxelles: Bruylant 2005), pp. 779 et seq. at p. 800.

[2] François Terré, Philippe Simler & Yves Lequette *Droit civil* Les obligations, 8th ed. (Paris: Dalloz 2001), p. 27.

[3] The notable exception is Council Directive 85/374/EEC of 25 July 1985 concerning liability for defective products *OJ L* 210 of 07.08.1985 (herein after "Product Liability Directive").

[4] Daniela Caruso 'Private Law and Public Stakes in European Integration: the Case of Property' *European Law Journal* 10 (2004) 6, pp. 751–765.

[5] Hugh Collins 'The Freedom to Circulate Documents: Regulating Contracts in Europe' *European Law Journal* 10 (2004) 6, pp. 787–803.

legal traditions catalysed by the EU enlargement. This target has recently been reiterated by the Commission in its Draft Common Frame of Reference.[6]

In this context, the debate around the role allotted to private law within the EU integration process revolves around two main conceptual axes,[7] which exacerbate the tensions that characterise this very same process.[8] On the one side, it opposes the euro sceptics to the militants of a strong EU—be it qualified "constitutional"[9] or "federated"—(section 1). On the other, it polarises the position of the partisans of a neo-liberal economy (section 3) and the promoters of a form of distributive justice which implicitly underlie some features of the Law of Obligations (section 4). In light of this analytical framework, one can observe that it is the intensity, the span and the content, as much as the procedural prerequisites that should precede the adoption of an EU framework which divides the contemporary scholarship. Through this lens and despite these polarities, private law increasingly becomes a supranational discussion forum which exponentially involves technocrats, intellectuals, lawyers as well as academics[10] (section 2). Indeed and although distinct, these theoretical poles are nevertheless united by a common denominator: they both offer evidence of a phenomenon of instrumentalisation of a field of law that becomes subordinated to politico-economic contingencies (section 5).

1 The Dialectic of Unification and Harmonisation of Private Law within the EU: An Old-fashioned Debate?

Unification of law generally means the erosion of national diversity: the image evokes a monochrome—such as that of famous painter Yves Klein[11]—, whereby a uniform (and patented!) blue colour envelopes the entire surface of the canvas, igniting with the interpreter sentiments of serenity, purity, even totality, sufficient to minimise the subtle asperities which slowly and progressively impose themselves on the eye. Within some of

[6] Available at <www.law-net.eu/en_index.htm>.

[7] This is certainly not the only relevant methodological framework: for a different perspective, see, e.g., Thomas Wilhemsson 'The Legal, The Cultural and the Political: Conclusions from Different Perspectives on Harmonisation of European Contract Law' *European Business Law Review* (2002), pp. 541 et seq. or Daniela Caruso 'The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration' *European Law Journal* 3 (1997), pp. 3 et seq.

[8] Many sectors of law have been the object of a harmonisation agenda by the EU institutions. Suffice it to mention antitrust, employment law, insurance law, banking law, tourism or publicity. On this topic, see generally Ole Lando 'Liberal, Social and »Ethical« Justice in European Contract Law' *Common Market Law Review* 43 (2006), pp. 817 et seq. or Christoph Schmid 'Le projet d'un code civil européen et la Constitution européenne' *Les Cahiers de Droit* 36 (2005), pp. 113 et seq.

[9] The paternity of this expression has been attributed to Joseph H. H. Weiler 'A Constitution for Europe? Some Hard Choices' *Journal of Common Market Studies* 4 (2002), pp. 563 et seq. The author notes that the mere decision to expand EU's frontiers was already a decision of a constitutional nature, in margins of any constitutional framework *per se*. Cf. Peter Holmes 'The WTO and the EU: Some Constitutional Comparisons' in *The EU and the WTO* Legal and Constitutional Issues, ed. Graìnne De Burca & Joanne Scott (Oxford & Portland: Hart Publishing 2001), p. 59.

[10] In this regard, the legal literature is immense. Suffice it to signal, *ex plurimis*, the contributions by Elena Ioriatti Ferrari *Codice civile europeo* (Padova: CEDAM 2006) and Eric Descheemaker 'Faut-il codifier le droit des contrats?' *Revue de Droit de McGill* 47 (2002), pp. 791 et seq.

[11] Yves Klein *Untitled blue monochrome* (IKB 82) (New York: Guggenheim Museum 1959) in <www.guggenheimcollection.org/site/movement_work_md_Nouveau_Realisme_76_3.html>.

the EU Member states where private law is apprehended as "a place for identity",[12] resistance to such uniformity is the rule: the monochrome does not succeed with its seduction. Opposition to unification is self evident, since the hypothesis that legal rules—and, by necessary implication, their history—may be eroded by a newer supranational legal order sometimes provokes rejection reactions.[13] Harmonisation therefore appears as a compromise, since it allows the maintenance of national normative variations, while admitting that these might be reconfigured by communitarian rules. This conceptual image evokes instead a painting by an American artist Frank Stella, where an angular matrix composed of two squares placed on a diagonal axis superposes itself to a triptych of concentric circles made of psychedelic colours.[14] In fact, the word 'codification' has disappeared from the technocrats' language, as the more recent communications coming from Brussels have rather privileged "softer" forms of harmonisation.[15]

On the legal scene and at a micro level, such tension can be observed through a quarrel that has long opposed the first generation of EU private law scholars: while some advocate a top down form of harmonisation, others would prefer to uphold the national traditions in the construction of the EU by way of a slower, voluntary, bottom up harmonisation—promoting the "free circulation of legal rules"[16]—echoing the American experience.[17] In reality, though, some authors rightly point out that the context within which European private law evolves has already (and irreparably) initiated the mutation phenomenon of national legal traditions. As C. Joerges states:

> "Even where private law appears to have preserved its national characteristics, the Europeanisation process has replaced the former institutional environment. It is this discrepancy between the apparent survival of private law institutions and the erosion and renewal of

[12] From an historical perspective, on the correlation between codes and identity, see, e.g., Sylvio Normand 'Le Code civil et l'identité' in *Du Code civil du Québec* Contribution à l'histoire immédiate d'une recodification réussie (Montréal: Thémis 2005), pp. 619 et seq.

[13] See, for example, note 36.

[14] Frank Stella *Harran II* (1967) [polymer and fluorescent polymer] (New York: Guggenheim Museum) in <http://www.guggenheimcollection.org/site/artist_work_md_148_1.html>

[15] See, e.g., Communications of the Commission to the European Parliament, COM (2001) 398 final and COM (2003) 68 final. For a definition of these concepts, see Raymond van Der Elst 'Les notions de coordination, d'harmonisation, de rapprochement et d'unification du droit dans le cadre juridique de la communauté économique européenne' in *Les instruments du rapprochement des législations dans la communauté économique européenne* (Bruxelles: Université Libre de Bruxelles 1976), pp. 1 et seq.

[16] The expression is borrowed from Jan Smith 'A European Private Law as a Mixed Legal System' *Maastricht Journal of European and Comparative Law* 5 (1998), pp. 328 et seq. at p. 336.

[17] Cf. Pierre Legrand 'European Legal Systems are not Converging' *International and Comparative Law Quarterly* 45 (1996), pp. 52 et seq. or, more recently, his 'Antivonbar' *American Journal of Comparative Law* 1 (2006), pp. 14 et seq.; Christian Von Bar & Ole Lando 'Communication on European Contract Law: Joint Response and the Commission on European Contrat Law and the Study Group on a European Civile Code' *European Review of Private Law* 10 (2002), pp. 183 et seq. On the question of the intensity of harmonisation, see Kamiel Mortelmans 'Minimum Harmonisation and Consumer Law / Harmonisation minimale et droit de la consummation' *Revue européenne de droit de la consommation* 3 (1988), pp. 2 et seq. and Silvia Ferreri 'Unificazione, Uniformazione' in *Digesto delle discipline privatistiche* Sezione civile (Torino: UTET 1987), pp. 504 et seq.

> their social function which the analysis of the EU as multi-level of governance is able to capture".[18]

By extension, a new private law has already been configured by a supranational legal order: it materialises itself into the *acquis communautaire*.[19] The polarities seem to fade away, ever since the quarrel over "why harmonise?" has probably reached its zenith with the famous von Bar–Legrand divergences.[20] Times are now at discussing the "how to harmonise". In fact and beyond the dialectic of harmonisation and unification, the suggestive notion "national margins of discretionary appreciation"[21] probably better illustrates, from a conceptual standpoint, the idea of a normative synergy whose internal dynamics are tributaries of a variety of vertical and sectorial legal sources. Borrowed from the field of human rights, this notion, according to Delmas-Marty and Izorche, "underlies […] the two processes of internationalisation of law: be it from domestic law or international law, it expresses a tension from one to another, and this tension allows the respect of a certain pluralism".[22] From a technical perspective and within the margins of the delicate question surrounding the adoption of a European Civil frame of reference, different legal instruments (such as directives or regulations) and secondary legal tools (European Court of Justice case-law) are used in order to balance national legislation[23]. Their importance vary in light of the supranational sources of law, be they legislative, technocrat, judicial, or scholarly.[24]

In the end, in every single Member State, European private law is rooted in national traditions, framed by unified rules, melded by the harmonised ones, flavoured by soft law and legal traditions. Given this superposition of European private laws, it would appear simplistic to tackle the debate by referring to the mere unification/harmonisation dichotomy: the relationship between national legislations (and most particularly, Civil

[18] Christian Joerges 'The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective' *European Law Journal* (1997), p. 378.

[19] See, e.g., the following directives: Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises *OJ L* 372 31.12. 1985, p. 31; Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *OJ L* 95, 21.4.1993; Directive 94/47/EC on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of a right to use immovable properties on a timeshare basis, *OJ L* 280, 29.10.1994; Directive 97/7/EC on the protection of consumers in respect of distance contracts, *OJ L* 144, 4.6.1997; Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, *OJ L* 171, 7.7.1999; Directive 97/7/EC on the protection of consumers in respect of distance contracts *OJ L* 144, 4.6.1997, p. 19; Directive 2002/65/EC concerning the distance marketing of consumer financial services, *OJ L* 271, 9.10.2002, p. 16; Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, *OJ L* 178, 17/07/2000 p. 1. For a further analysis of EU private law directives, see Christoph Schmid 'Pattern of Legislative and Adjudicative Integration of Private Law' *Columbia Journal of European Law* 8 (2002), pp. 415 et seq.

[20] Cf. note 17.

[21] This concept was brought about by Mireille Delmas Marty & Marie-Laure Izorche 'Marge nationale d'appréciation et internationalisation du droit: réflexions sur la validité formelle d'un droit commun pluraliste' *Revue de droit de McGill* 46 (2001), pp. 923 et seq.

[22] *Id*., p. 930 (emphasis added).

[23] For an early and efficient description of these instruments, see Lucía Millan *La armonizacion de legislaciones en la C.E.E.* (Madrid: Centro de Estudios Constitucionales 1986).

[24] See, e.g., Giuseppe Gandolfi 'Per un codice europeo dei contratti' *Rivista Trimestrale di Diritto e Proceduera Civile* 46 (1991), pp. 781 et seq., or *The Principles of the European Group on Tort Law* presented in Vienna (May 2005) <http://www.egtl.org/Principles/index.htm>.

Codes[25]) and supranational law, which materialises in the imprecise locution approximation of laws, appears to be more fruitful in this regard.

2 The Functionalist Approach to the Internal Market versus *Social Justice: The Luxuriant Debate?*

Given the existing symbiotic relation between national legislations and EU law, this second section raises the problematic of determining the function and the justification of European legal rules within the EU legal order. However, it must be noted that for most of the Member States, the integration of EU law into national law has increased the legal protection offered by private law in matters such as consumer law. In this regard, the thoughts surrounding the theme of social justice are largely configured by the depth of consumer protection traditions in different Member states. In fact, the voice of scholars emanating from the founding States of the Treaty of Rome in 1957 does not always represent the situation that is observable in the newer Member states. Whereas the former sometimes observe the erosion of certain social values by reason of the creation of the internal market, the latter rather witness an increase of the legal protections that are offered to the most vulnerable subjects in society (such as consumers or children).

Such apparent discrepancy is caused by the fact that the contemporary process of approximation of law evolves in parallel with the phenomenon of economic integration. Within an internal market which is based upon competition and the free circulation of goods, the premise lies in the idea that all economic operators must benefit from equal conditions. In contract law, in this sense, the spirit of harmonisation seems to have been inspired by the Communication of the European Commission in 2003,[26] which launched a vast consultative project. This initiative sought to verify whether the smooth functioning of the internal market could have been hindered by obstacles linked to the formation, the interpretation or the enforcement of transnational contracts. More precisely, it aimed at determining what effect the diversity of national legislation might have on the deceleration of import/export flows or the increase of their costs, and if the sector-based harmonisation approaches of contracts threaten the coherence of EU law, or generate problems of disparate national transposition of EU law into national legal systems.

Previously, though, some initiatives had attempted to set parameters which would have facilitated the construction of the internal market while protecting the legal national traditions. For example, the European Principles of Contract Law (EPCL) written under the auspices of the Commission on contract law (Lando Commission[27]) elaborated

[25] Regarding the Dutch Civil Code, for example, see Martijn W. Hesselink 'The Ideal of Codification and the Dynamics of Europeanisation: The Dutch Experience' *European Law Journal* 12 (2006) 3, pp. 279–305.

[26] See Communication from the Commission to the European Parliament and the Council *A More Coherent European Contract Law* An Action Plan, COM/2003/0068 final, *OJ C* n° 063, 15/03/2003, p. 1. This communication seeks "to obtain feedback on a suggested mix of non-regulatory and regulatory measures, i.e. to increase coherence of the EC *acquis* in the area of contract law, to promote the elaboration of EU-wide standard contract terms and to examine whether non-sector specific measures such as an optional instrument may be required to solve problems in the area of European contract law. As such, it constitutes a further step in the ongoing process of discussion on the developments in European contract law": See the critiques addressed by Martin W. Hesselink 'The Politics of a European Code' *European Law Journal* 6 (2004), pp. 675 et seq.

[27] These principles are published in *Principles of European Contract Law* 1: Performance, Nonperformance

paralegal materials that certainly could define the general orientations of the debate. The premise which underlies the work undertaken mostly centres around efficiency. It suggests that "national contract laws differ, but often more in the formulation and techniques than in the results".[28] Contracts are perceived as being apolitical; they rather are vectors of obligations which materialise the will of the parties to enter a commercial relationship. More globally, the arguments in favour of the adoption of a Code suggest that "[a] common market needs a uniform infrastructure of private laws able to stand up in a global competition to US law".[29] Hence, the idea of smoothing the market within EU boundaries while increasing legal certainty suffices to legitimate the merging of national legal traditions.

One could certainly object that such a premise is not recent: more than twenty-five years ago, the preamble of the United Nations Convention on Contracts for the International Sale of Goods (CISG) provided that "the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade".[30] Likewise, the notions of legal certainty and predictability are clearly visible beneath the surface within the Communication of the Commission. Conversely, it must be kept in mind that in the field of private law and beyond the EU's reality, the existing supranational instruments are primarily of a procedural nature. In fact, a glance across the Atlantic actually proves that substantive law is not the only way to achieve political integration: doesn't the North American Free Trade Agreement[31] function on the fringes of any structural organisation?[32]

From a political standpoint, referring to federalism *à l'européenne* or North-American economic integration, triggers the same problematic: how to construct a functional common market while preserving, at the same time, cultural peculiarities and national traditions? International economic treaties, in fact, usually avoid definitions: instead, they provide for mechanisms that allow the parties to circumvent them by practicing forum

and Remedies, ed. Ole Lando & Hugh Beale (Nijhoff: Dordrecht 1995) and *Principles of European Contract Law* I–II, ed. Ole Lando & Hugh Beale (The Hague: Kluwer Law International 2000).

[28] Lando 'Liberal, Social and »Ethical« Justice…' [note 8], p. 825.

[29] Christoph U. Schmid 'Legitimacy Conditions for a European Civil Code' *Maastricht Law Journal* 8 (2001), p. 279, who challenges such a premise.

[30] Emphasis added.

[31] North American Free Trade Agreement (NAFTA) implemented on January 1 1994, R.T. Can. 1994 no 2, 32 I.L.M. 289. On its internal mechanism, see H. Patrick Glenn [The Morris Lecture] 'Conflicting Laws in a Common Market? The NAFTA Experiment' *Chicago–Kent Law Review* 76 (2001), pp. 1789 et seq., according to whom "As a simple free trade arrangement, NAFTA has a primarily intraregional effect, removing or restraining tariff and non tariff barriers to trade in goods between the member countries. There is no effort to create a Fortress America, in the form of a common external tariff wall (p. 1790). See also Frederick M. Abbott 'Integration without Institutions: The NAFTA Mutation and the EC Model and the Future of the G.A.T.T. Regime' *American Journal of Comparative Law* 40 (1992), pp. 917 et seq.

[32] Interestingly enough, Glenn suggests that there is a relationship between the federal structure of States that desires to form a supranational entity (e.g. Mexico, Canada and United States) and the necessity to give more details to the supranational rules they will eventually abide by. Moreover, Glenn suggests that the parties to the NAFTA, precisely because they are federations or confederations, are more used to arbitrating among laws which might enter in conflict. Glenn [The Morris Lecture] [note 31], p. 1792.

shopping.[33] The dichotomy between the respective domains of private international law (of a more procedural nature) and international private law (of a more substantive nature), probably explains the sudden interest of scholars in the latter, since it poses the particularity of transforming the legal traditions by excluding any possibility, for the parties, to choose the forum they retain most appropriate.

In parallel, the functionalist approach to the market also emerges from the discursive method adopted by the ECJ. Indeed, the analysis of case-law emphasises the lack of coherence that occasionally exists between the EU's legislative intention and the real impact of legal texts on different national legal traditions. This discrepancy can be explained in light of the legal basis upon which lie communitarian policies; this constitutional component serves as an interpretative expedient in order to affirm the prevalence of market-based objectives over more recent EU competences such as health or consumer protection (respectively Art. 152-153 EC).

3 Of Markets, Constitution and Legal Basis

It was in the mid-1980s that Article 100 CEE permitted the EU legislator, for the first time, to adopt directives having an important impact on private law,[34] such as the Product Liability Directive, or the Doorstep Directive.[35] As anticipated, the recitals of these EU texts evoke the necessity to harmonise legislation since disparities among national laws could constitute barriers against the fluent functioning of the common market. Nonetheless, it also appears rather clear that these two Directives pursued the hidden goal—subsidiarity barred forthrightness!—to protect the more vulnerable parties inside contractual dynamics. Of an apparent banality, this reference to such a legal basis has had a certain impact on the interpretation expedients which guided the ECJ. On occasion of the recent case handed down the ECJ in the context of the Product Liability Directive, for example, the Court held that given that the legal basis is closely linked to the construction of the internal market, we must convene that its prescriptions crystallize a politico-economic compromise.[36] Hence, it is not possible for Member States to move away from the black-letter law in order to maintain victim-focused protections, unless the Directive itself expressly provides for such a possibility.[37]

Chiefly, the Court held that the Directive contains no provision expressly authorising the Member States to adopt or to

[33] See, e.g., Franco Ferrari 'International Sales Law and the Inevitability of Forum Shopping: A Comment on Tribunale di Rimini, 26 November 2002' *Journal of Law and Commerce* 23 (2004), pp. 169 et seq. The UNIDROIT principles represent a partial exception to the rigidity of the above-mentioned affirmations. This peripheral legal order allows the parties to enter into a contract by submitting themselves to these principles; this possibility is left to the entire will of the parties.

[34] For an analysis of the problematic of determining legal basis in EU private law building, see Ferrari *Codice civile europeo* [note 10], p. 155ss.

[35] Directive 85/577/CEE.

[36] *Commission* v. *French Republic*, case C-52/00, *ECR* 2002, I-3827, *Gonzalez Sanchez* v. *Medicina Asturiana SA*, case C-183/00, *ECR* 2002, I-3901 and *Commission* v. *Greece*, case C-154/00, *ECR* 2002, I-3879 (herein after "ECJ trilogy of April 25 2002", emphasis added).

[37] See, e.g., Directive 85/577/CEE, Art. 8: "This Directive shall not prevent Member States from adopting or maintaining more favourable provisions to protect consumers in the field which it covers".

maintain more stringent provisions in matters in respect of which it makes provision, in order to secure a higher level of consumer protection".[38] Consequently, national legislators (in this case, France and Greece) could not provide more favourable legal protection for victims, since they exposed themselves to a procedure stemming from Article 226 EC. While used as interpretative instruments, therefore, legal bases greatly impact on the integration process. Indeed, they further create a sort of competition—somewhat undesirable—between EC rules on the one hand, and national rules on the other: in most circumstances, EU citizens will seek to avail, by all means, of the most profitable rules for themselves, even if this means that EC law shall be set aside and consequently reduced to a mere optional, secondary body of rules.[39]

Following the Maastricht and Amsterdam treaties, however, the rigidity of *ex* Article 100 CEE has been attenuated by the progressive insertion of rules more concerned with social values, such as consumer protection (Art. 153 CE) and those subtly providing for the protection of health (Art. 152 CE). Besides these special, enumerated circumstances attributing competence to the EU institutions (e.g. blood and blood-derived products), we need to observe that these legal bases are not autonomous: their transversal application remains subordinated to that of other EU competences, such as the creation of the market.[40] This intrinsic limit was clearly illustrated by famous tobacco cases,[41] where, in having to judge on the conformity of the Directive in light of EU law,[42] the ECJ concluded—against all odds—that the Directive was deprived of any constitutional legitimacy. Among other things, the arguments set forth by the German republic revolved around the finding of a hypertrophy of consumer protection to the detriment of the only legitimate goal of levelling the functioning of the internal market. In particular, the ECJ held that *ex* Article 129 (now Article 152 EC) excluded any possibility of the harmonisation of the Member States legislation. Furthermore, the Court observes that the hori-

[38] ECJ trilogy of April 25 2002. For a deeper analysis, see Marie-Eve Arbour 'Corte di giustizia e protezione delle tradizioni giuridiche nell'interpretazione della direttiva 374/85/CEE' *Danno e responsabilità* 4 (2003), pp. 375 et seq.

[39] This situation can be observed in Italy. See, e.g., Corte di cassazione, sez. III civ., n. 8981 of 1/2/2005, commented by Anna Lisa Bitetto 'Responsabilità da prodotto difettoso: strict liability o negligence rule?' *Danno e responsabilità* 3 (2006), p. 261. For an analysis of the application of EU directives in private law, see Leone Niglia 'The Non-Europeanisation of Private Law' *European Review of Private Law* (2001), pp. 575 et seq.

[40] See for example, Council Resolution of 2 December 2002 on Community consumer policy strategy 2002–2006 *OJ C* 11, 17.1.2003, p. 1–2. The Council clearly states: "Consumers together with business are key players in the internal market. A well-functioning internal market promoting consumer confidence in cross-border transactions will have a positive impact on competition to the benefit of consumers".

[41] *OJ L* 137 30.05.1990 p. 36, also based on Art. 100A. Its first recital evokes the necessity to leval national criteria in light of the maximum amount of tar contained in cigarettes. This directive was eventually replaced by Directive 2001/37/EC concerning the manufacture, presentation and sale of tobacco products, *OJ L* 194 18.07.2001, p. 26: the first recital reiterates the construction of the internal market, but the fourth recital states that: "In accordance with Article 95(3) of the Treaty, a high level of protection in terms of health, safety, environmental protection and consumer protection should be taken as a basis, regard being had, in particular, to any new developments based on scientific facts; in view of the particularly harmful effects of tobacco, health protection should be given priority in this context (emphasis added). For a very efficient presentation of this policy, see among others Tamara R. Harvey 'Up in Smoke? Community (Anti)-tobacco Law and Policy' *European Law Review* 26 (2001), pp. 101 et seq.

[42] *The Queen* v *Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd.*, Case C-491/01, *ECR* 2002, I-11453 (see in particular par. 23–35).

zontal dynamic of the legal basis only allows it to play a peripheral role, w i t h i n the exercise of other EU competences.[43] In doing so, the Court stated that the *ethos* of the Directive, its centre of gravity, revolves around the protection of public health, a theme that had remained in the sphere of competence of the Member States. Therefore, the ECJ concluded that an inadequacy between the alleged legal basis and the real effects that the Directive actually produced existed and struck down the entire Directive.[44]

This image evokes that of a consumer seated between two chairs, because the constitutional dimension legitimating the construction of EU private law somewhat impedes that social values be taken into consideration at a time where the *a c q u i s c o m m u n a u t a i r e* had not crystallised them yet.[45] The result is quite unorthodox, when one observes, for example, that EU product liability induced a very high level of unification into national legislation, while, paradoxically, Directive 1985/374/CEE was adopted at a time when the EU institutions had l e s s competences over health or consumer protection. Moreover, and in light of the ECJ Tobacco cases (most particularly the absence of any internal market in publicity), one could question if the links between the Product Liability Directive and the creation of the common market were indeed sufficient to ground the legislative effort into *ex* Art. 100 EEC.[46] In fact, such a hypothesis –the lack of constitutionality of Directive 1985/374/CEE– probably explains the difficulties that the ECJ experienced in the interpretation of the legal text, as much as the odd results that stem from such judicial discretion. Less pessimistic scholars may object that such an orthodox result remains an artefact of the *ante* Maastricht period, and that the increasing synergy between market and social values will, in the end, attenuate the polarity between these two regulation goals.

In the meantime, it is in reaction to such shortcomings that the famous Manifesto in the context of contract law was published.

4 Alongside the Manifesto

A group of scholars published, in 2004, an article entitled *Social Justice in European Contract Law*.[47] Somewhat in opposition to the monochrome aesthetic previously sketched, the Study Group on Social Justice in EU Private Law expressed the idea that European contract law reflected the diversity of national traditions while simultaneously taking ad-

[43] *Id*., par. 77–79.

[44] *Id*., par. 83–84.

[45] This correlation is confirmed by Steven Weatherill 'The Constitutional Competence of the EU to Deliver Social Justice' *European Review of Contract Law* 2 (2006), pp. 136 et seq. at p. 141.

[46] See for example, the first recital: "Whereas approximation of the laws of the Member States concerning the liability of the producer […] is necessary because t h e e x i s t i n g d i v e r g e n c e s m a y d i s t o r t c o m p e t i t i o n a n d a f f e c t t h e m o v e m e n t o f g o o d s w i t h i n t h e c o m m o n m a r k e t and entail a differing degree of protection of the consumer against damage caused by a defective product to his health or property"; very few empirical evidence has proven the causal relationship between legislation divergences and entrepreneurship.

[47] [Study Group on Social Justice in European Private Law, reporter Hugh Collins] 'Social Justice in European Contract Law: A Manifesto' *European Law Journal* 10 (2004), pp. 653 et seq. Others seem to implicitly agree; see among them Brigitta Lurger 'The Future of European Contract Law between Freedom of Contract, Social Justice and Market Rationality' *European Review of Comparative Law* 4 (2005), pp. 442 et seq.

vantage of newer forms of regulation tools, which are rooted in multi-level forms of governance. In particular, the authors denounce an out of date economic liberalism which still seems to inspire the Council and the EU Commission. Instead, they propose to build EU legislation upon the ideal of consumer protection in order to ensure legal protection to parties who are more vulnerable within the consumer society, and in such a way as to increase distributive justice.[48] In this perspective, an osmotic interpretation to free market and the protection of social values should pave the way towards the construction of EU private law.

According to the authors, this project does not necessarily command the adoption of new rules at supranational level: "We should doubt, whether the needs of the Internal Market programme could really support proposals for uniform private law on their own".[49] Without being hostile to future harmonisation, the authors of the Manifesto reject the idea that the EU's social function be atrophied or reducible to the necessity of assuring the smooth functioning of the internal market. They rather suggest that judicial discretion might suffice, for example, to interpret contracts and attenuate their rigidity, by sanctioning, for example, bad faith or by promoting equity among parties.[50] They argue that albeit necessary, harmonising contract law should stem from a multi-dimensional legal basis such as Article 6 of the Treaty on the European Union, which provides that "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States". In conclusion, the authors argue that European contract law must aim at constructing a union of shared fundamental values; towards this end, they suggest that "the governance system of the multi-level pluralistic European Union requires new methods of the construction of this union of shared fundamental values (which includes respect for cultural diversity) as represented in the law of contract and the remainder of private law".[51]

If the authors reject the functionalist approach to the internal market, they nonetheless implicitly agree that private law is now an important variable, along with others, within the greater political project of EU creation. Were private law to become both or either the vector of the internal market or the protection of social values, suffice to conclude that its role within society has been renewed. Being propelled on the public sphere, this old regulation tool acquires a new political dimension.[52]

[48] For a prudent analysis of the Manifesto, see Christophe Jamin, 'Le solidarisme contractuel: Un regard franco-québécois' in *9th Conférence Albert Mayrand* (Montréal: Thémis 2005), pp. 32–33.

[49] *Id.*, p. 655.

[50] See, e.g., Gunther Teubner 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences' *Modern Law Review* 62 (1998), p. 11.

[51] The *Manifesto* [note 47], p. 657.

[52] On this topic, see mostly Christoph Schmid *Die Instrumentalisierung des Privatrechts in der Europäischen Union* [Habilitation thesis] (Munich: University of Munich 2004); the ideas of which are reproduced in his 'Instrumentalist Conception of the Acquis Communautaire in Consumer Law and its Implications on a European Contract Law Code' *European Review of Contract Law* 1 (2005), pp. 211 et seq. For a similar conclusion in the field of property law, see Caruso 'Private Law and Public Stakes…' [note 4] or Fabrizio Cafaggi 'Un diritto privato europeo della regolazione? Coordinamento tra pubblico e privato nei nuovi modelli regolativi' *Politica del diritto* 2 (2004), pp. 205 et seq.

5 The Rise of the Politicisation of Private Law

While contracts become political, vice-versa, contemporary policies tends to generate more contracts as the Welfare State is increasingly superseded by a privatisation phenomenon. Indeed, and despite the obvious lack of interest of the population in contract law, the debate concerning the law of obligations' socio-economic role is of crucial importance, according to Hesselink, given that in our contemporary economy, wealth is distributed, in the first place, through the enforcement of contracts, that different contract laws lead to different distributive outcomes".[53] Of course, other historical events have relied on the unification of private law in order to pursue political goals (in such contexts were Germany, Austria and Italy created), to spread a culture (e.g., the *ius commune*[54]), or to impose its domination upon others.[55] How is EU private law building any different from these experiences? This question has already been posed by Csaba Varga[56] who identifies the variables that singularise the EU's construction process. Among other things, he notes that EU-style codes do not aspire to conceptual clarity or completeness in its traditional meaning, while, by contrast, the common law and civil law dichotomy remains well alive.[57]

Besides, the answer lies in the different impulses which stimulate the harmonisation exercise. In this sense, and according to some scholars, the contemporary research of a European legal common core presents the particularity of belonging primarily to the academics themselves; they have formed groups proposing different methodological pathways in order to find out the common denominator to all legal traditions. In this regard, Van Hoecke ironically points out that such an appropriation of a legal field is not necessarily capable of translating reality, since "*la »réalité juridique« ne se montre pas plus dans les cours et tribunaux que la santé d'une population se déduirait de ce qu'on peut voir dans un hôpital*".[58]

From a practical standpoint, the representation of Members States is generally voluntarily assured by academics or lawyers; some Member States are somewhat better represented than others—in quantity as much as in quality—, this situation leads to the hypertrophy of certain legal solutions compared to others.[59] Beyond the technical approach to harmonisation,[60] they intend to promote a methodology somehow borrowed from the

[53] Hesselink 'The Politics of a European Code' [note 26], p. 677.

[54] See Eric Descheemaker 'Faut-il codifier le droit des contrats?' [note 10], pp. 826 et seq.

[55] On the circulation of legal models, see *ex plurimis* Alan Watson 'From Legal Transplant to Legal Formats' *American Journal of Comparative Law* 43 (1995), pp. 469 et seq. and Ugo Mattei 'A Theory of Imperial Law: A Study of the U.S. Hegemony and the Latin Resistance' *Global Jurist Frontiers* 3 (2003), pp. 1 et seq.

[56] Varga 'La codification…' [note 1], pp. 786 et seq.

[57] *Id.*, p. 789.

[58] Mark van Hoecke 'L'idéologie d'un Code civil européen' in *Le Code Napoléon, un ancêtre vénéré?* Mélanges offerts à Jacques Vanderlinden, dir. Régine Beauthier & Isabelle Rorive (Brussels: Bruylant 2004), p. 473.

[59] See Heinz Kötz 'The Trento Project and its Contribution to the Europeanization of Private Law' in *Making European Law* Essays on the »Common Core« Project, ed. Mauro Bussani & Ugo Mattei (Trento: Università degli studi di Trento 2000), pp. 115 et seq.; see also Ugo Mattei & Mauro Bussani 'The Common Core Approach to European Private Law' *Columbia Journal of European Law* 3 (1997–1998), pp. 339 et seq. or Rodolfo Sacco *Introduzione al diritto comparato* 5th ed. (Torino: UTET 1997) and Rodolfo Sacco 'Legal Formants: A Dynamic Approach to Comparative Law' *American Journal of Comparative Law* 39 (1991), pp. 21 et seq.

[60] The expression is borrowed from van Hoecke 'L'idéologie d'un Code civil européen' [note 58], p. 457.

common law tradition. This intention seems to be commonly shared by these different groups; in this regard and considering that the EU making process was primarily born out of an exercise focused on shedding light on similarities and differences between legal traditions, one may note that the heritage left by the preceding generation of comparatists is of doubtless relevance, from a linguistic and a conceptual point of view.

Generally speaking, the methodological framework which sets parameters within which these working groups can operate is of an inductive nature: the specialists firstly elaborate *questionnaires* that build on factual hypothesis—often, indeed, the questions are inspired by national case-law[61]—for which a practical solution must be found. Afterwards, these questionnaires are approved by every subgroup that is formed to address the various fields of private law. Questionnaires are filled by every national reporter, before being distilled in an analytical process by a general reporter that should merge them all towards a common solution. Theoretically speaking, therefore, the obtained result should represent a mosaic of all represented States' national law, through a common-law-like methodology. As Drobnig observes: "The use of a case-based factual approach ideally specifies the *tertium comparationis*, both for creating a common ground for a multinational group of researchers and for demonstrating the potential interplay of rules from various branches of law".[62] Such a statement probably remains anecdotic, although it has been taken very seriously by many scholars;[63] they certainly testify of the teleological stance which too often underlies EU initiatives.

Conclusion

Private law building has contributed to the creation of a true EU thinking by increasing the dialogue between legal cultures much beyond the reciprocal duel between civil law and common law, and by increasing transparency by opening their session to observers and giving free access to their results or questionnaires on the Internet. Despite the presence of epistemic polarities which still divide the academic community, EU private law making evokes an Erasmus program for scholars, where language barriers fall down and national cultures both collide and come together. In this sense, the EU making progress is a phenomenal success.

Interestingly enough, the author explains that most of the groups presents these common features: 1) they optimistically believe in the evolution of the EU; 2) they show some naivety regarding methodological obstacles; 3) they lack creativity, as they follow a pyramidal, positivist conception of private law, and 4) they lie on the premise that unification of private law, at the EU level, is desirable (p. 468).

[61] See, for an example, of the questions stemming from the research group *Personality Rights in European Tort Law*: "After the death of a famous politician, his doctor published a book revealing many details of his former patient's illness and private life, which were covered by professional secrecy. Is there any claim of the politician's wife and children against the doctor?" Gert Brüggemeier & Aurelia Colombi Ciacchi in *Common Core of European Private Law* Torts: Third Draft Questionnaire (2001).

[62] Ulrich Drobnig 'A Memorial Address for Rudolf Schlesinger' in *Making European Law* [note 59], p. 12. This paradigm somewhat circulates in the corridors of the World Bank, which concludes in 2006 that civil law jurisdictions are less competitive than those of a common law foundation: [World Bank] *Doing Business in 2006* Creating Jobs (Oxford: Oxford University Press & Washington: International Finance Corporation 2005).

[63] For a much deeper analysis of this question, see Caruso 'Private Law and Public Stakes…' [note 4] and Cafaggi 'Un diritto privato europeo della regolazione?' [note 52].

From a methodological standpoint, nonetheless, the groups have exposed themselves to important critiques. In their desire to contribute to EU law, some scholars have been accused of manipulating the information in order to attenuate the differences that might distinguish Member States' legislation.[64] Most importantly, it has also been argued that they consider their expertise as being sufficient to legitimate the obtained results.[65] Without considering it a defect, or an illegitimate objective, it is nevertheless necessary to avoid that the integration process of private law—as technical as it may sometimes seem—had the effect of creating another democratic *vacuum* in the EU, by subtracting itself from a debate that ultimately belongs to the entire civil population. It is as a p r o c e s s[66] that comparative law must now contribute to the equilibrium between the protection of the legal traditions and the building of a new corpus of harmonised legislation, although it seems unavoidable that the m e t h o d o l o g i c a l n a t i o n a l i s m[67] that somewhat colours these comparative works concurs to the creation of a plural European private law. Comparatist scholars must therefore follow both the upward spiral which leads to supranational law studies, and the downward one that gives legitimacy to the entire process.[68]

FACULTY OF LAW
LAVAL UNIVERSITY, QUÉBEC & SALENTO UNIVERSITY, LECCE
MARIE-EVE.ARBOUR@FD.ULAVAL.CA

[64] See Basil Markesinis 'Why a Code is Not the Best Way to Advance the Cause of European Legal Unity' *European Review of Private Law* 5 (1997), pp. 519 et seq. at p. 520. An author—Pierre Legrand 'On the Unbearable Localness of the Law: Academic Fallacies and Unseasonable Observations' *European Review of Private Law* 61 (2002), p. 66—evokes the potential suppression of the local peculiarities as being a synonym of the political correctness *à l'européenne*.

[65] Otto Pfersmann 'Le droit comparé comme interprétation et comme théorie du droit' *Revue Internationale de Droit Comparé* 2 (2001), pp. 275 et seq. at p. 279. See also J. Hill 'Comparative Law, Law Reform and Legal Theory', *Oxford Journal of Legal Studies* (1989), pp. 101 et seq. and Mark van Hoecke 'L'idéologie d'un Code civil européen' [note 58], pp. 471–472.

[66] On this point, see Matthias Reimann 'Stepping out of the European Shadow: Why Comparative Law in the United States must Develop its Own Agenda' *American Journal of Comparative Law* 46 (1998), p. 637 et seq. or Pfersmann 'Le droit comparé…' *id.*, p. 275. Another author observes that often "[c]omparatists fail to trace developments that characterize the path of private law towards Europeanization". See the contribution by Leone Niglia 'Taking Comparative Law Seriously – Europe's Private Law and the Poverty of the Orthodoxy' *American Journal of Comparative Law* 54 (2006), p. 401 and Pierre Legrand 'Public Law, Europeanisation and Convergence: Can Comparatists Contribute?' in *Convergence and Divergence in European Public Law* ed. P. Beaumont, C. Lyons & N. Walker (Oxford: Hart Publishing 2002), p. 225.

[67] This expression is borrowed from Christian Joerges 'The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline' *Duke Journal of Comparative & International Law* 14 (2004), p. 149.

[68] This contribution further develops the ideas expressed at a Conference entitled 'Le droit privé dans le processus d'intégration: vieil instrument, nouveau rôle?' Colloque *Regards croisés sur l'Union européenne qui se fait* (Montreal: HEI / CERIUM Octobre 6th, 2006). The author wishes to thank Keiva Carr for extremely helpful linguistic revision.

Brain Death vs. Heart Death

Stéphane Bauzon

> "There exists in contemporary culture a certain Promethean attitude which leads people to think that they can control life and death by taking the decisions about them into their own hands."
>
> (John Paul II *Evangelium Vitae*, 15)

This somewhat provocative title, *Brain Death vs. Heart Death*, is aimed at pointing the current debate about having Brain Death as the unique criterion to define human death. Nowadays, Brain Death is commonly well accepted for two main reasons. The first reason, which dominates the current medical practice,[1] lays on the idea that human life ceases with the total loss of brain function. Besides this biological definition of human death, there is also a sociological reason aimed at guaranteeing legal immunity for discontinuing life-prolonging measures and at collecting vital organs for the purpose of saving the lives of other human beings through transplantation.

These two reasons (biological and sociological) are being harshly debated by many scholars, mainly catholic but not only, such as the German Robert Spaemann, the Italian Roberto de Mattei, the Japanese Yohio Watanae, the American Alan Shewmon, and so on. My intent is to give here a synthetic view of their arguments against Brain Death as a sound criterion to define human death as well as to briefly comment on the idea that the neo-*cortex* (the cerebral hemispheres) is the place where human consciousness would be located.

*

In the public opinion as well as for the majority of physicians, Brain Death is perceived as a sound scientific way to define the specific moment of human death. The old criterion of death (still used some decades ago) of the 'irreversible' cessation of respiration and heart beat is no longer decisive. Certainly, this irreversibility leads inevitably to the destruction of brain tissue and the death of all other organs but with the invention of mechanical ven-

[1] See World Medical Association (WMA) *Declaration on Death* adopted by the 22nd World Medical Assembly in Sydney, Australia, August 1968.

tilation, the circulation of oxygenated blood can be maintained artificially. Furthermore, the criterion of cardio-pulmonary death does not really indicate the death occurred immediately after the end of breathing and heartbeat, but at a later moment. Then, if we want to declare someone to be a 'corpse' we have to be absolutely certain of the s p e c i f i c m o m e n t of death and Brain Death seems to be the right criterion to indicate it. Nevertheless, it is not so sure that Brain Death is not also part of the process of dying and, as a result, Brain Death remains an 'estimated' definition of death.[2] In any case, as Hans Jonas said, even if we can barely define "the exact borderline between life and death—we let nature cross it, wherever it may be",[3] we have to justify discontinuing measures that prolong life. As for this latter point, the definition of Brain Death as "the irreversible cessation of all functions of the entire brain, including the brain stem"[4] is criticized for its vagueness. According to it, the brainstem, which controls breathing and many other vitally important processes in the human body, must be irreversibly destroyed. This specific clinical evaluation (also called *apnea* test) is a test of the respiratory cephalic reflex. But this diagnosis (which consists in the transient withdrawal of mechanical respiratory support, up to 10 minutes in most countries) may cause irreversible damage to brain tissue. For medical reasons, at least according to David W. Evans, "the prescribed testing of brain stem function is not rigorous"[5] enough to define human death. Moreover, the means to register Brain Death differs from one place to another. For instance, the *electroencephalographic* (EEG) is not required in the United Kingdom even if throughout the world we can say that death is now perceived as being equivalent to the flat line in the EEG. We could even be tempted to affirm that death has become an '*iso*electrical silence'! In fact, and on the contrary, we must know that residual EEG activity can last up to 168 hours after the clinical 'diagnosis' of brain death…![6] Actually, if Brain Death is well accepted in the public opinion, it is not for its scientific background to define the moment of death, but for a utilitarian reason that allies a medical approach of the process of dying with the social need of having human organ procurement. However, dying is not death! Here lays the risk to think that 'brain death' is as good as death for transplant purpose, and then forget that the improved knowledge on the pathophysiology of coma could now save lives that would have been hopelessly lost years ago. This is the case especially for people in persistent vegetative state (PVS) who could be defined as 'dead persons' at least according to Peter Singer's standards[7] (when the organic basis of typical human mental processes ceases to exist, the person is dead) and their organs usefully procured to other patients.

[2] *Definition of Death* ed. S. J. Younger, R. M. Arnold & R. Shapiro (Baltimore & London: Johns Hopkins University Press 1999) and *Revisiting Brain Death* ed. B.A. Lustig [special issue of the] *Journal of Medicine and Philosophy* 26 (2001).

[3] H. Jonas *Technik, Medizin und Ethik* Zur Praxis des Prinzips Verantwortung (Frankfurt 1987), p. 221. See also H. Jonas 'Against the Stream: Comments on the Definition and Redefinition of Death' in his *Philosophical* Essays From Ancient Creed to Technological Man (Englewood Cliffs, New Jersey: Prentice-Hall 1974).

[4] WMA *Declaration on Death* [note 1], para. 4.

[5] This criterion ignores evidence of persisting medullary cardioregulatory function, and it declines to make use of special techniques which can reveal active brain stem neural pathways, see D. W. Evans 'The Demise of »Brain Death« in Britain' in *Beyond Brain Death* The Case against Brain Based Criteria for Human Death, ed. M. Potts, P. A. Byrne & R. G. Nilges (Dordrecht: Kluwer Academic Publishers 2000).

[6] Cicero Galli Coimbra, 'The Apnea Test – A Bedside Lethal »Disaster« to Avoid a Legal »Disaster« in the Operating Room' in *Finis Vitae* Is Brain Death Still Life? ed. R. de Mattei (Rome: Rubbettino–CNR 2006).

[7] P. Singer *Practical Ethics* 2nd ed. (Cambridge: Cambridge University Press 1993).

As R. D. Ruog wrote: "The most difficult challenge for the concept of 'brain death' would be to gain acceptance of the view that killing may sometimes be a justifiable necessity for procuring transplantable organs". [8]

*

The obvious advantage of 'Brain Death' is to make more organs available for transplantation. Currently, most lay people are convinced that the donation of organs is a noble deed based on humanity and that organ transplantation is a wonderful therapy that can save lives of patients suffering from otherwise incurable illnesses. However, the voice of the antagonists of Brain Death is seldom heard and their criticism of the vagueness of the Brain Death criterion is quickly dismissed by most physicians. Besides, they are not often taken seriously when they denunciate the idea that the neo-*cortex* (the cerebral hemispheres) is the place where human consciousness would be located. The criterion of brain death has become dominant not only for medical reasons (i.e. ventilation techniques) but also for a philosophical assertion that human life is reduced to brain activity with a split between the Brain and the Body. It is true that the biological process of dying can be 'arrested' for some days while the functions of the lungs and the heart are maintained. For instance, a pregnant woman can be 'kept alive' for months until the unborn child can be delivered. Nevertheless, a 'spiritual life' is not only a "material" located in the brain. In other words, one may think that his or her 'spirit' is like an 'algorithmic program', and the brain is like the hardware, and the destruction of the latter implies the 'death' of the former in both cases. But such an opinion is just a mere opinion; it is not a scientific fact. One may think like Francis Crick that "you, your joys and your sorrows, your memories and your ambitions, your sense of personal identity and free will, are in fact no more than the behaviour of a vast assembly of nerve cells and their associated molecules."[9] But this is not a scientific assertion, just a mere philosophical opinion (that can be qualified as 'scientific') that will never explain to us the quality or the intelligence of human spirit. As a result, the talk about 'Brain Death' becomes no longer a medical issue but a philosophical one. Locating the 'human spirit' in the brain *cortex* is criticized by those, like R. de Mattei, who think that "there is a high possibility that brain-damaged body still retains a soul, just like the embryo almost certainly has one from the very first stage of its development". In this perspective, the most important thing to do is to preserve their lives: *in dubio pro vita*! Certainly enough, one may say that such assertion is a philosophical opinion. There is no doubt about it. But the fact of having more organs for transplantation thanks to a definition of death which is not a certainty (epistemologically speaking, we now know that what was described as 'irreversible' some years ago, no longer is so[10]), it is a philo-

[8] R. D. Ruog 'Is it Time to Abandon »Brain Death«?' *Hastings Center Report*, 27 (1997) 1, pp. 29–37, quoted by W. F. Weaver 'Unpaired Vital Organ Transplantation: Secular Altruism? Has Killing Become a Virtue?' in *Finis Vitae* [note 6].

[9] F. Crick *The Astonishing Hypothesis* The Scientific Search for the Soul (New York: Scribner 1994), p. 3.

[10] A. Shewmon 'The Brain and Somatic Integration: Insights into the Standard Biological Rational for Equating Brain Death with Death' Journal of Medicine and Philosophy 26 (2001), pp. 457–478.

sophical decision. Sociologically speaking, the 'brain death' is u t i l e (it provides more organs and less sanity cost) but it ought to be challenged for what it really is: a philosophical opinion!

FACULTY OF LAW
UNIVERSITY OF ROME TOR VERGATA
SBAUZON@LIBERO.IT

From the Reification to the Re-humanization of the Contractual Bond?

André Bélanger

While jurists view contract relationship first and foremost in terms of economic value, it appears necessary to contemplate the possibility of re-humanizing the contract through such rules of law that do not resort solely to vague moral precepts begging for legitimization.[1] As someone who is trained in civil law and takes an interest in contract law, I find it fitting to re-examine Csaba Varga's works on the matter of reification and put them briefly in perspective with those, more recent, of Axel Honneth, so as to investigate if the matter of reification can be pertinent to the study of private-law contracts. This modest thought, coming from a young jurist trained neither in political philosophy nor in sociology (and who witnessed the collapse of state socialism before even having reached the voting age), should be understood as aiming to emphasize the fact that the philosophy of law and certain issues pertaining to Marxism remain rich in ideas and intellectually stimulating for any doctrinal allegiance.

A brief introduction is required into the crucial questions that appear to be the driving force in the contract theory of Quebec law. In order to do so, after having outlined the present state of contract theory (1), I will venture a mention of some of Varga's works related to the concept of reification (2). The purpose of this is to initiate a critique of the current hegemonic representation of the contract, a representation that stems from a strict utilitarian outlook. This ought to open the way for some avenues of doctrinal

[1] I will illustrate this with the definition given by one of the greatest theorists of contract law. Thus, in Ghestin's synthetic view of the realities of contemporary contract law, "we may consider that in our current system of private law, the contract, involving an exchange of goods or services subject to payment, can be characterized as a legal category, through the agreement of wills, which is the essential subjective element, and through utility and justice, which are its objective purposes. It is consequently an agreement of wills intended to produce effects of law whose compulsory force depends on its conformity to objective law. For this reason, it must be in conformity with its objective purposes, i.e. utility and justice. From its teleological social utility, the secondary principles of legal safety and cooperation are inferred. From the teleological contractual justice, the search for the equality of the services ensues while abiding to a really correct and equitable contractual procedure. Jacques Ghestin 'Le contrat en tant qu'échange économique' *Revue d'économie industrielle* (2000), No. 92, pp. 81–100 at p. 100. The difficulty here undoubtedly arises from the impossibility of defining the compliance to "a really correct and equitable contractual procedure". One could even say that it is the reference to these very concepts of correctness and equity that cause the problem and thwart any real theoretical advances in the matter of the contract.

introspection which, in turn, should shed light on contract relationships and allow us to contemplate an overall theory based on social relations of communication and the search for common agreement (3). Thus, the contract as an object of exchange and enrichment could become an instrument of social and legal communication b e f o r e and rather than an object of economic benefit.

1 Some Theoretical Deadlocks

In Quebec law, as well as in French law, the basic precepts are simple and well-known: according to both the *Code Napoléon* of 1804 and to the 1866 *Civil Code of Lower Canada*, the contract was seen as the product of the meeting of the minds of the two parties. This conception, described as spiritual insofar as it did not involve any kind of materialism (under the terms of the principle known as consensualism), was grounded on the foundations of political and economic liberalism, according to which each individual is responsible for his wellbeing. However, even before the development of consumerism, this theoretical approach was the subject of relentless criticism, prompted in France to a large extent by the adoption of the German *Bürgerliches Zivilgesetzbuch*, which implemented a significant change in the theory of contract. Thereafter, because of the development of modern capitalism as much as of the ensuing contractual practices, the theory of voluntarism resulting from an excess of liberalism was called into question. It was then understood that, since the satisfaction awaited by one of the parties depended on the correlative impoverishment of the other, this "system of communicating vessels to which the analysis of contract [is] subjected is disconcerting and irreconcilable with the real nature of the contract".[2]

It was however this principle of contractual voluntarism that was renewed in the *Civil Code of Quebec* in 1994. And this in spite of the many fault-finding works which, since Gounot[3]—if not before—have not ceased to criticize the voluntarist theory so as to allow the evaluation and re-evaluation of what has since been labelled the dogma of the autonomy of the will. In spite—or because—of this constant deconstruction, several elements of s o c i a l analysis persist as far as contracts are concerned: for example, the matter of the exchange within contractual solidarism,[4] the interrelationship in the rela-

[2] F. Diesse 'Le devoir de coopération comme principe directeur du contrat' *Archives de Philosophie du Droit* 43 (1999), pp. 259 et seq. on p. 260.

[3] E. Gounot *Le principe de l'autonomie de la volonté en droit privé* Contribution à l'étude critique de l'individualisme juridique [thèse] (Dijon 1912).

[4] René Demogue 'Des modifications aux contrats par volonté unilatérale' *Revue Trimestrielle du Droit civil* (1907), p. 246; René Demogue *Les notions fondamentales du droit privé* Essai critique (Paris: A. Rousseau 1911); René Demogue *Traité des obligations en général* 1 & 6 (Paris: A. Rousseau 1923 & 1931); Christophe Jamin 'Plaidoyer pour le solidarisme contractuel' in *Études offertes à Jacques Ghestin* Le contrat au début du XXI^{e} siècle (Paris: Librairie Générale de Droit et de Jurisprudence 2001), pp. 441–472; Horatia Muir Watt 'Analyse économique et perspective solidariste' in *La nouvelle crise du contrat* dir. Ch. Jamin & D. Mazeaud (Paris: Dalloz 2003), p. 183; *Le solidarisme contractuel* dir. L. Grynbaum & M. Nicod (Paris: Economica 2004); Marc Mignot 'De la solidarité en général, et du solidarisme contractuel en particulier ou Le solidarisme contractuel a-t-il un rapport avec la solidarité?' in *Revue de la Rercherche Juridique* Droit prospectif (2004), No. 4, pp. 2153–2197; Christophe Jamin *Le solidarisme contractuel* Un regard franco-québécois (Montréal: Thémis 2005); Anne-Sylvie Courdier-Cuisinier *Le solidarisme contractuel* (Paris: Litec 2006); André Bélanger & Ghislain Tabi Tabi 'Vers un repli de l'individualisme contractuel? L'exemple du cautionnement' in *Les Cahiers de droit* (2006), No. 47, pp.

tional approach,[5] the intersubjectivity as conceived by Habermas.[6] Altogether, it seems that a reference to d i a l o g u e and the w i l l o f c o m m u n i c a t i o n between the contracting parties endures even in the contemporary legal context of the mass contract which is the a d h e s i o n c o n t r a c t. This does not mean that the contract should become an abstract c o n c e p t that would spur aporias—hence allowing an endless palaver valid only by itself and for itself—but that it can fall very well under a f u n c t i o n a l i s t approach of the contract that would perceive it first and foremost as a tool.[7] A tool, however, that is not strictly e c o n o m i c, but rather a primarily l e g a l tool, which would imply taking into account *inter alia* the effects of the synallagma in society. Accordingly, one should avoid reducing everything to the mere level of the interests of the parties,[8] for that way law would disregard several vital social dimensions that, with a desire of objectivity and dissimilarity, one might call h u m a n dimensions.[9] In this sense, one should not lose sight of the fact that before p r o d u c i n g economy, the contractual relationship creates legal n o r m s. This fundamental normative relationship cannot be neglected. Consequently, in a context of legal modernity, one should make sure that it is not only the economic dimension that gets to be essential to both parties, especially in the case of adhesion contracts.[10]

429–474; Isabelle Dhainaut 'Demogue et le droit des contrats' *Revue Interdisciplinaire d'Études Juridiques* (2006), No. 56, pp. 111–136.

[5] By Ian R. Macneil, 'The many Futures of Contracts' *Southern California Law Review* 47 (1974), pp. 694 et seq., 'Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical and Relational Contract Law' *Northwestern University Law Review* 72 (1978), pp. 854–905, *The New Social Contract* An Inquiry into Modern Contractual Relations (New Haven, Connecticut: Yale University Press 1980), 'Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a Rich Classificatory Apparatus' *Northwestern University Law Review* 75 (1981), pp. 1018–1063, 'Values in contract: Internal and external' *Northwestern University Law Review* 78 (1983), pp. 340–418 and 'Relational Contract: What we Do and Do Not Know' *Wisconsin Law Review* (1985), pp. 340 et seq.; by Jean-Guy Belley, *Le contrat entre droit, économie et société* (Cowansville: Yvon Blais 1998) and 'Théories et pratiques du contrat relationnel: Les obligations de collaboration et d'harmonisation normative' in [Conférences Meredith Lectures 1998-1999] *La pertinence renouvelée du droit des obligations* Back to Basics: The Continued Relevance of the Law of Obligations (Cowansville: Yvon Blais 2000), pp. 137 et seq.; Louise Rolland 'Les figures contemporaines du contrat et le Code civil du Québec' in *McGill Law Journal* 44 (1999), pp. 903 et seq.; Horatia Muir Watt 'Du contrat relationel: Réponses à François Ost' in [Association Henri Capitant des amis de la culture juridique française] *La relativité des contrats* (Paris: Librairie Générale de Droit et de Jurisprudence 1999), pp. 169 et seq.

[6] Murielle Fabre-Magnan 'L'obligation de motivation en droit des contrats' in *Études offertes à Jacques Ghestin* [note 4], pp. 301 et seq.

[7] I share the opinion that "we should therefore give up making 'contract' a concept and agree instead to reduce it to the more modest, but more precise role of a legal notion, whose sole justification can only be a functional one". Ghestin 'Le contrat en tant qu'échange économique' [note 1], p. 81.

[8] Thus, "what must be, generally, sought is that each party have an emotional interest to put into contract, this interest, this particular utility being, as we have seen, the very engine of that party's will. A priori, it is necessary and sufficient that each party be able to rationally consider that they receive more, or in any case something more useful for themself than that of which they are deprived". *Ibid.*, p. 97.

[9] According to an author, "it is indeed very likely that most contracts comprise at least one element which is intuitively felt as a potential of humanity—of 'relationality'—looming under the tenuous terms of the obligations". Horatia Muir Watt 'Du contrat »relationnel«' in *La relativité du contrat* Travaux de l'association Henri Capitant – Journées nationales (Paris: Librairie Générale de Droit et de Jurisprudence 2000), pp. 169–179 on p. 172.

[10] Ghestin does not deny this when he writes that "the contract must be intended to produce effects of law, a condition necessary for the wills to receive their full significance. On the hierarchical level that is its own, the contract causes the creation of legal norms. It requires that those who will be subjected to a rule take part in

Now, the context of the over-consumption of products and services, just as much as the proliferation of adhesion contracts, have inevitably contributed to the fact that the contractual grounds of positive law are once again called into question and have stopped making juridical sense. Thus, in contemporary Quebec law, many protective rules contravene to the principles of the general theory of contract, a phenomenon that appears as inevitable as it is desirable in the eyes of lawyers. The consumer—understood in a general sense—is vulnerable on the strategy level (domination of the s t i p u l a t i n g party), on the symbolical level (strong commercial requests) as well as on the systemic level (tool produced on a large scale), and these situations of vulnerability have become "normal and often standardized in contemporary society".[11] Such sensitivity to the control of the contractual relationship was not completely absent from the legal culture of Quebec during the last century. However, it is especially in reference to the fuzzy concepts of "good faith", the "utmost good faith", equity, or "contractual morals" that contract law has especially developed. These concepts have made a dramatic comeback in the area of justifications for contractual obligations these past years, thereby taking the form of an expression of post-modernity in law.[12] By themselves, these concepts do not contribute at all to a new understanding of the contractual relationship. This production of normative nonsense, ever present in the context of mass contracts, is undoubtedly representative of a more general state of facts, namely that of the whole of the legal field.[13] It is in the attempt of coping with this shortfall to be found, among other things, in the crisis of the contract, that jurists must try to establish a new contractual paradigm based not on an individual notion of the contract—namely the meeting of two opposing minds and the consideration of the facts that have brought about this f u s i o n to establish the obligations part (art. 1426 of the *Code Civil du Québec*)—but on the quintessentially intersubjective, social and human, even polyphonic, nature of the contract. This would contribute to a normative revival, falling under the on-going project of legal modernity.

If the contract is a c o m m o n p u r p o s e of the parties, how was it possible to get to the generalization of the adhesion contract in legal practice, without a substantial theoretical adjustment having succeeded in attaching itself to such a reality? This question, which may seem naive and overused at first sight, appears to us on the contrary of a great theoretical relevance. If decrees and legislative adjustments have warded off the most critical contractual injustices during last decades, by making contractual justice a minor issue and supplanting it with its economic and social u t i l i t y, it seems in-

the creation of the rule itself. It is necessary, in this respect, to be careful not to confuse the ability to create the rule with that of taking part, through negotiation and dialogue, in its development. It is not the negotiation that makes the contract, but the creation of a rule by an agreement of wills. The adhesion contracts remain contracts inasmuch as the negotiated payments remain rules imposed to those subjected to them". Ghestin 'Le contrat en tant qu'échange économique' [note 1], p. 85.

[11] Jean-Guy Belley 'La Loi sur la protection du consommateur comme archétype d'une conception socioéconomique du contrat' in *Mélanges Claude Masse* En quête de justice et d'équité (Cowansville: Yvon Blais 2003), pp. 121–147 on p. 139. See, additionally, and more generally about the issue of vulnerability in law, Bjarne Melkevik *Considérations juridico-philosophiques* (Québec: PUL 2005).

[12] M. E. Storme 'La bonne foi dans la formation du contrat' in [Travaux de l'Association Henri Capitant 1992] *La bonne foi* (Paris: Litec 1994), pp. 459 et seq.

[13] Simone Goyard-Fabre 'Le dialogisme: un chemin pour surmonter la crise du droit?' in *Du dialogue au texte* Autour de Francis Jacques (Paris: Éditions Kimé 2003), pp. 126 et seq.

evitable today to be interested in the reverse of legitimacy of these legal rules which one could liken to emergency measures. As far as contracts are concerned, for example, it has been stressed that one puts forward

> "the most brilliant element of the system, that which praises the autonomy of everybody's will, from the r e a l petty craftsman to the huge l e g a l entity of international dimensions, which are on an equal footing (since the language of law proclaims the equality of all), and they conceal at the same time the planning and the government hidden by the metaphorical organization, which clandestinely exerts an ever greater control over the regime and includes an ever larger part of the world".[14]

In such a context, the question remains of how to l e g i t i m i z e the contemporary contractual paradigm that is the adhesion contract? In other words: how to approach the obligation relationship, in the context of a mass contract, as a true legal creation (that is to say the inception of the contractual obligation) in several voices, and therefore as the fruit of the will of the parties and not as a trope?[15] In the meantime, the place reserved for the will of the parties has faded, so much so that what is left of voluntarism today is no more than bait for many persons subject to trial whereas the contract is perceived as an economic good.[16] If the goal of the contract remains the same (to bind the parties), must rules change—and can they change—so as to give a normative sense which is accessible to both parties? Is the contract a form of d i s c o u r s e for the parties? Is its role that of c o m m u n i c a t i n g a commitment? If that will prove true, albeit partly, one should then admit that the contract has an intersubjective nature which is precisely the one refused by the reification of which it seems to be the object today more than ever.

2 Acknowledging the Reification of the Contractual Bond?

Axel Honneth has recently used the concept of reification, developed mainly by Lukács, in order to invigorate critical theory.[17] Csaba Varga also considered Lukács' work on reification[18] and it is in this respect that Varga's works were influential in the theory of contract. Today, in order to allow a better comprehension of this l a w o f t h e p a r t i e s that the contract should be and remain, can a critique based on the concept of reification be helpful in the matter of the intersubjective revival of the rules of the contract? In Lukács' words, is there in the case of the contract a form of colonization of the

[14] Marie-Claude Prémont *Tropismes du droit* Logique métaphorique et logique métonymique du langage juridique (Montréal: Thémis 2003), p. 134.

[15] *Ibid.*

[16] On the "dangers" of the adhesion contract, Belley, in reference to the work of Arthur A. Leff, speaks of "perceiving the consumption contract as what it has been in most cases, i.e. as a written document, prefabricated by legal advisors, printed in millions of copies, distributed through all the channels of a marketing network, promoted in advertising campaigns, offered to consumers, bought by them and, to some extent, consumed as it is being used. Seen from thus phenomenal perspective, the contract becomes itself an object of consumption, a standardized technical asset, a possibly defective and potentially dangerous product. Consumer protection should consequently be conceived as a public operation of quality control of the adhesion contract understood as a product offered to the consumers." Belley 'La Loi sur la protection du consommateur…' [note 11], p. 126.

[17] Axel Honneth *La réification* Petit traité de Théorie critique (Paris: Gallimard 2007).

[18] Csaba Varga *The Place of Law in Lukács' World Concept* (Budapest: Akadémiai Kiadó 1998).

world inhabited, let's say, by contracting parties—but one should also speak undoubtedly about the world of lawyers—falling under a uni-dimensional generalization of commercial exchange to any social, ergo contractual, interaction, so that each contracting party sees the contractual relationship in its entirety (the contract in itself, but also the parties to it and the cause of it) as objects? Quoting in part Adam Schaff, Csaba Varga wrote that a

> "concise definition would describe reification as »formulations different from a single and same social bond which consists in dissimulating the interindividual relationship through links between things«. That is, so to speak, nothing other than the objectified functioning of the objectivations of the social being and the objectified representation of this functioning".[19]

Even if this "objectified functioning of objectivations" seems *a priori* inevitable in the case of civil law, does it not contribute, paradoxically, to the loss of normative sense for the contracting parties who see themselves, in general for one of the parties, excluded from the normative process and m a n i p u l a t e d according to the interest that he represents for his synallagmatic counterpart? In other words, is there any danger that the contractual process and its actors be alienated today? It is therefore to this other concept of classical Marxism which is the concept of *alienation* that one ought to resort. Now, if as an objective system law can only entail reification, alienation is obviously not its object. Thus, Varga wrote:

> "Law is an objectivation whose objectified functioning and the objectified representation of the aforesaid functioning produce reification. Thereby, law is a phenomenon—historically established—*a priori* reified, characteristic, which persists, as a specific determination, even as considerable efforts are being deployed in order to abolish it (for example in today's societies). However, law as a reified structure does not produce in itself the phenomenon of alienation."[20]

But if the objectivation of law is necessary, it is as imperative to work at making it possible. Still according to Varga:

> "The objectivation of law and its organization in formally rationalized structures are indispensable to a given degree of social development [...]. It is therefore necessary for us to arrive at the conclusion that the linguistic objectivation is not, in theory, more than a reference point, whose only relevant r e a l i t y from the point of view of the social existence is given by its status—its practical application, etc.—corresponding to the social being existing precisely as in such or such moment. Hence another conclusion results, namely that, in theory, there only exists a manipulated form of law; a law that is in the process of being ceaselessly manipulated. In theory, therefore, law is a form of continuity always in motion in which there remains nothing static and identical with itself except the text, this concrete totality of linguistic signs, etc., considered as a base of reference."[21]

[19] Csaba Varga 'Chose juridique et réification en droit: Contribution à la théorie marxiste sur la base de l'Ontologie de Lukacs' in *Archives de Philosophie du Droit* 25 (1980), pp. 385–411 at p. 399.

[20] *Ibid.*, p. 409.

[21] Csaba Varga 'La question de la rationalité formelle en droit: Essai d'interprétation de l'*Ontologie de l'être social* de Lukács' in *Archives de Philosophie du Droit* 23 (1978), pp. 213–236 at p. 234.

This constant manipulation of law—and of the theory of contract—must thus be a constant subject of critical studies, at the risk of losing any kind of objectivity. It seems to us that such Marxism-influenced remarks can s t i l l challenge lawyers today inasmuch as contracts are concerned: can the reification of the theory of contract bring about its own alienation? Let us remind the importance of distinguishing between "reification", "alienation", and "objectivation".[22] On this subject, Varga wrote that:

> "The meeting between reification and other social conditions produces alienation as an objective phenomenon with all its subjective consequences. Since, thanks to the complex dialectic of social processes, reifications not alienated in themselves can, with the help of other factors, exert an effect of alienation, both the reification of law in general and the construction of a network of concepts of fictitious and artificial »things« in particular, can at the same time constitute the source of the forces of alienation. It is on this level that the »thing« binds itself to the problem of the reification in law. Indeed, law is in itself a reified system. Hence, by means of the concept of »thing«, entirely artificial and fictitious, the construction of new reifying structures onto law would only be justified if it proved necessary to the functioning of a social existence of law—i.e. if its effect did not consist any longer of the mere negative fact that it obscures and conceals, and that it gives expression, as pure »things«, to the deeply social economic and legal processes which proceed in fact behind the facade of law."[23]

Is this not what is mostly obtained with the economic and utilitarian approach of the contract? It is difficult not to recognize that lawyers and contracting parties seem today placed in front of a "façade" which prevents them from perceiving the various and complex social dimensions of the contractual bond. For one should realize that the objectivation of law itself is not the result of chance, far from it.[24] And in this line of thought, Varga adds:

> "Such methodical frames of thought had given a form in which modern coding—recreating law as a system manageable also from the point of view of logic—had taken place; of course, as a material force, it was the specific development of feudal absolutism that had determined it. The rising strata of the bourgeoisie required a legal regulation guaranteeing a rational calculation and a univocal security in the exchange of commodities, on the one hand, and with this request—while presenting a community of interests in the victory over particularism and feudal privileges—went hand in hand the interests of the absolute monarch who, while endeavouring to organize the monetary businesses of the country as monetary businesses of the state, to organize the armed forces that ensured his power as an army of the State, to encourage the industry and the trade as a support of the latter, and finally to make the king's jurisdiction and public administration effective and powerful factors of unity, brought to life an army of civil servants, organized in a bureaucratic way and based on a professional qualification, whose unified actuation as an impersonal order supposed at the

[22] Thus, "objectivation, reification, and alienation are distinct specific categories which never overlap, although they correspond to a historically identical evolutionary process: the objectivation can have an effect as a reinforcement of the reification, whereas the reification has an effect as a reinforcement of the alienation". Varga 'Chose juridique…' [note 19], p. 397.

[23] *Ibid.*, p. 411.

[24] Varga 'La question de la rationalité formelle…' [note 21], p. 221.

> same time a sufficiently detailed, comprehensive regulation, ensuring foreseeability and univocity."[25]

However, in addition to the development of the contracts of subjection and the appeal to the utility of the contract in order to justify the existence of unbalanced relationships, doesn't contemporary analysis of the contract, through an exclusively economic approach, find the same results today? Quoting Engels, Varga adds once more:

> "»In a modern State, law should not only translate the general economic state and be its expression, but also be the *coherent* expression, without intrinsic contradictions, of it. To this purpose, the exact reflection of the economic conditions is more and more often made to disappear.« Consequently, the assumption according to which law is the reflection of the economic relationships, in its immediacy is nothing but an appearance."[26]

This directly challenges the contractual approach according to which the contract is but a small-scale reflection of an inevitable liberal economy. Thus, when Csaba Varga writes that certain legal concepts rise from a long historical development,[27] it is difficult not to think of the concept of contract. If it seems obvious that Varga did not think directly of the concept of contract (which, to be strictly accurate, is not a legal "thing", but an "act" in civil law), shouldn't one wonder whether the very concept of "thing" in civil law did not develop (just as the whole of our intersubjective relationships seem to have reified themselves) so as to include contract today?[28] Still within the range of the widening of the concept of "thing", Varga explains:

> "The later broadening of the concept of »thing«—particularly during the development of bourgeois society—already occurred like a chain reaction. Not only law and the credit would become »thing«, but the same would apply to the workforce. And insofar as human knowledge becomes a force of production, professional work would transform into »things«, then its products, ideas also, just like, through copyright, its newly autonomous attributions. In the cycle of commodities exchange, the money would become a mediated agent. It would have an abstract value, just like stock exchange titles or commercial drafts thereafter, which only incorporated the rights relative to a certain value; which means that there are real things whose physical-sensorial nature has become, precisely, of a secondary interest."[29]

Such an o b j e c t i v a t i o n, at least in the case of the contract, undoubtedly moves us away from the s o c i a l i z a t i o n of the contractual relationship, from the taking into account of the interpersonal aspect within the contract. In a general way, Varga wrote:

> "The objectivation is at the same time the increased socialization of society and its vector; the objectivation is none other than »the really objectified and hence really

[25] *Ibid.*, p. 223.
[26] *Ibid.*, p. 230.
[27] Varga 'Chose juridique…' [note 19], p. 385.
[28] *Ibid.*, p. 387.
[29] *Ibid.*, p. 389.

> objective existence of the social being«. […] There is no doubt that law is an objectivation. Without taking into account for the moment its specific features, one could note that law is a product of the praxis of man, more exactly of his conscious teleological projection that aims to control the social relations of man and, thus, to control the entirety of social existence, to exert its dominion over these relations and over this existence."[30]

While reading such remarks, the jurist will ask himself: doesn't the reification of the contract through economic analysis and the utilitarian approach contribute on the contrary to "de-socialize" the contractual bond?

From another point of view, according to Axel Honneth—and contrary to Lukács' position, considered to be too general—, the contractual relationship would prevent reification because of the minimal legal rights which it guarantees to the contracting parties (among other things, the fundamental rights[31]?). But insofar as even the basic rights tend more and more to oppose not humans facing difficulties of a legal nature, but recipients of "rights" who seek to put them forward on the legal market like the businessman puts forward his capital, it is difficult to support the idea that the contracting parties remain "persons". In the field of general theory (and thus of the normative sense to be brought to the contractual commitment), the parties and the bond they forge are perceived more and more on an economic[32] or purely utilitarian basis. In the case of insurance contracts, for example, the acknowledgment of reification appears obvious insofar as the policyholder is first and foremost perceived as a "risk", which must be observed objectively. To this should be added the perspective imposed by shareholders[33]. The same goes with financial products, where the contracting parties are also manipulators of risks. In this context, the (human but also legal) persons who initiate a contract are first sensitive to the i n t e r e s t s concerned. Can one speak here about "pathology of the social" and "of disturbing elements", as Honneth does in a more general way? Can a r e t u r n to

[30] *Ibid.*, p. 398.

[31] "All these remarks on mere observation as a dominant type of behavior in the life of the worker, in his relationship with nature, in his social commerce even, converge towards a thesis that concerns the theory of society: the thesis according to which the generalization of commercial exchange during the capitalist era constitutes the single cause of these phenomena of reification. As soon as the subjects become constrained to achieve their social interactions in the prevalent form of the economic exchange of merchandise, they would be led to perceive themselves, their partners in these interactions, as well as the goods exchanged according to the pattern of objects, and thus put themselves in such a relation to the surrounding world that is, once again, that of observation. To this marrowy thesis it is difficult to oppose a single, central objection, as so many of its components are problematic. The very reference to the fact the reification of other people occurs only in the circumstance in which the preliminary recognition of their quality as persons is forgotten underlines the frailty of Lukacs' equivalence between the exchange of goods and reification. Indeed, in the economic exchange, the partner of the interaction preserves his statute of a person, in the legal sense of the term." Honneth *La réification* [note 17], p. 107.

[32] Here, I wish to highlight the important contribution of my colleague, Prof. Michelle Cumyn, of whose enlightenment in this matter, and in many others, I benefited during our joint teaching of a graduate seminar on contemporary contract law.

[33] "The stock exchange reflects the value of the companies through the eyes of the shareholder and is blind to the value that the companies produce for all the other groups involved: employees, banks, regions, the State, subcontractors, purchasers, and consumers". This type of capitalism has been described as a "shareholder capitalism" by Axel Honneth *La société du mépris* Vers une nouvelle théorie critique (Paris: La Découverte 2006), p. 282.

certain Marxist concepts help jurists prune the contract of the economic ramifications which were grafted to it from everywhere for decades, and which tend to choke the chiefly social character specific to the legal field to which it is attached and which justifies its existence?

According to Varga, the jurist must be integrated into the idea of reification since the "existential functioning of law in modern times requires that the law expert adapts and is integrated into the reified system, thus producing himself the ideology which fits best this functioning according to its own postulates".[34] As lawyers, that can only challenge us and prompt us to ask whether contract law is not today in the process of losing "its own postulates" in favour of those of the economy? Isn't this the "danger" of "a new" reification that Honneth exposes and which seems already discernible in contract law? A form of reality, an observation that imposes itself and that the jurist ought to acknowledge? Thus, the reification of the contract would take the form of "reality".[35] Rather, it would be necessary for the jurist to try to see beyond the reifying structure. Thus, one should address the possibility that the contract as an "economic good" has become a "reality" and has ceased to be a mere tool of legal structuring. The parties in a contract (or at least one of them, the vulnerable party on whom the contract is imposed) precisely "controlled" by the reification that the contract has become by generalizing its analysis from the economic and utilitarian viewpoint? The contractual "thing" would present itself as an "artificial human construction" that tends to fall into the category of "an autonomous vision of the world, to rise to the height of a cognitive category, of an ideological expression which one fine day starts to control us instead of being controlled by us".[36] From this point of view, the importance that takes the taking into account of the value of the respective exchanges of the parties in the contractual relationship, as well as the attention given to the various theories—relational, of justice and utility, of economic analysis of the contract—, all seem to become part of process of reification in the sense given by Honneth nowadays. In the words of this latter:

> "The social cause which explains at the same time the generalness and the widening of the reification, according to Lukacs, is the extension of the commercial trade which, with the establishment of capitalist societies, has become the dominating mode of intersubjective activity. As soon as the subjects start to regulate the relationships they maintain with their counterparts on the mode of the exchange of equivalent commodities, they are constrained to register their connection to the environment in a reified relationship; they cannot perceive any more the elements of a given situation except by evaluating the importance of these elements with the yardstick of their selfish interests."[37]

This is, also, Ghestin's conclusion when he writes that:

> "What must be sought for generally is that e a c h p a r t y h a v e a n e f f e c t i v e i n t e r e s t t o t a k e o u t , t h i s i n t e r e s t , t h i s p a r t i c u l a r

[34] Varga 'Chose juridique…' [note 19], p. 402.
[35] *Ibid.*, p. 400.
[36] *Ibid.*, p. 395.
[37] Honneth *La réification* [note 17], p. 22.

> utility being, as we have seen, the very engine of its will. It is necessary and sufficient, *a priori*, that each party might rationally consider that it receives more, or in any case something more useful for itself, than that of which it is deprived."[38]

Such a generalized notion of the contractual relationship must be put in perspective with these other remarks by Honneth:

> "The reification constitutes a "posture" [*Haltung*], a mode of behavior so developed in capitalist societies that one can speak in connection to it about a "second nature" of man. One can see thence that the "reification" according to Lukacs cannot be conceived any longer as immoral behavior, as an infringement on moral principles. So that moral terminology may be relevant in the analysis of this posture, it would be necessary that a subjective intention intervene. Unlike Martha Nussbaum, Lukacs is not interested in knowing from which moment does the fact of reifying other people become equivalent to expressing contempt towards them. In his opinion, all the members of capitalist societies adopt, by their very socialization, the system of reifying behavior, so that for Lukacs the instrumental treatment of the other is at first just a social fact, and not a moral fault."[39]

With that, and with a bit of cynicism, given the current perspective on the contract, we could say, borrowing Mauss' formula, that the contract is a "total social fact"… While insisting on the necessary distinction between "reification" and "depersonalization",[40] Honneth challenges Lukács over the issue of the minimal protection that the contract offers to the individuals who would benefit subsequently from the legal status of person. But in a context of proliferation of adhesion contracts and quasi systematic appeal to an economic analysis of contracts, this minimal protection is perhaps nothing but bait? There is the rub: is such "a first experience of recognition"[41] still present in so far as contracts are concerned? Honneth does not forget anyway to stress that:

> "The spectrum of social evolutions which reflect today such tendencies to reification goes widening—from all that has gradually emptied the labor contract of its legal substance to the development of the practice consisting in seeing the potential of individual gifts of the child as an object of genetic research and manipulation. In these two cases, we are in danger of seeing the institutionalized barriers that had so far prevented the development of a denial of the first experience of recognition crumble down."[42]

All things considered, when faced with such a remark, how can we to seek to re-humanize the contractual relationship on a theoretical level? With regard to the contract of private law, in a paradoxical way, the reification can play at the same time the role of enemy and of ally, since the contract is to some extent doubly reified or rather it is reified on two different levels. First, it is and must be reified by law itself, insofar as it is objectified,

[38] Ghestin 'Le contrat en tant qu'échange économique' [note 1], p. 97.
[39] Honneth *La réification* [note 17], p. 27.
[40] *Ibid.*, p. 109.
[41] *Ibid.*, p. 115.
[42] *Ibidem.*

which should assure us of a legal and social takeover. The reification of the contract as an ally, I think, should help jurists take a critical distance in front of a contractual approach which is essentially economic and utilitarian. And it is here that the second, most obvious, level of reification, namely that which turns the contractual relationship into an "object", an exchangeable commodity, enters the game. Thus, the contract is justified by itself and for itself, and it exists as a value worth taking into account, which can prevents it from finding its theoretical markers inside the legal field. The contract as a pre-written "thing", the contract "produced" on a more or less large scale, the contract as a non-negotiation, a non-agreement, excludes the human and hence the legal connection. Thus, the contract de-socializes itself, de-humanizes itself. Worse, by excluding the social actors who are the only ones to allow the inception of the legal norm, the contract viewed as a good cannot create rights and obligations, at least not in a society where the parties—at the same time authors and recipients of rights—want to control their legal universe. Hence, the "adherent" to the contract as a good is not enough. The involvement of all the contracting parties is necessary if one wants to avoid the reifying monologism. There is the enemy to fight against. Besides, this is what the following remarks of Varga suggest:

> "In other words, one must consider the professional ideology of legal experts from two angles, namely the ontological and the epistemological angle. From the ontological point of view, the reified functioning of the reified structure requires and creates a reified conscience. At the same time, from the point of view of the epistemological theory, it is necessary to explore the social tendency dissimulated behind »the fantastic form of a relationship of things« so that the active man, seeing beyond reification, may discover the place of the structure in question within the global structure. The socialist science of law does not only take up a function of cognition when it discovers behind the reified mechanism and the reified apperception the place of law and of the lawyer in society. It is precisely that way that it wishes to mobilize the lawyer so that he may take part with a more thorough conscience, i.e. in a more creative way, to the process of the social and legal movements."[43]

In this sense, a dialogical approach of the contract is supposed to create a new contract theory more centred on the rich complexity of human relationships.

3 The Dialogical Way as a Possible Re-humanization of the Contractual Bond

The concept of reification thus makes it possible to warn jurists against an analysis too exclusively centred on the interests of the parties, to the point of forgetting its intrinsic intersubjective[44] aspect. It seems important, in a search of normative sense and re-humanization of the contractual bond, to re-evaluate the p l a c e of the real communication between the contracting parties insofar as the contract remains an act of will. Thereby, I wish to check if a new theoretical approach might facilitate, not the rejection

[43] Varga 'Chose juridique…' [note 19], p. 403.

[44] I would have liked to write "relational" here, but a consequence of MacNeil's important work has been that of focusing the contractual agreement on the sole interest of the parties, who would thus find a "general interest" in the contract.

of the role of the will, but rather that of the dogma of the m e e t i n g of wills, in order to approach the contractual relationship from an angle more intersubjective and thus representative of the polyphonic discourse which constitutes the contract. Consequently, there is one thing under discussion here: the rejection of the voluntarism that is to be found at the base of the contract so as to manipulate it and exploit it, and not the role of the will of the parties in the formation of contracts. To this purpose, several ways can be exploited: Marcel Mauss' theory of the gift, whose results are used and prolonged by certain Francophone sociologists and anthropologists within the Anti-Utilitarian Movement in Social Sciences (M.A.U.S.S.);[45] the contractual solidarism developed by the French lawyer Demogue at the beginning of the 20th century and which has been lately the object of an "updating";[46] various obligations such as that of motivation which forces the parties to raise the veil—so often strategic and valued in the neo-liberal approach—from their contractual "will"; or even a theory derived from linguistics, originally applicable to the literary text and developed by the Russian socio-linguist Mikhail Bakhtin at the beginning of the 20th century: dialogism. It is over this last approach that I would like to ponder as a conclusion of this text, in order to underline its possible theoretical repercussions, favourable to a contemporary re-understanding of the contract.

The concepts of polyphony and dialogism reveal the non-uniqueness of the subject which expresses itself or, in other words, the presence of a multitude of voices in every utterance—and thereby also in the contract—even when there does not seem to be *a priori* more than one producer of discourse—as it is the case with the adhesion contracts. Thus, when the moment to interpret the meaning of a contract imposed by a party comes, the postulate of single s p e a k i n g subject according to which an utterance would only express the words of the one who has produced it is inverted. As soon as one goes beyond the mere producer of the utterance in order to dwell on the various representations delivered by the language, the meaning is no longer delivered as a homogeneous representation, but rather as a form of abstract dialogue (dialogism) or as a concert of orchestrated voices (polyphony).[47] Let us recall that at the origins of the concepts of dialogism and polyphony is the Russian socio-semiotician Mikhail Bakhtin as well as some of his contemporaries (the Bakhtin Circle[48]) or of current thinkers who seek to remain close to Bakhtin's thought.[49] Also, for a few decades now, Oswald Ducrot has introduced

[45] Alain Caillé *Dé-penser l'économie* (Paris: La Découverte 2006); Alain Caillé *Anthropologie du don* (Paris: La Découverte 2007); Jacques T. Godbout *Ce qui circule entre nous* Donner, recevoir, rendre (Paris: Seuil 2007).

[46] Cf. note 4.

[47] Andy Van Drom 'Le bruissement des voix discursives: polyphonie ou cacophonie? Panorama des principales théories de dialogisme et de polyphonie en linguistique' [Research paper] (Québec: Université Laval, Juillet 2007), p. 2.

[48] See, by Mikhaël Bakhtin, *La poétique de Dostoïevski* (Paris: Seuil 1978), 'Du discours romanesque' in his *Esthétique et théorie du roman* (Paris: Gallimard 1984), pp. 83–233 and *Le marxisme et la philosophie du langage* Essai d'application de la méthode sociologique en linguistique (Paris: Les Éditions de Minuit 1977). On Bakhtin, see Tzvetan Todorov *Mikhail Bakhtine* Le principe dialogique (Paris: Seuil 1981).

[49] See, by Jacques Bres, 'Bakthine, une paternité rétrospective pour la praxématique' *Cahiers de praxématique* 10 (1988), pp. 33–55, *L'autre en discours* (Montpellier: Université Paul Valéry 1999), 'Savoir de quoi on parle: dialogue, dialogal, dialogique; dialogisme, polyphonie…' in *Dialogisme et polyphonie* Approches linguistiques, dir. Jacques Bres et al. (Bruxelles: De Boeck & Duculot 2005); Jacques Bres & A. Nowakowska 'Dialogisme: du principe à la matérialité discursive' in *Le sens et ses voix* Dialogisme et polyphonie en langue et en discourse (Paris: L. Perrin 2006), pp. 21–48.

the concept of polyphony in linguistics and the works of several Scandinavian polyphonists, at the origin of the Scandinavian Theory of linguistic polyphony (*ScaPoLine*), seek to anticipate the influence of polyphonic phenomena on the interpretation of texts.[50] It is thus with the concepts of dialogism and polyphony that one should confront the contract and its general theory.

By dialogism, one can understand an anthropology of otherness.[51] Todorov wrote:

> "I cannot perceive myself in my appearance, feel that it includes me and expresses me… In this sense, one can speak of man's absolute aesthetic need of others, of this activity of the others which consists in seeing, keeping, gathering, and unifying, and which by itself can produce the external personality; if others did not produce it, this personality would not exist."[52]

To remain in the same tone, one could say that, for the contracting party, that means that the ego is in continuous relation and communication with the alter, without which under no circumstances would it exist and give place to a legal relation by means of the contract. According to Bakhtin, such a constitutive alienation is perfectly reflected in the language, which we inherit, on the one hand, from an other, and that we direct, on the other hand, towards the other. This makes Todorov say that:

> "No member of the verbal community ever finds words of the language that are neutral, free of the aspirations and the evaluations of the other, uninhabited by the voice of the other. Not, it receives the word through the voice of the other, and this word remains filled with it. He intervenes in his own context starting from another context, penetrated by the intentions of an other. His own intention finds a word already inhabited."[53]

Consequently, according to Bakhtin, any linguistic activity—and thus the contract—is inhabited by dialogue, insofar as each utterance is in relation, in interaction, with other utterances. Altogether, "an isolated utterance cannot exist. An utterance always presupposes utterances that have preceded it and that will follow it; it is never the first, never the last".[54] Likewise, "there is no such thing as a 'meaning in itself'. The meaning exists only for another meaning, with which it exists jointly".[55] Such a dialogue can be exteriorized by the alternation of speech, which we will name the dialogal. But it can also remain interiorized, insofar as the utterance is directed towards other utterances "in the principle of its production as well as of its interpretation",[56] which will constitute the dialogical. This orientation towards the discursive otherness introduces then the other into the one[57] so

[50] See, by Oswald Ducrot, *Dire et ne pas dire* Principes de sémantique linguistique (Paris: Hermann 1980), *Le dire et le dit* (Paris: Minuit 1984) and 'Quelques raisons de distinguer »locuteurs« et »énonciateurs«' in *Polyphonie linguistique et littéraire* 3 (2001), pp. 19–41.

[51] Van Drom 'Le bruissement des voix discursives' [note 47], p. 5.

[52] Todorov *Mikhail Bakhtine* [note 48], p. 147.

[53] *Ibid.*, p. 77.

[54] Mikhaël Bakhtin *Esthétique et théorie du roman* [note 48], p. 355.

[55] *Ibid.*, p. 366.

[56] Bres & Nowakowska 'Dialogisme…' [note 49], p. 23.

[57] Jaqueline Authier-Revuz *Ces mots qui ne vont pas de soi* (Paris: Larousse 1995).

that an utterance makes no sense except for in its relation to the other. In the case of the contract, now when individualism and the strategic defence of one's own interests modulate the interpretative comprehension of the contractual bond, such an approach that introduces the d i s c u r s i v e o t h e r n e s s appears relevant to the critical distance necessary to the reception of any legal theory. Thus, it is the interpretative approach of the contract that could be transformed if jurists took into account the works of Bakhtin which tend to establish the fundamental links between all discursive utterances:

> "The object of the discourse of a speaker, whatever it may be, is not an object of discourse for the first time in a given utterance, and the given speaker is not the first to speak about it. The object has already, so to speak, been spoken, discussed, clarified and judged variously, it is the place where different points of view, visions of the world, tendencies intersect, meet, and separate. A speaker is not the biblical Adam, faced with pristine objects, not yet designated, that he is the first to name. […] An utterance, however, is connected not only to the chain-links that precede it, but also to those that follow it in the chain of verbal exchange. […] [T]he utterance, from its very beginning, is worked out according to the possible answer-reaction, for which it is worked out precisely."[58]

Moreover, it should be considered that the contracting party who subjects—imposes even—a contractual text to his counterpart "never makes anything but build a schematization in front of his audience without 'transmitting' it to them strictly speaking".[59] In this sense, it should be recalled that any schematization, and the contract in particular, is a co-construction and that thus it "has a role of showing something to somebody; more precisely, it is a discursive representation directed towards a recipient of what its author perceives or imagines of a certain reality".[60] Grize clarifies thus the postulate of dialogism:

> "A schematization, at the same time process and result, is generated by a double activity. One is in the presence of a phenomenon of induction or resonance, as physicists say […]. When a variable current goes through a reel *A*, it induces a variable current in the reel *B* placed in its vicinity, but one should pay attention to the nature of the reels. The current induced by resonance will be identical to the primary current only if the two reels themselves are identical. Now, it is at the very least implausible to think that two speakers *A* and *B* can be identical. In fact, they never are, if only because it is *A* who initiates the discourse. Consequently the isomorphism between the construction and the re construction of a schematization is only a purely theoretical borderline case and it only occurs in formal logical-mathematical texts; these are calculations, not discourses."[61]

How should the contract be concerned with such a dialogical conception? Goodrich argues that the contract "belongs at a specific textual community and its institutional

[58] Mikhaël Bakhtin *Esthétique et théorie du roman* [note 48], p. 300.
[59] Jean-Blaise Grize *Logique et langage* (Paris & Gap: Ophrys 1990), p. 21.
[60] Jean-Blaise Grize *Logique naturelle et communications* (Paris: Presses Universitaires de France 1996), p. 50.
[61] Jean-Blaise Grize 'Argumentation et logique naturelle' in *Texte et discours* Catégories pour l'analyse, dir. Jean-Michel Adam Grize, Jean-Blaise Grize & Magid Ali Bouacha (Dijon: Éditions Universitaires de Dijon 2005), pp. 23–27 on p. 24.

meaning must be established according to this community",[62] but he also underlies how the contract "establish[es] the genre of law [and] acts as an antidote to the other discourses".[63] Goodrich thus considers the contract as an act of communication. Following Bakhtin, we can make a distinction between the primary and secondary genres of the verbal exchange. Depending on the "communicative nature" of the verbal exchange, Bakhtin distinguished the everyday life or "primary genres" ("natural" and spontaneous productions) from their derived—and reified!—productions, belonging to the "secondary genres" ("constructed" and institutionalized productions).[64] According to Maingueneau and Cossutta, the "symbolic" finality of these "secondary genres" determine the values of a certain field of discursive production. Consequently, they prefer the term "constituent genres", further identifying that "constituent are primarily the religious, scientific, philosophical, literary, and legal discourses".[65]

If the contribution of the dialogical approach to the contract theory seems stimulating, its many potential pitfalls should however be underlined. Thus, the "fracture lines"[66] appear in many places within the various empirical and theoretical studies, whether they are linguistic, literary, or discursive. Nevertheless, a holistic and philosophical approach of dialogism could favour the integration of dialogue and otherness within the theory of contract, and thereby stimulate its re-humanization. No doubt that there is here a question of operating a major epistemological change. Thus, in a society where the adhesion contract is less and less a producer of sense, dialogism:

> "opens itself to an interpersonal horizon, the "true" dialogue, even when the disagreements stated in presence are complex, [and] it reveals its fruitfulness: it is a producer of sense. Nothing is as essential as this production of sense to avoid logomachy and semantic uncertainties, when it is a question of contract law, of taxation rules, or of the norms of international law: not only that familiar concepts can, through relevant criticism, be specified, but the old or worn-out, even obsolete, concepts can be re-evaluated and can therefore answer to the prerequisites that the present context imposes."[67]

It would consequently be necessary to be able to consider the development of the contractual bond, of the theory of contract as a whole, from a late-modernity point of view, always based on a normative reason. It is thus a question of exploring the avenues that dialogism could offer to contract matters, while wishing that these latter be able to prove sense-producing, both for the contracting parties and lawyers. Through the intersubjective comprehension that it brings to the fore, dialogism would make it possible for the contract to remain an act of will and would facilitate the justification of the normative constraint which the private-law exchange of obligations generates. All things considered, it is a question of checking if contemporary contract law has reached "a turning point in

[62] Peter Goodrich 'Contractions' *Droit et Société* (1989), No. 13, pp. 321–342 at p. 326.
[63] *Ibid.*, p. 340.
[64] Viorel-Dragos Moraru *Research paper* (Québec: Université Laval, Juillet 2007), p. 28.
[65] Dominique Maingueneau & Frédéric Cossutta 'L'analyse des discours constituents' *Langages* (1995), No. 117, pp. 112–125 on p. 112.
[66] Van Drom 'Le bruissement des voix discursives' [note 47], p. 41.
[67] Goyard-Fabre 'Le dialogisme…' [note 13], p. 131.

its evolution where change through an exception to the general theory of contract, as securing as it may have appeared for a long time, is not sufficient any more".[68] It is thus important to seek a new doctrinal force which would make it possible to fill the vacuum of legitimacy left by the crumbling of contractual voluntarism (and the precepts that it supports: the obligatory force of the contract, the autonomy of the will, the formation of the contract), while integrating—and specifying—the various contemporary elements of analysis and control which good faith, contractual morality and obligation equity have become. A dialogical approach, through the intersubjective consideration of the contract that it would create, would legitimize the intervention of the judge in the matter of contractual interpretation and it would make it possible to avoid the postmodern pitfalls of the good faith and of the contractual morality.

4 Conclusion

The current reification of the contractual bond encourages jurists to approach the problems from a new dogmatic angle, using theoretical tools borrowed, why not, from linguistics and philosophy, in order to allow the development of a theory of contract that cannot be unaware of the relational dimension of the contract as a social fact, even as a social artefact.[69] Dialogism sustains a calling into question that never ceases to be necessary. One should however be aware that the dialogical approach itself has been the subject of multiple interpretations and it has been in constant re-evaluation since its first development in the work of Bakhtin. Thus, a whole series of semantic complications must be cleared up to offer a rich and innovative theoretical base and to prevent that "the dialogical way be one of those bulky ways that lead nowhere".[70] The challenges are important, but the need for a re-humanization and a re-socialization of the contract is at least as important.[71]

FACULTY OF LAW
LAVAL UNIVERSITY, QUÉBEC
ANDRE.BELANGER@FD.ULAVAL.CA

[68] Catherine Thibierge-Guelfucci 'Libres propos sur la transformation du droit des contrats' *Revue Trimestrielle du Droit Civil* (1997), p. 372.

[69] M. C. Suchman 'The Contract as Social Artifact' *Law & Society Review* 37 (2003), pp. 91 et seq.

[70] Goyard-Fabre 'Le dialogisme…' [note 13], p. 132.

[71] The author would like to thank Viorel-Dragos Moraru who worked on the translation of this text.

The Concept of Validity: Some Remarks on the Theories of Carl Schmitt, Hans Kelsen and Alf Ross

Jes Bjarup

It is a great pleasure for me to pay tribute to my friend Csaba Varga who, like me, is getting older and it gives me the opportunity to reciprocate his generous remarks in his tribute to me.[1] There is a saying by Aeschylus, "Old men are always young enough to learn, with profit". I have profited from reading his article on the relation between Hans Kelsen (1881–1973) and Carl Schmitt (1888–1985). Varga draws attention to the fact that Schmitt advances "a counter-concept" to Kelsen's theory (p. 527), and I wish to offer some critical comments in Section 1. Varga writes in an article that "the entire question of the validity of the law seems to be overemphasized in legal thinking on the continent of Europe".[2] I ask for forgiveness to consider the question once more but the concept of validity is crucial for Alf Ross (1899–1979) who also offers his "counter-concept" to Kelsen's theory (p. 527), to be considered in Section 2.[3]

1 Hans Kelsen and Carl Schmitt

As Varga points out, Schmitt and Kelsen lived in times of economic, social and political crisis, experiencing Hitler's ascent to power in Germany in 1933. For Varga, Schmitt's "reaction was typical of intellectual, official and financial circles, significant there and then. Neither his origin, nor his values nor his commitment to the advance of his nation pre-destined him to an immediate, principled and uncompromising con-

[1] Csaba Varga 'Change of Paradigms in Legal Reconstruction (Carl Schmitt and the Temptation to Finally Reach a Synthesis)' in *Perspectives on Jurisprudence*. Essays in Honor of Jes Bjarup = *Scandinavian Studies in Law* 48, ed. Peter Wahlgren (Stockholm 2005), pp. 517–529.

[2] Csaba Varga 'Heterogeneity and Validity of Law: Outlines of an Ontological Reconstruction' {reprint from *Rechtsgeltung* Ergebnisse des Ungarisch–österreichischen Symposiums der Internationalen Vereinigung für Rechts- und Sozialphilosophie 1985, hrsg. Csaba Varga & Ota Weinberger Stuttgart: Franz Steiner Verlag Wiesbaden 1986) [Archiv für Rechts- und Sozialphilosophie, Beiheft 27]} in his *Law and Philosophy* (Budapest: ELTE TEMPUS 1994), p. 210. See also Csaba Varga 'Validity' in *The Philosophy of Law* An Encyclopedia, ed. Christopher Berry Gray (New York & London: Garland Publishing 1999), pp. 883–885 [Garland Reference Library of the Humanities, 1743].

[3] Abbreviations for Hans Kelsen's works: *Hauptprobleme* = [note 6]; for Karl Olivecrona works: *Law as Fact* = [note 26]; and for Alf Ross' works: *Law and Justice* = [note 20]; *Realistic Jurisprudence* = [note 19]; *Theorie der Rechtsquellen* = [note 5]; *Validity* = [note 32].

frontation" (p. 519). This seems to me to overlook that SCHMITT endorsed HITLER's chancellorship and became a member of the *Nationalsozialistische Deutsche Arbeiterpartei* just before the party stopped admitting new members.[4] Then SCHMITT went on to provide an intellectual justification of the Nazi's destruction of the Weimar Constitution in several articles and books and his position during the Nazi regime is in dispute among scholars. VARGA asks the question whether SCHMITT "should be considered a satanic embodiment of totalitarian immorality or simply the herald of the imminent bankruptcy of legal positivism and political liberalism?" (p. 520). The former view is related to SCHMITT as "the crown jurist of the Third Reich" claiming that "law is no longer an objective norm but a spontaneous emanation of the 'Führer's' will.[5] The Führer's will represents the social instincts of the German Volk and this implies that the Nationalist Socialist state knows no difference between law and morality. Thus SCHMITT rejects political liberalism and KELSEN's version of legal positivism in terms of normativism. This is related to the latter view of SCHMITT as a scholar presenting a scholarly critique of KELSEN's theory of law and legal science and its relation to liberalism.

KELSEN's normativism proceeds upon the fundamental distinction between is and ought to hold that the law is only positive law that is brought about by the intentional activity of legal authorities in terms of valid norms prescribing the proper conduct in relation to the constitution that in turn is grounded in the *Grundnorm*. KELSEN's theory of law and legal science is put forward in his *Hauptprobleme der Staatsrechtslehre* that according to ROSS marks "a turning point in German jurisprudential thinking".[6] Drawing upon the work of ADOLF MERKEL, KELSEN conceptualizes the positive law as a hierarchal system of valid norms or prescriptive propositions having an objective meaning concerning the normative relations between human conduct and sanctions to be used to regulate life among people in order to maintain peace. It follows that legal norms have internal relations within the legal system as valid norms and this accounts for the use of the concept of validity as an internal legal concept stating the criteria to create and identify a norm as a valid legal norm according to the constitution. The constitution is in turn grounded in the *Grundnorm* that states that one ought to obey the constitution and the norms derived as valid norms from the constitution. In this way the *Grundnorm* provides the scheme for understanding the existence of legal norms since the concept of legal validity is used to demarcate the area of legal norms from the area of non-legal norms in terms of reasons for belief and action.

KELSEN uses the concept of validity not only as an internal legal concept but also in the moral sense that there is a duty to obey the law. The concept of legal validity is used to identify the law without any reference to any moral values. And this does not tell us if the

[4] Manfred H. Wiegandt 'The Alleged Unaccountability of the Academic: A Biographical Sketch of Carl Schmitt' *Cardozo Law Review* 16 (1994–1995), pp. 1569–1598 on p. 1588.

[5] Karl Loewenstein 'Law in the Third Reich' *Yale Law Journal* 45 (1935–1936), pp. 779–815 at p. 811, citing Carl Schmitt 'Der Führer schütz das Recht' *Deutsche Juristen-Zeitung* 39 (1934), p. 947. For Carl Schmitt, „Für uns gibt es nur Recht und Unrecht, und das unrichtige und unsittliche Recht ist für uns kein Recht." Carl Schmitt *Nationalsozialismus und Völkrrecht* (Berlin: Junker und Dünnhaupt 1934) [Schriften der Deutschen Hochschule für Politik… I: Idee und Gestalt des Nationalsozialismus 9], p. 17.

[6] Hans Kelsen *Hauptprobleme der Staatsrechtslehre* entwickelt aus der Lehre vom Rechtssatze (Tübingen: J. C. B. Mohr 1911); Alf Ross *Theorie der Rechtsquellen* Ein Beitrag zur Theorie der positiven Rechts auf Grundlage dogmenhistorischer Untersuchungen (Leipzig & Wien: F. Deuticke 1929), p. 191.

positive law is justified in moral terms of justice or goodness, nor does it tell us whether a law should be obeyed. Considering the question to obey the law, no legal norm can create a duty to obey it by including that duty in the norm. This requires a rule of inference which is supplied by the *Grundnorm*. This explains the necessity of the *Grundnorm* and since it functions as a rule of inference it cannot be affected by any facts and it is also neutral with respect to moral validity of the law in terms of justice or goodness.[7] Kelsen presents the *Grundnorm* as a hypothesis and this implies that the duty to obey the law is not an absolute but a hypothetical duty. The legal validity of legal norms does not require that the norms should be obeyed and Kelsen insists that the concept of legal validity cannot be identified with the concept of efficacy of legal norms. It does not follow that legal norms lack any relation to reality as Schmitt and Ross claim since legal norms are related to reality in terms of reasons for belief and action as manifested in human conduct.

Kelsen's appeal to the *Grundnorm* makes it possible to distinguish between his theory of law and legal positivist theories on the one hand and natural law and natural right theories on the other as well as sociological or psychological theories. This is related to the study of the law since the law can be studied from the normative perspective of legal science providing an account of the meaning of the law in terms of descriptive propositions as opposed to the moral perspective of moral science concerned with the evaluation of the law in terms of moral propositions. Kelsen rules out the moral perspective since he denies the possibility of moral knowledge and insists upon the separation between legal and moral inquiries into the law. He also insists upon the separation between legal and sociological inquires since the former is normative cognition based upon the principle of imputation, having the form "if *A* then *B* ought to be" in order to arrive at legal knowledge whereas sociological inquiries are based upon the principle of causality, having the form "if *A* is then *B* is" in order to arrive at empirical knowledge of the impact of legal norms upon human conduct. Varga refers to Schmitt's critique of Kelsen's "purist approach" separating the positive law "as r u l e out of the law's very *s o c i a l t e x t u r e* in terms of "the embodiment of 'rule-of-law-rationalism'" that is rooted in "the widespread admiration to the enlightenment and the myth of rationalism" (p. 521, his emphasis). To be sure, Kelsen is adamant that the political power must be governed by a system of valid norms based upon the constitution. But it seems to me that Schmitt—and Varga—ignores that Kelsen's pure theory of law is put forward to depolitize legal scholarship but not the positive law which Kelsen holds is always informed by various political views.

According to Kelsen, a norm is not a valid legal norm because it is just or reasonable but only valid because it is promulgated as a valid norm. Schmitt's mockingly comments, "here the ought suddenly stops and normativity is interrupted; at their place appears the tautology of a crude reality: a norm is valid, if it is valid, and because it is valid. This constitutes »positivism«" since the concept of validity does not refer to fundamental moral ideals.[8] The result of Kelsen's positivism leads to a version of "bourgeois relativism" since Kelsen admits a variety of constitutional laws to create a hierarchy of impersonal legal norms to provide the framework within a "bourgeois *Rechtsstaat*". Thus Kelsen supports

[7] See Jes Bjarup 'The Genres of Law: Law and Jurisprudence' *Associations* 8 (2004), pp. 115–134.
[8] Carl Schmitt *Verfassungslehre* (München & Leipzig: Duncker & Humblot 1928), pp. 9 & 67.

the liberal idea of a parliamentary democracy based upon compromises between various values but fails to address the question that political actions in the end are based upon the fundamental distinction between friend and enemy that implies that a state cannot be based upon discussions and compromises between people but must be grounded in the homogeneity of the people. And Kelsen's normativism breaks down since positive norms are only valid if they are effective, and they are only effective if they are upheld by the political power that brings conflicts to an end. For Schmitt, this shows the incoherence of Kelsen's theory of law in terms of thinking in impersonal norms based upon the distinction between the validity of a norm and its effectiveness. Instead Schmitt advances his counter-concept in terms of his theory of *Dezisionismus* according to which the only criterion for the validity of a law is the possession of the power of the ultimate decision that effectively brings conflicts to an end and establishes the unity of the people.

Thus Kelsen's pure theory of law exemplifies the failure of political liberalism to cope with the problems within a parliamentary democracy and must be replaced with Schmitt's pure theory of power wielded by the sovereign that happens to be embodied in Adolf Hitler. The Führer protects the law and there is an absolute duty to obey his will. Kelsen also admits that the law is brought about by the will of political actors in terms of impersonal norms but this is for Schmitt a "degenerate decisionism, blind to the law, clinging to 'the normative power of the factual', and not to a pure decision".[9] For Schmitt, the validity of a law is derived from "a pure decision not based on reason and discussion and not justifying itself, that is [...] an absolute decision created out of nothingness". Schmitt's critique that Kelsen's theory leads to nihilism can be turned against Schmitt. In a radio interview produced in January 1933 Schmitt states: "I am a theorist [...] a pure academic and nothing more than a scholar".[10] This seems also to be Varga's view of Schmitt, referring to Schmitt's "stigmatisation as a *Kronjurist*" who "was retaliated by American and then allied Nuremberg arrest for two years" (p. 519). But as a scholar Schmitt was involved in politics and was appointed a *Preussischer Staatsrat* by Hermann Göring for his services to Hitler's government. Schmitt was also given a chair at the University of Berlin and in this capacity he became the leader of the legal organization of the *NSDAP* and made editor-of-chief of *Deutsche Juristen-Zeitung*, the leading law magazine, in 1934. However, due to internal struggles among the Nazis, Schmitt was removed from his party positions in January 1937 but kept his title of a *Preussischer Staatsrat* as well as his chair at the university where he engaged in research on Hobbes and international law. When the war was over, Schmitt went on working and was only arrested after the American occupation of Berlin and put into an internment camp until October 1946. Schmitt was arrested again on 19 March 1947 and brought to Nuremberg to be interrogated by the deputy prosecutor Robert W. Kempner. During the interrogation, Schmitt maintained that he never gained any material advantage through his co-operation with the Nazis and only was involved in National Socialist matters in his capacity as a law professor. Schmitt was released on 21 May 1947 and Kempner later

[9] Carl Schmitt *Political Theology* [1922, 2nd ed. 1934] trans. George Schwab (Cambridge, Massachusetts: MIT Press 1985) [Studies in Contemporary German Social Thought], pp. 3 & 66.

[10] Wiegandt [note 3], p. 1581, citing Paul Noack *Carl Schmitt* Eine Biographie (Frankfurt am Main: Propyläen Verlag 1993), p. 166.

stated that one reason for interrogating Schmitt was the feeling that the Nazi professors would not otherwise be prosecuted, but he saw no obstacle to Schmitt's release: "Why should I have prosecuted this man? He did not commit crimes against humanity, he did not kill prisoners of war, and he did not prepare aggressive wars".[11] Despite Schmitt's denial, his joining the *NSDAP* brought him advantages in his career and as a scholar he is faced with the question of his responsibility for his writings supporting Hitler's regime that cannot be ignored when reading his other books.

Turning to Kelsen, Varga holds that Kelsen's "course of life was not burdened with political dramas and radical turning points and who in person had not been forced to do penance" (p. 525). This suggests that Schmitt did penance after the war, which seems to me to be false, but it would have been the proper moral thing to do. It also seems to me that Varga overlooks that Kelsen was involved in Austrian politics, drafting the Austrian Constitution (*Bundes-Verfassungssgesetz* 1920) to make room for judicial review of legislation by means of special court, the so-called Constitutional Court [*Verfassungsgerichtshof*].[12] The members of the court had to be elected by the Austrian Parliament in order to make the Court as independent as possible from the administration. Kelsen was elected in 1919 as a member for life and made decisions that were attacked in the press by adherents of the Catholic Church and the Christian-Social Party. This resulted in political efforts to change the membership of the court from being elected by the Austrian Parliament to being appointed by the administration that proved to be successful and introduced by an amendment in 1929. The amendment was disapproved by Kelsen who was embittered and resigned as a member of the Constitutional Court in 1930 and also from his chair in Constitutional and Administrative Law at the University of Vienna which he had held since 1919. Fortunately, Kelsen had received a call for a chair in Cologne and although it was a chair in International Law, Kelsen was happy to accept the offer and moved to Cologne in 1930 with his family and stayed until 1933.

The question of judicial review is addressed by Schmitt in terms of *The Guardian of the Constitution* to use Schmitt's title of his book to which Kelsen responded with his article, *Who shall be the Guardian of the Constitution* (p. 522 note 15).[13] For Schmitt, the answer is the Head of the State, the *Reichpresident*, and not the courts. His reason is that judicial review of statutory law is not compatible with the concept of adjudication that is based upon the application of the law to concrete facts. The question of the validity of a law according to the constitution is not a legal but a political question to be decided by the Head of State. Kelsen's rejoinder is that Schmitt proceeds upon the constitution in terms of a politically desirable situation of a homogeneous unity of the German *Volk* as opposed to the constitution in terms of fundamental organizing norms that empower human beings to make and apply norms as valid legal norms. Next, Schmitt's concept of adjudication contradicts his view that a judicial decision has a creative dimension that cannot be derived from the content of the law. This is also Kelsen's view that every legal decision has a norm creative aspect when a norm is applied that is dismissed by Schmitt

[11] Wiegandt, p. 1596, citing Noack, p. 242.

[12] *Hans Kelsen im Selbstzeugnis* Sonderpublikation anlässlich des 125. Geburtstages von Hans Kelsen am 11. Oktober 2006, hrsg. Matthias Jestaedt (Tübingen: Mohr Siebeck 2006) [Hans Kelsen Werke].

[13] Varga refers to Carl Schmitt *Der Hüter der Verfassung* (Tübingen: Mohr 1931) [Beiträge zum öffentlichen Recht der Gegenwart 1] and Hans Kelsen 'Wer soll der Hüter der Verfassung sein' *Die Justitz* 6 (1931), pp. 5–56.

as an empty jurisprudential scheme that misses the problem that judicial review is a political act of constitutional legislation that must be decided by the Head of State. If so, Kelsen asks, what prevents the supposedly neutral entity of Schmitt's Head of State from being an active participant in the political conflict? Besides, Kelsen insists that law is informed by political values and in this respect there is only a quantitative but not a qualitative difference between the political character of legislation and that of adjudication as Varga duly notices (p. 525). To be sure, judicial review involves political values and this is the reason for introducing a constitutional court having jurisdiction to consider the validity of norms and composed of judges to be elected by the Parliament as opposed to other judges appointed by the government. For Kelsen, Schmitt's approach leads in the end to substitute dictatorship for democracy. Kelsen's own experience in Vienna concerning the reform of the Austrian Constitutional court confirms that he was right. As Kelsen later puts it,

> "the old court was, in fact, dissolved and replaced by a new one almost all the members of which were party followers of the Administration. This was the beginning of a political evolution which inevitable had to lead to Fascism and was responsible for the fact that the annexation of Austria by the Nazis did not encounter any resistance".[14]

When in Cologne, Kelsen received a visit from Schmitt who had received a call to teach for the summer semester of 1933 and asked Kelsen for his collegial cooperation despite their academic controversies, and Kelsen offered his support to Schmitt's appointment. As a Jew, Kelsen was among the first professors who were removed from their chairs by Hitler's regime passing the law to maintain Aryan standards, *Gesetz zur Wiederherstellung des Berufsbeamtemtums* of April 7, 1933. Schmitt was the only law professor in Cologne not to sign a petition for Kelsen and Varga writes that Schmitt "personally contributed to the dismissal of Kelsen as a university professor" (p. 525). Kelsen was informed of his dismissal when he had his breakfast reading the paper *Kölner Stadtanzeiger* when his wife sitting opposite said: "your name is on the back of the paper."[15] Kelsen realized that his life was in danger and only escaped the Nazi persecution thanks to the assistance from a civil servant in the University who, somewhat paradoxically, was a member of the Nazi Party.

Kelsen left for Geneva where he had to learn French in order to teach and also taught at the University in Prague. When the war began in 1939 he decided to leave Europe with his family to settle in the United States and sailed from Lisbon bound for New York and arrived on 21 June 1940. Thus nearly at the age of 60, Kelsen had to find a job which he found difficult, not speaking and writing fluently in English. He got the Oliver Holmes Lectureship at Harvard Law School and taught *Law and Peace in International Relations*. The fellowship was financially supported by the Rockefeller Foundation and lasted until 1942 but was not renewed. The President of the Harvard University, James Conant, informed Kelsen that even if the Rockefeller Foundation was prepared to undertake the financial commitment, there was no possibility of a renewal, the reason given being that this would imply a moral obligation of permanent tenure at the university that was impossible to fulfil. Kelsen was offended and doubted whether this was the real reason,

[14] Hans Kelsen 'Judicial Review of Legislation' *The Journal of Politics* 4 (1942), pp. 183–200 at p. 188.
[15] *Hans Kelsen im Selbstzeugnis* [note 11], pp. 82f.

especially since he had received an honorary doctorate from Harvard in 1936 and therefore expected to receive a better treatment. However, he received an offer to become visiting professor at the University of California, Berkeley in 1942 which he accepted and got tenure in 1945 in the Department of Political Science. At the age of 64 Kelsen and his family finally settled in Berkeley. Thus I think it is fair to conclude that Kelsen's life was burdened with political dramas and radical turning points. Unlike Schmitt, Kelsen had no reason to do penance for his writings before and during the world wars since they were concerned to present arguments for a well-ordered society among citizens. Kelsen also honoured his moral obligation to act properly under a totalitarian regime and surely had no moral obligation to obey the Nazi legislation. It has been argued that Kelsen's pure theory of law paved the way for Hitler's ascent to power but this is preposterous since Kelsen's theory was rejected by the Nazis as "the typical expression of the corroding Jewish spirit during the after-war period in the field of Law and State theory".[16] Despite the hardships Kelsen suffered during his career he had the intellectual capacity to continue to produce books and articles that calls for admiration and quite rightly earned him the title as the most formative jurist of the 20th century. This was also recognized since he was appointed *Honorarprofessor für Staatsrecht an der Rechts- und Staatswissenschaftliche Fakultät der Universität Wien* and elected a member of the Austrian *Akademie der Wissenschaften* in 1947.

2 Hans Kelsen and Alf Ross

Ross also lived through troubled times but unlike Schmitt and Kelsen his "course of life was not burdened with political dramas and radical turning points", to use Varga's phrase. Ross was educated as a lawyer at the University of Copenhagen and received a scholarship that enabled him to pursue legal studies in France, England and Austria in 1923. In Vienna, he met Kelsen and other members of the so-called Vienna School of Legal Theory and developed his interest in philosophical questions. The result was a manuscript entitled *Theorie der Rechtsquellen* completed during his stay in Vienna in 1926 and submitted for the degree of doctor of law at the University of Copenhagen only to be rejected by the selection committee. This was a blow to Ross since to be is to be recognized. But Ross did not abandon his manuscript but got in touch with Axel Hägerström, holding the chair of practical philosophy at the University of Uppsala since 1911, in order to submit is as thesis for the degree of doctor of philosophy. Ross was required to pass the degree of philosophy, and he spent 1928 to 1929 in Uppsala, graduating in philosophy and was then awarded the doctoral degree in philosophy in 1929 when the book was published in *Wiener Staats- und Rechtswissenschaftliche Studien,* edited by Kelsen.[17] Ross earned his living as a part-time lecturer at the Faculty of Law at the University of

[16] Izhak Englard 'Nazi Criticism against the Normativist Theory of Hans Kelsen: Its Intellectual Basis and Post-Modern Tendencies' *Israel Law Review* 32 (1998), pp. 183–249 on p. 183, citing the *Meyers Lexikon* (1939). See also, on Gustav Radbruch, Jes Bjarup 'Continental Perspectives on Natural Law Theory and Legal Positivism' in *The Blackwell Guide to the Philosophy of Law and Legal Theory* ed. Martin P. Golding & William A. Edmundson (Oxford: Blackwell 2005), pp. 287–299 at p. 296.

[17] Ross *Theorie der Rechtsquellen* [note 5].

Copenhagen but he was also an ambitious author engaged in a project to promote the understanding of the task and method of jurisprudence through a critical analysis of fundamental legal concepts and problems and doctrines within legal science to be published in four volumes. The first volume is his *Kritik der sogenannten praktischen Erkenntnis* concerned with the question of moral knowledge which Ross sets out to demonstrate is an illusion.[18] The next volume is concerned with the analysis of fundamental legal concepts and appears in Danish as *Virkelighed og Gyldighed i Retslæren* which forms the basis for his book *Towards a Realistic Jurisprudence*.[19] Ross submitted *Virkelighed og Gyldighed* for the doctoral degree of law at the University of Copenhagen and finally received the coveted doctoral degree in law in 1934. He was appointed to a vacant lectureship in constitutional law in 1935 and in 1938 to the chair of International Law at the University of Copenhagen. From 1950 he taught jurisprudence and published his textbook *Om Ret og Retfærdighed* that later was translated into English as *On Law and Justice*.[20] He moved to the chair of Constitutional Law in 1958 which he held until his retirement in 1969.

Throughout his career, Ross paid tribute to Kelsen but he is influenced by Kelsen's attitude rather than Kelsen's doctrines on law and legal science.[21] What is congenial to Ross is Kelsen's demand for clarity and logical thinking and his endeavour to exclude the influences that spring from personal wishes and political interests distorting the pursuit of truth within philosophy and science. As noticed above, Ross pays tribute to Kelsen's *Hauptprobleme* and Ross subscribes to the Neo-Kantian approach that turns philosophy into a transcendental inquiry into the condition of cognition in order to determine that some of these conditions are a priori conditions, that is to say that the conditions are not only independent of experience but necessary and universal conditions in terms of categories which make experience of objects possible and form the conditions for the making of theories about the facts within the various sciences. Thus Ross turns jurisprudence into a transcendental inquiry addressing the question concerning the sources of law and takes the authors of the traditional accounts to task for failing to ask the crucial question, "What question are they addressing in their accounts of the sources of law?" (*Theorie der Rechtsquellen*, p. 291). Ross is surely right that this is an important question in relation to the use of the concept of the sources of law. In one sense, the concept is used in the causal sense to refer to the circumstances that produce and sustain the positive law within empirical inquiries concerned with sociological and psychological questions about the efficacy of the law. The concept is also used in the moral sense to refer to the standards of value in virtue of which the positive law is valuable within moral inquiries concerned with moral questions about the proper standards for the moral validity of the

[18] Alf Ross *Kritik der sogenannten praktischen Erkenntnis* Zugleich Prolegomena zu einer Kritik der Rechtswissenschaft (Kopenhagen: Levin & Munksgaard / Leipzig: Felix Meiner 1933).

[19] Alf Ross *Virkelighed og Gyldighed i Retslæren* En Kritik af den teoretiske Retsvidenskabs Grundbegreber [Reality and validity in jurisprudence: A critique of fundamental concepts within theoretical legal science] (København: Levin & Munksgaard 1934), developed into his *Towards a Realistic Jurisprudence* A Criticism of the Dualism in Law, trans. Annie I. Fausbøll (Copenhagen: E. Munksgaard 1946).

[20] Alf Ross *Om Ret og Retfærdighed* En indførelse i den analytiske retsfilosofi [On law and justice: An introduction to analytical jurisprudence] (København: A. Busck 1953) & *On Law and Justice*, transl. Margaret Dutton (London: Stevens 1958).

[21] Jes Bjarup 'Alf Ross – Pupil of Kelsen' in [Schriftenreihe des Hans Kelsen-Institut] {forthcoming}.

positive law. In still another sense, the concept is used in the legal sense of legal validity that refers to the conditions that turn rules or norms into legal rules or norms within legal inquiries concerned with legal questions about the conceptual meaning of the law. The different uses of the concept of the sources of law correspond to Kelsen's division of inquiries into the law in terms of legal science or legal dogmatics concerned with the normative exposition of the meaning of valid legal norms as prescriptions of human conduct and legal sociology concerned with the empirical exposition of the efficacy of legal norms upon human conduct. The evaluation of the law in terms of standards of justice or goodness does not admit scientific answers and belongs to legal politics. Ross endorses this classification and repeats Kelsen's warning against "*Methodensynkretismus*", that is to say the blending of different inquiries and methods with respect to the scientific study of law that Ross claims is exemplified in the traditional accounts of the sources of law (*Theorie der Rechtsquellen*, p. 192).[22]

Considering legal science, the authors refer to the sources of law in terms of statutes, judicial and administrative decisions, and customary law but they proceed dogmatically upon the assumption that cognition of the law is grounded in experience and thus fail to ask the jurisprudential question, "what does it mean and how can it be known that a norm exists or is a valid norm?" (*Theorie der Rechtsquellen*, p. 50; cf. pp. 3 & 195). The prevailing positivist view holds that cognition of the law is grounded in experience which for Ross is tantamount to subscribe to an "uncritical empiricism" or "naive epistemological realism" that is exemplified by Karl Bergbohm's approach to support his theory that the positive law exists in terms of commands expressing the will of the competent authority (*Theorie der Rechtsquellen*, p. vi; cf. p. 181).[23] Bergbohm's theory is a version of "naive positivism" which overlooks the need for a transcendental inquiry into the conditions which make cognition of law possible. Thus Ross is concerned with the question of the sources of law in the jurisprudential sense of the ground of cognition of something as positive law in order to provide the proper theory (*Theorie der Rechtsquellen*, p. 292). For Ross, cognition requires a theory in order to have experience of facts and in this respect Kelsen's theory presents an enlightened version of the prevailing positivist theories since it is based upon the fundamental demarcation between nature (*Sein*) and norm (*Sollen*) to insist upon the positivity of the law in terms of valid norms created according to the constitution which in turn is grounded in the *Grundnorm* that provides the category or scheme of interpretation which makes it possible to identify norms as valid legal norms without recourse to moral values. But Ross finds Kelsen's theory wanting and proceeds to present his counter-concepts in terms of an immanent and a transcendental critique of Kelsen's theory of law and legal science.

[22] The term 'syncretism' is used as a negative term for the eirenic theologies of Grotius and Calixtus in the 17th century and extended to denote any attempted union or reconciliation of diverse or opposite tenets or practices, especially in philosophy and religion in the 1830s. Cf. *The Shorter Oxford Dictionary* on Historical Principles [1973] prep. Willilam Little, H. W. Fowler & Jessie Coulson, ed. C. T. Onions, 3rd ed. (Oxford: Clarendon Press 1975), p. 2223.

[23] The reference is to Karl Bergbohm *Jurisprudenz und Rechtsphilosophie* 1: Das Naturrecht der Gegenwart (Leipzig: Duncker & Humblot 1892).

The immanent critique is that Kelsen is laid astray by following the traditional approach asking, "what is the reason for the validity of the law?" as opposed to ask the proper question, "what does it mean and how can it be known that the law is valid?" It seems to me that the objection fails since Kelsen insists that the law is only positive law that is brought about by the intentional activity of human beings according to the constitution which authorizes them to act as legal authorities to create and apply norms as valid norms (cf. above sec. 1). The constitution is in turn grounded in the *Grundnorm* as a formal category to account for the validity of the positive law in relation to legal cognition as opposed to a material category concerning the content of the law in relation to moral cognition, as Ross duly notices (*Theorie der Rechtsquellen*, pp. 231f). Ross questions Kelsen's distinction between the *Grundnorm* and the constitution since it suffices with appealing to the constitution, and anticipates H. L. A. Hart's objection that Kelsen's *Grundnorm* "seems to be a needless reduplication" (*Theorie der Rechtsquellen*, p. 356).[24] As noticed above the objection fails since the *Grundnorm* functions as a rule of inference. Ross also objects that Kelsen's theory of law lacks any relation to reality but this ignores that valid norms are related to reality in terms of valid reasons for belief and action that is the topic for legal inquiries. Another question is the efficacy of valid legal norms, that is the question whether people act upon legal reasons that are the topics for sociological or psychological ones. Kelsen's theory of legal science is restricted to legal inquiries but he admits the relevance of sociological or psychological inquiries within the study of the law. For Ross, Kelsen's view of legal science is too restrictive since it is confined to a logical inquiry into relations between norms without any regard for the surrounding reality.

This is related to Ross' transcendental critique of Kelsen's demarcation between norm and nature that Ross claims must be replaced with the category of totality according to which cognition of law is grounded in the legal system. In view of Hägerström's critique, Ross later abandons the category of totality which I have dealt with elsewhere.[25] Ross's critique of Kelsen can be seen in terms of his "counter-concepts" that Varga traces to Schmitt (p. 527; cf. p. 520). Like Schmitt, Ross mounts an attack upon the philosophical foundation of Kelsen's theory claiming that

> "validity in the sense of a category or sphere of existence co-ordinated with reality is nonsense in the literal meaning of the word: validity (value or duty) is nothing objective or conceivable whatsoever, it has no meaning, is a mere word. Viewed from the angle of the analysis of consciousness there exits no notions of validity at all, but merely conceptually rationalised expressions of certain subjective experiences of impulses" (*Realistic Jurisprudence*, p. 77).

Ross does not use the concept of rationalization in the logical sense of giving reasons for the validity of moral and legal norms but in the psychological sense that the reasons adduced are spurious reasons that are offered to conceal feelings and volitions. Ross subscribes to Hägerström's doctrine of conceptual nihilism according to which the moral

[24] H. L. A. Hart *The Concept of Law* [1961] 2nd ed. & postscript Penelope A. Bulloch & Joseph Raz (Oxford: Clarendon Press 1994) [Clarendon Law Series], p. 293.

[25] Bjarup [note 21].

and legal vocabulary is not a cognitive vocabulary used to express propositions on what there is reason to believe, to do and to feel, but a non-cognitive or metaphysical vocabulary used to express feelings and volitions in words devoid of any conceptual meaning but having a suggestive effect that is manifested in human behaviour. It follows that "the so-called legal proposition is in reality no proposition, has no meaning, but can only be regarded in its actual existence as a statement giving expression to certain other psycho-physical phenomena" (*Realistic Jurisprudence*, p. 101). Thus Ross rejects Kelsen's view that legal norms have an objective meaning and Kelsen's view that the law regulates its own creation, application and execution is dismissed as "magic" since it is impossible to claim that "the law produces or creates what it itself pronounces as law" (*Realistic Jurisprudence*, p. 95).[26] For Ross, the positive law is "a sphere of expressions concerned with rationalisations without any theoretical meaning" (*Realistic Jurisprudence*, p. 104). The implication is that the language of the law is not a cognitive language using concepts but a magical language using words to express superstitious ideas in terms of right and duties. The magical language is used by the legal authorities to cause the appropriate feelings and volitions, if necessary by means of force, in order to maintain a legal ideology which is manifested in the appropriate behaviour. In this respect Ross is at pains to retain the concept of validity. As he puts it,

> "our object in determining the concept of law is not to spirit away the normative ideas, but to put a different interpretation on them, reading them for what they are, the expressions of certain peculiar psycho-physical experiences, which are a fundamental element in the legal phenomena" (*Realistic Jurisprudence*, p. 49).

This makes room for the concept of validity, but not in any moral or legal sense but only in the empirical sense in terms of "disinterested behaviour attitudes" (*Realistic Jurisprudence*, p.87). Ross relies upon the behavioural theory of meaning to suggest that this is a matter of social suggestion. Thus the positive law is part of reality in terms of "an ideology, a disinterested behaviour attitude evoked by social suggestion and the Pavlovian conditioning of reflexes" (*Realistic Jurisprudence*, p. 86).

Ross follows Schmitt that Kelsen's theory tears the law as a system of valid norms "out of the law's very s o c i a l c o n t e x t u r e by elevating it into a linguistically constructed imperative" (p. 521, Varga's italics). For Ross, this is related to Kelsen's view that legal science is "dogmatism or normative knowledge" as opposed to legal science as "social theory as a knowledge of reality" (*Realistic Jurisprudence*, p. 97, cf. p. 101). In his *Theorie der Rechtsquellen* Ross claims that Kelsen's theory marks the turning point in jurisprudential thinking about law and legal science, but now he holds that "in reality Kelsen is no revolutionary but the consistent sustained of the viewpoints of the

[26] Ross follows Hägerström's critique of Kelsen's account of the act of legislation as a great mystery (*Hauptprobleme*, p. 431) which for Hägerström is tantamount to "a medieval thinker who discusses the great mystery of the God-man". Axel Hägerström 'Kelsen's Theory of Law and State' ['Hans Kelsen: Allgemeine Staatslehre' *Litteris* An International Critical Review of the Humanities 5 (1928), pp. 20–40 & pp. 81–99] in his *Inquiries into the Nature of Law and Morals* trans. C. D. Broad, ed. Karl Olivecrona (Stockholm: Almqvist & Wiksell 1953), ch. 4, pp. 257–298 on p. 268. Karl Olivecrona repeats this critique in *Law as Fact* (Copenhagen: E. Munksgaard & London: H. Milford / Oxford University Press 1939), p. 21. This is akin to Schmitt's view, cf. Varga [note 1], p. 526, note 24.

traditional doctrine itself" (*Realistic Jurisprudence*, p. 40). Ross takes Kelsen to task for obliterating the distinction between legal norms and scientific propositions about the law (*Realistic Jurisprudence*, p. 197). It seems to me that the objection fails and I shall return to this below. Since legal norms for Ross lack any conceptual meaning it is obvious that there is no point in trying to account for it within legal science in terms of normative knowledge. Legal norms exist only in terms of social facts that constitute the object of science in terms of scientific propositions. In this respect Ross holds that "legal knowledge presents no specific epistemological problem and any concept of the source of law as a specific epistemological basis is absurd" (*Realistic Jurisprudence*, p. 140). This is a major departure from his former view which implies that his systematic account in *Theorie der Rechtsquellen* is absurd, although Ross is careful not to mention this. Thus Ross makes no room for legal science as normative knowledge in terms of propositions describing the conceptual meaning of legal norms. As I see it, this is Kelsen's view that legal science offers normative information in terms of hypothetical propositions on what there is legal reason for people to believe and to do. This is surely important and Ross cannot provide this information since he holds that legal norms lack any conceptual meaning. Kelsen also makes room for empirical inquiries into the impact of the law upon human conduct. By contrast, Ross confines legal cognition to the legal ideology produced by human beings and expressed in meaningless words to sustain various values. This turns legal science into a branch of the social sciences having the task to describe and explain the legal ideology or the various causes that have an influence upon legal decision-making.

Ross returns to the question of legal cognition in *On Law and Justice* to offer what he calls "a realistic interpretation of the law, that is, an interpretation in accordance with the principles of an empirical philosophy" (*Realistic Jurisprudence*, p. ix). Ross has shifted his allegiance from Hägerström's philosophy to the philosophy of logical positivism to claim that "the subject of jurisprudence is not law, nor any part or aspect of it, but the study of law" (*Law and Justice*, p. 25). Thus the object of jurisprudence is solely the juristic language used within legal science and the jurisprudential method is logical analysis based upon the verification principle according to which the meaning of a proposition is its method of verification in order to demarcate what makes sense from what is nonsense. But Ross also holds that "the problem of the concept of the nature of law is undoubtedly one of the principal problems of jurisprudence" (*Law and Justice*, p. 5). Thus Ross presents his analysis of the nature of law based upon the classification of sentences into a) propositions with representative (cognitive) meaning, b) exclamations with no representative (cognitive) meaning and no intent to exercise influence, and c) directives with no representative (cognitive) meaning but with intent to exert influence. Ross uses this classification to question Kelsen's view that legal norms are prescriptive propositions having objective or cognitive meaning relating sanctions with human conduct. Ross also uses the concept of norm but in contrast to Kelsen, Ross claims that legal norms must be conceptualized as directives devoid of any cognitive meaning.[27] As Ross puts it, the law is not written in order to impart theoretical truths, but to direct people—judges and private citizens alike—to act in a certain manner. "A parliament is not an information

[27] Ross follows Olivecrona who conceptualizes legal norms as "independent imperatives", that is, "imperative statements about imaginary actions, rights, duties etc." (*Law as Fact*, p. 42).

bureau, but a central organ for social direction" (*Law and Justice*, p. 8). Ross overlooks that the legal norms passed by a parliament must contain information about the appropriate human conduct. This is captured by Kelsen's view that legal norms have objective meaning in relation to the use of the concept of legal validity as an internal legal concept stating the criteria that turn norms into valid legal norms. As Ross puts it, Kelsen makes "validity an internormative relation (deriving the validity of one norm from the validity of another)" (*Law and Justice*, p. 70). However, he repeats his critique of Kelsen since "once we know what positive law is [...] the function of investing it with 'validity' is demanded by the metaphysical interpretation of legal consciousness, though no one knows what it is" (*Law and Justice*, p. 70). This is false since the concept of legal validity is known to people in general and legal authorities and lawyers in particular since it is used to create and identify a norm as a legal norm in terms of a valid reason for belief and action and in this way it is possible to demarcate legal reasons from non-legal reasons. The concept of legal validity must be kept apart from the concept of moral validity and perhaps it is the latter that Ross has in mind in relation to the metaphysical interpretation since Ross denies the existence of moral values as well as the obligation to obey the law. As noticed above, Kelsen also uses the concept of validity in the moral sense to refer to the hypothetical obligation to obey the law. Both Kelsen and Ross claim that the law is only addressed to legal officials, in particular the judges and administrative officials. This view rules out that ordinary people have an obligation to obey the law and does not stand for closer scrutiny. What is important is that Kelsen holds that the question of political obligation is a legitimate question whereas Ross holds that the question is "senseless. It presupposes that it is possible objectively, that is, as a truth, to assert that the law should be obeyed. But such an assertion is a logical absurdity because it is impossible to ascribe truth to a directive (a norm)".[28]

Considering the cognitive meaning of legal norms, Varga also claims that "Kelsen remained at fault until his death with a theory of meaning and a proper legal logic" (p. 526). It seems to me that this can be questioned since Kelsen has a theory of meaning grounded in the normative principle of imputation that holds that a human being is a free person because actions are imputed according to norms.[29] For Kelsen, the positivists are right that the law is brought about by the will of the appropriate legal authorities but they are wrong to identify this with the meaning of the law in terms of commands or imperatives. The positivists overlook the crucial distinction between the will of a legal authority and its expression in terms of norms according to the constitution, having the normative function to transform the subjective meaning of acts of will into the objective meaning of valid legal norms. The norms are introduced by the legal authorities, having the epistemological authority to set the measures of what is right and wrong and also the semantic authority to define the legal concepts by reference to sanctions in terms of punishment. Thus the positive law can only be understood as a system of valid norms in terms of propositions prescribing a certain human conduct by attaching to the contrary

[28] Alf Ross 'Hans Kelsen, What is Justice? Collected Essays, Berkeley 1957' *California Law Review* 45 (1957), pp. 564–570 on p. 568.

[29] The principle of imputation can be traced to Samuel Pufendorf *Of the Law of Nature and Nations* 4th ed. with Barbeyrac's notes, trans. Basil Kennett (London: [S. Aris] 1729 [reprint: Clark, New Jersey: Lawbook Exchange 2005).

conduct a coercive act as a sanction. In contrast to the positivist theories that an offence has a sanction attached to it because it is an offence, Kelsen holds the opposite view that the law can have any content determined by the authorities in terms of offences, and it is only an offence because a legal sanction is imputed according to the normative principle of imputation having the form "if *A* is then *B* ought to be" that is used within the law to relate norms and human conduct in terms of valid legal norms that can be enforced, if necessary by the use of force. Adopting the principle of imputation in legal thinking implies that human beings are conceptualized as free and responsible persons using the normative language of the law as reasons for belief and action.

Kelsen insists that the validity of the law is distinct from the efficacy of the law, although it is the case that legal norms are generally observed by people and, if not, applied by the legal authorities. For Ross this is tantamount to the fact that the "specific validity as a categorical form becomes a superfluous drape" (*Law and Justice*, p. 70). What matters is rather "the interpretation of the 'validity' of the law in terms of social effectivity, that is, a certain correspondence between a normative idea content and social phenomena" (*Law and Justice*, p. 68). Ross is concerned with the psychological and social reality of the impact of legal norms upon human behaviour based upon the principle of causality whereas Kelsen is concerned with the normative reality of the validity of legal norms in relation to human conduct based upon the principle of imputation. Ross rejects the latter which leads him to claim that "Kelsen has at the outset precluded himself from dealing with the heart of the problem of the validity of the law—the relation between the normative idea content and social reality" (*Law and Justice*, p. 70). The critique is misplaced as Kelsen duly points out.[30] Like Kelsen, Ross understands the positive law as a specific social technique for the promotion of peace among people. But there is a fundamental difference between them with respect to the interpretation of the social technique since Kelsen holds that this is a question of communication by means of legal norms as valid reasons for belief and action whereas Ross holds that it is a question of social suggestion by means of directives using meaningless words as causes of human behaviour as the effect.

This is important in relation to the cognition of the law where Ross holds that Kelsen's legal science is a version of jurisprudential idealism according to which there are

> "two different »worlds«, »the world of reality« comprising all the physical and psychical phenomena in time and space which we apprehend through the experience of the senses. And then »the world of ideas or validity« comprising various sets of absolutely valid normative ideas (the true, the good and the beautiful) which we apprehend immediately by our reason" (*Law and Justice*, p. 65).

Jurisprudential idealism is based upon the assumption that the law belongs to both these worlds and Ross proceeds upon a distinction between material and formal idealism. Material idealism subscribes to the view that normative ideas of justice or goodness not only inform the content of the law but are also constitutive for the validity of the positive law. Ross duly acknowledges that Kelsen rejects material idealism to subscribe to

[30] Hans Kelsen 'Eine »realistische« und die Reine Rechtslsehre: Bemerkungen zu Alf Ross: On Law and Justice' *Österreichische Zeitschrift für öffentliches Recht* X (1959–1960), pp. 1–25.

formal idealism holding that the legal validity of the positive law can be identified without any reference to moral values. However, Ross claims that Kelsen confuses norms with propositions about norms. Using his classification of sentences mentioned above, Ross claims that there is a fundamental difference between propositions and directives since the meaning of propositions differs from the meaning of directives. This is true if we follow Ross' definition of legal norms as directives devoid of any cognitive meaning which raises the question if Ross' definition is acceptable. This is not the case if we follow Kelsen's definition of norms as prescriptive propositions that constitute the object of legal science as expressed in scientific propositions. In both cases, legal norms and scientific propositions have objective or cognitive meaning but they differ since legal norms have authority in virtue of their origin in the will of the legal authorities as valid norms in relation to a legal system whereas this is not the case with scientific propositions about the law that are true or false with respect to the meaning of the positive law. Thus Kelsen maintains the distinction between norm and scientific propositions about the norms.

However Ross claims that Kelsen's version of formal idealism must be replaced with what Ross calls "jurisprudential realism". This is the view that "there is only one world and one cognition. All science is ultimately concerned with the same body of facts, and all scientific propositions about reality—that is, those which are not purely logical-mathematical—are subject to experimental test" (*Law and Justice*, p. 67). Ross overlooks that Kelsen also holds that there is only one world but it can be studied from two different perspectives, the normative perspective based upon the principle of imputation used to create the positive law that is the concern of legal science as an autonomous science having the task to offer information on what there is legal reason to believe and the causal perspective based upon the principle of causality used within the social sciences having the task to offer information about the impact of legal norms upon human conduct. Ross uses Kelsen's term *scheme of interpretation* but not in the normative sense to understand the validity of the law but in the empirical sense to understand the legal ideology produced by the directives addressed to legal officials, in particular the judges. Ross endorses the logical positivist view that the method of verification determines the meaning of propositions and "this means that propositions about valid law must be interpreted as referring not to an unobservable validity or »binding force« derived from a priori principles or postulates but to social facts" (*Law and Justice*, p. 40). The social facts are the decisions made by judges as opposed to the behaviour of people in general. This is the point that directives are addressed to the judges since this simplifies the verification of scientific propositions. Thus scientific propositions about the law have representative or cognitive meaning since they can be verified by reference to the arguments made by judges. However Ross is in trouble since he holds that the arguments presented by judges to justify their legal decisions cannot be trusted, since they are only spurious reasons to cover the emotions which in fact motivate judges to render their decisions. This turns legal science into a branch of the social sciences which fits with Ross' commitment to logical positivism and the unity of science advanced by Otto Neurath and his call for "a thoroughly empiricist reconstruction of jurisprudence".[31] Ross also claims that "to construct a scientific sociology of

[31] Otto Neurath *Foundations of the Social Sciences* (Chicago, Illionis: The University of Chicago Press 1944) [International Encyclopaedia of Unified Science 2:1], pp. 1–51 on p. 41.

law is an urgent but difficult task" (*Law and Justice*, p. 333). It cannot be said that Ross makes any contribution to carry out the task since he makes no effort to enter into any sociological or psychological inquiries in his textbooks on Constitutional Law and International Law that are confined to the traditional sources of law to arrive at the conclusion that "the cognitive study of law cannot be separated from legal politics" (*Law and Justice*, p. 40). If so, Ross collapses his own distinction between directives and scientific propositions about directives. This sets Ross apart from Kelsen who insists upon the distinction between legal science and legal politics.

Ross returns to his critique of Kelsen in an article on *Validity and the Conflict between Legal Positivism and Natural Law.*[32] Ross repeats his critique that Kelsen's theory is "a continuation of a quasi-positivist thought. Kelsen has never overcome the idea that an established legal system, as such, possesses validity in the normative sense of the word. According to Kelsen, the existence of a norm is its 'validity', and to say that a norm possesses validity means 'that individuals ought to behave as the norm stipulates'" (*Validity*, p. 159f). As noticed above, Kelsen uses the concept of validity in the legal sense to refer to the criteria that turn a norm into a legal valid norm. He also uses the concept in the moral sense to refer to the obligation to obey the law. But Kelsen insists that validity in the legal and moral sense must be kept apart from the concept of efficacy. By contrast Ross repeats his claim that "the existence (validity) of a norm is the same as its efficacy" (*Validity*, p. 159). Ross mentions Kelsen's article *Eine »realistische« und die Reine Rechtslehre* but does not bother to provide a reply. Instead Ross turns to Hart's critique that Ross fails to give an account of the concept of legal validity as "an internal normative statement of a special kind".[33] Ross tries to clarify his position by holding that the concept of legal validity is used in three different ways: 1) the doctrinal use within legal science to indicate whether a legal act, say a contract or an administrative order, has the desired legal effect. "This is an internal function for to state that an act is valid or invalid is to state something *in accordance with* a given system of norms. The statement is a legal judgement applying legal rules to certain facts"; 2) the theoretical use within jurisprudence or a general theory of law to indicate the existence of a norm or a system of norms. The validity of a norm in this sense means its actual existence or reality, contrary to the case of a merely imagined or drafted norm. "This is an external function, for to state that a rule is or a system of rules exists or does not exist is to state something *about* the rule or system. The statement is not a legal judgement, but a factual assertion referring to a set of social facts"; 3) the moral use within ethics and natural law "to mean a specifically moral *a priori* quality, also called the 'binding force' of the law, which gives rise to a corresponding moral obligation" (*Validity*, pp. 158f, Ross' italics).

Now Ross rejects the moral use (3) since the concept of moral validity is not a scientific concept but an ideological word used to sustain the authority of the legal system. Thus the normative function is purely psychological since the word is used to produce at-

[32] Alf Ross 'Validity and the Conflict between Legal Positivism and Natural Law' [*Revista Juridica de Buenos Aires* (1961), pp. 46–93] in *Normativity and Norms* Critical Perspectives on Kelsenian Themes, ed. Stanley L. Paulsson & Bonnie Litschewski Paulson (Oxford: Clarendon Press 1998), pp. 147–163.

[33] H. L. A. Hart 'Scandinavian Realism' [*Cambridge Law Journal* 17 (1959), pp. 233–240] in his *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press 1983), pp. 161–169 on p. 167.

titudes with respect to the law but their rationality is an illusion. If this position is correct then the positive law is an expression of special and private interests that is maintained by the use of force. It follows that Ross' position is not far from that of Schmitt.

Then there is the doctrinal use of the concept (1) and Ross is right that the concept has an internal function since it is used by the legal authorities to create and apply norms as valid norms. He is also right that this is a matter of legal judgements using the criteria that turn norms into valid legal norms in relation to a legal system. This is Kelsen's view and Hart's as well. Ross overlooks that legal science lacks the authority to pass legal judgements. Legal science is concerned to present an account of the law and this is related to the jurisprudential use of the concept of validity (3). Ross claims that in this case the concept has an external function and this is true since it indicates the difference between legal norms and propositions or assertions about the law within legal science. Still legal science is concerned with the legal validity of norms as opposed to the efficacy of norms. This is Kelsen's view and also Hart's view, it seems to me, but Ross collapses this distinction when he claims that "the existence (validity) of a norm is the same as its efficacy". Ross is in difficulty when he tries to separate the doctrinal from the theoretical use of the concept of validity, or the internal and external use of the concept of validity. He makes a reference to Danish and German usage according to which

> "a distinction is made between *gyldig* [*gültig*] and *gældende* [*geltend*]. A contract is said to be *gyldig* or *ugyldig* [valid, or invalid, void], but we use another term to speak of the law, namely »*gældende*«, to mean prevailing law, law actually in force, actually existing. It is noteworthy that for the negation of »*gældende*«, there is no word corresponding to the negating »*ugyldig*« [invalid]. Unable to find an English equivalent for »*gældende*«, I have used »valid« in the English version of my writings to cover not only the function of »*gyldig*« but also that of »*gældende*«. I understand now that this translation might be confusing" (*Validity*, p. 158f).

It is confusing since Ross overlooks that it is quite proper in Danish to refer to an administrative order as valid or invalid as well as that a law can be valid or invalid. It is one question to ask if a law is a valid law or not. It is another question to ask if a valid law is effective or ineffective, that is to say '*gældende ret*'. Thus Ross is wrong that there is no corresponding English word to the Danish word '*gældende*', since there is the word 'effective' to refer to the fact that the valid law is observed by people and the word 'ineffective' to refer to the opposite fact that a valid law is not observed by people. If a valid norm is ineffective then this may call for action by the legal authorities to apply the valid norm. Kelsen and Hart proceed upon an analysis of juristic and legal thinking to claim that there is a crucial difference between the validity of a law and its efficacy which is manifested in the use of the language of and about the law. By contrast, Ross claims that juristic thinking is not a reliable guide for logical analysis since it is "saturated with ideological concepts that reflect emotional experience" (*Validity*, p. 161). The rejoinder is that Ross also appeals to juristic thinking in his analysis of the doctrinal and theoretical use of the concept of validity, but his analysis is informed by his commitment to the empiricist principles advanced within logical positivism to put the study of law upon the path of an empirical science. For Kelsen, this is not the path to follow if we wish to understand the normative language of the law and Hart follows suit.

By way of conclusion, I agree with Varga that "we have to ponder over such debates, bearing in mind the lessons derived from the disputable pieces of the past as well" (p. 529). And I look forward to a fruitful exchange of views concerning Kelsen, Schmitt and Ross.

bygholm søpark 19a
dk 8700 horsens
jes.bjarup@stofanet.dk

Moore's Law and Law

Jan M. Broekman

Being human implies being part of a civilization that seeks to extend its cultural and humane boundaries, a civilization that reaches out to new horizons whilst overcoming its prejudices with regard to other minds and longstanding scientific insights. Law plays an important role in this extension of the human essence as Csaba demonstrated more than once in his international and intercontinental contributions. The language of the Law, becoming almost universal and reaching beyond the boundaries of a specific legal system, is the language that guided him on his lifelong trip outwards. Hence the relevance of this Tribute Volume: *Law and Philosophy in the XXIst Century* and its vital question about specific profiles of law today.

1 Moore's Law...

It fascinates how the expressiveness of language in conjunction with the profiles of law, language and society changed in the first years of the new century. The extension of our contemporary civilization shows notions about reality, which were hitherto beyond common knowledge and technological reach. The most fundamental is in the emergence of our E-world, in which geographical and cultural boundaries as well as those between real and virtual reality were abolished. The battle between various types of appreciation of this development is vehement. Even Courts must in the nearest future decide about the implications of this battle whilst differentiating between social contexts.[1] One of the persisting questions is whether inhabiting an E-world means that we are all becoming *cyborgs*—and what then with us as legal subjects? All this depends on a host of appreciations for which we are not educated, as little as we are prepared for E-technology, not to mention its technological innovations and the many features we don't acknowledge as specifically human characteristics.[2]

Reflections are multiple here: does becoming a *cyborg* imply an estrangement from the humane essence, does technological modification of humans (for example neurological implants) make them inhuman, or, to move one more step, is a human

[1] See Jeffrey Rosen 'Roberts v. the Future' *New York Times Magazine* (August 28, 2005) & <http://www.nytimes.com/2005/08/28/magazine/28ROBERTS.html>.

[2] Jan M. Broekman *The Virtual in E-education* (New York: IIS Publishing Cie / ExLibri 2004).

with a bionic implant (a heart for instance) no longer a human being? Do limitations of technological nature defy the ongoing merger of humans with technology? This is not easy to answer, the more because one should also read the question as an important indication of a profound and perhaps disruptive transformation in human nature. Non-biological intelligence enters the history of mankind more rapidly than ever before, although that development is by no means accepted – neither universally nor in local cultures. No wonder that the future of the Law seems extremely precarious. Law is deeply intertwined with a multitude of cultural developments. Legal discourse and Court practices are consequently often perceived as based on uncertain premises and unwarranted assumptions. It is true that most legal articulations do by no means include essential knowledge about the powers that shape future cases and legal case materials. And, moreover, they do not include clues about the true character and the pace of technology and culture that are developing in the first decades of the century.

Moore's Law is generally accepted as a first radical attempt to understand this. His law laid down the foundations of insight pertaining to our culture's true character and pace, and is therefore also important for Law's future, its discourses and institutions included. Gordon Moore, with Robert Noyce the founder of Intel and in the mid-seventies its chairman, had accomplished a series of inventions pertaining to integrated electronic circuits. His law—which he never himself called a law—expressed the observation that every twenty-four month twice as many transistors can be loaded onto an integrated circuit as in the period before. In other words, the complexity of chips doubles every twenty-four month and this already holds some 35 years. Numbers changed, but not the principle. His original 1965 statement is:[3]

> The complexity for minimum component costs has increased at a rate of roughly a factor of two per year [...]. Certainly over the short term this rate can be expected to continue, if not to increase. Over the longer term, the rate of increase is a bit more uncertain, although there is no reason to believe it will not remain nearly constant for at least 10 years.That means by 1975, the number of components per integrated circuit for minimum cost will be 65,000. I believe that such a large circuit can be built on a single wafer.

Under the assumption that chip complexity is proportional to the number of transistors, Moore's law has largely held the test of time to date, indicating a limit for the number of transistors on the most complex chips. However, his law refers also in a more general sense to the rapidly continuing advance in computing power per unit cost. Also the rate of disk storage has actually sped up more than once. The current rate of increase in hard drive capacity is roughly similar to the rate of increase in transistor count although recent trends show that this rate is dropping, and has not been met for the last three years. And, what is more, his law suggests a phenomenal progress of technology in recent years. On a shorter timescale, that progress implies an average performance improvement in the industry as a whole. It took two years in the middle of the preceding century to

[3] Gordon E. Moore 'Cramming More Components onto Integrated Circuits' *Electronics Magazine* (April 19, 1965).

double the price-performance of computation and it is now doubling every year. A chip is doubling in power each year for the same unit cost. However, the number of chips is growing exponentially so that computer research budgets grew considerably over the last decades. For a manufacturer competing in a competitive market, a new product that is expected to take three years to develop and is just two or three months late is 10 to 15% slower, bulkier, or lower in storage capacity than competing products. What matters here is the exponential increase in useful work or communication capacity, executed per unit time. Moore himself stated in an interview that his law might not hold for too long, since transistors are reaching limits at atomic levels also called nano-levels. Moore foresaw how the size of atoms is approaching and form a fundamental barrier. "It'll be two or three generations before we get that far—but that's as far out as we've ever been able to see. We have another 10 to 20 years before we reach a fundamental limit", he suggested recently.

Kurzweil's expansion of Moore's Law shows that the underlying trend holds true from integrated circuits to earlier transistors and electromechanical computers due to paradigm shifts. He projects that a continuation of Moore's Law until 2019 will result in transistor features just a few atoms in width.[4] Although this means that the strategy of nanotechnologies will have run its course at that moment of history, it does most probably not mean the end of Moore's law: computing devices have been consistently multiplying in power (per unit of time) from the mechanical calculating devices used in the 1890 US Census to Turing's relay-based "Robinson" machine that cracked the Nazi enigma code and the CBS vacuum tube computer that predicted the election of Eisenhower to the transistor-based machines used in the first space launches or the integrated-circuit-based personal computers, Kurzweil states. Yet, the story of Moore's law has been the story of half a century of technological changes and competing views about the quality of electronic devices. The essential element in all this is the question how long Moore's law will hold, despite his own hesitations and variations in decades.

A new type of technology will replace current integrated-circuit technology anyway, so that Moore's law will hold true for several decades if not longer. Kurzweil concludes that the exponential growth suggested by Moore's law continues in technologies, which sustain what he calls (in philosophical language) the "technological singularity. Encyclopedias will formulate one day, how it was a common belief at the turn of the century, that Moore's law made predictions regarding all forms of technology, although his initial ideas were only about semiconductor circuits. However, many still use the term »Moore's law« to describe ideas like those put forth in writing about future developments of our globalizing culture.

John Smart wrote[5] in a series of philosophical remarks on the issue of singularity that

> Philosophers have long noted that their children were born into a more complex world than that of their ancestors […]. This early and perhaps even unconscious recognition of accelerating change may have been the catalyst for much of the utopian,

[4] By Raymond Kurzweil, *The Age of Spiritual Machines* (Viking/Penguin 1999) and *The Singularity is Near* (Viking/Penguin 2005).

[5] See <http://www.singularitywatch.com> and <http://www.Accelerating.org>.

> apocalyptic, and millennialist thinking in our Western tradition. But the modern difference is that now everyone notices the pace of progress on some level, not simply the visionaries.

A variety of conclusions and insights can thus be formulated after this introduction into Moore's law. The following should be highlighted in view of the position of legal discourse in our modern culture.

(1) It has never been clear whether Moore's observations were restricted to technological developments or were in essence a matter of a new turn in the philosophy of history. The pace of technology changes is after all a matter of course of history in one field of culture, which can become extrapolated into others. Kurzweil's reformulation of Moore's law suggests the latter, and a worldwide reception beyond the realm of electronic technology suggests the same.

This is unique in so far as an analysis of technology leads to a new view on the history of our Western globalizing culture. Such a view reaches far beyond classical distinctions between reality and the virtual, or between the human body and mind. Our central interest focuses, however, another aspect and challenges a different conclusion: if Moore's law has to be seen as a 21st century philosophy of history—especially regarding linear and exponential development, and reaching the point of singularity—then it is time that legal theoreticians and philosophers of Law take notice!

(2) Components that define the traditional concept of history have changed in the course of Moore's conceptions. Subject of historical changes that form the materials of a philosophy of history are no longer local and national attitudes, government decisions or economic strategies. Technological progress and its social consequences, changes in scientific paradigms, including the rate of change in all regions of daily life, which altogether change in an accelerating mode, have taken a role in a new paradigm. The self-understanding of subjects in history takes place in the framework of an importantly new concept, which is called the accelerating change.

The importance of determination and management of that change became extremely clear after Moore's law, which is already fifty years ago! The power of the future has in this half century been given a new place. As paradigms shift in a hitherto unimagined pace, linear and intuitive understanding of history became obstacles. The real issue for a philosophy of history seems to know the power and to understand the structure of the future.

A group of scientists that focuses the accelerating rate of change as a predominant force in modern history (together with the interpretation of the pace of time as a non-linear but rather exponential phenomenon) emphasizes the concept of "Singularity". Among them are Ray Kurzweil's *The Age of Intelligent Machines* (1989), Hans Moravec's *Robot: Mere Machine to Transcendent Mind* (1997) or Damien Broderick's books *The Spike* (2001), as well as the Internet-mediated philosophical texts of John Smart. The concept of singularity is philosophical as well as technological, and it does by no means

carry univocal meanings. But it coordinates the notion of ever-higher rates of paradigm shifts, of exponential growth of information technologies, of the possible hardware and software that is able to emulate human intelligence, of new mental models of reality and human intelligence. The modern forceful non-invasive brain scan techniques relate to those ideas-to-become a fact in history. Kurzweil describes[6] the concept of singularity as an expression for the phase of nearly vertical exponential growth of technology and its expansion. All acknowledge how this new concept entering the world of today is a consequence of Moore's law—all deviating interpretations and misunderstandings pertaining to local domains of the law included.

(3) Our observation becomes even more complex when one understands that the authors focusing singularity do not write and contemplate computers or computer technologies in particular. Computers are not subjects of specific paradigms in the history of science and technology. They simply bring underlying technologies to surface. Different images of man and a new history of mankind are involved. It fascinates how there is a direct link between Moore and his CEO-ship of Intel, and his law! Technology became linked with human features through new imaging techniques and understandings of the human body and brain in terms of wirings and information.

All lay the groundwork for a new language in the human sciences. That jargon is at a large distance to the philosophical anthropology in the twenties of the last century. Philosophical and scientific discourses on man are now embedded in a jargon that comprises fragments from biology, neurology, psychiatry, genetics, electrophysiology and computer sciences. One has to take into account that not only ethical but also technological changes determine human sciences of this century. Medicine plays a central role in this regard and the law-medicine relationship becomes more and more of essence. But let us ask: if medicine develops in the new context of the jargon on human sciences, does legal discourse follow? In other words, does the law speak and understand the modern discourse on man? Moore's law shows, but apparently does not bridge that abyss!

2 . . . and Law. . .

Legal theory and philosophy of Law have not spent much attention to Moore's law and the changes that lead to a new image of man in legal discourse. The consequences of his law pertain to two major developments. A *first* is a changing view on time: the contrast between linear growth/development on one hand and the exponential growth/development on the other is a matter of a newly reconstructed view on history in the life of man and culture. A *second* is a changing view on space that results from the introduction of nano-scales in all measurements. Pace and space are the catch-

[6] Kurzweil *The Singularity. . .* [note 4], pp. 24ff.

words that relate to Moore's law. How relates his law (in a physicist's sense of the word) to Law (as a specific discourse in society)?

Moore's Intel jingle can be heard in all offices and private rooms of legal scholars. When their computers are switched on, the sounds can be heard. It amazes how these tones are neither representing a different concept of history and progress, nor underlining new views on images of human bodies and minds, which are at the other end proclaimed to be subject of law.

The relevance of this observation is in the reception of the Harrington case, Iowa 2003.[7] The case shows a theme that connects law and medicine in the context of contemporary human sciences. It also shows a narrative that resembles a non-legal genre and rather reads as a science fiction text, which pertains necessarily to i d e n t i t y in its psychological, philosophical and social dimensions and in particular as a problem of nano-scaled brain activities. The Harrington case was decided on "information about what the person has stored in his brain". This is a dubious formula, since it includes a philosophy, which does not compete with the notions of space and neurology, electrophysiology or brain scan technology. Various elements of these sciences were, however, straightforwardly included in the arguments of Iowa's Supreme Court. They reached from "brain-function" to "brain-storage" and via "brain-scan" to "brain-fingerprint" . Notice the translation from one discourse into another, and its semantics: b r a i n means " b r a i n - s c a n ", and " f i n g e r p r i n t " means l a w ! That translation illustrates how law reacts to implications of Moore's law[8] although the case could read as l e g a l d i s c o u r s e ' s f i r s t c a s e w i t h s c i e n c e f i c t i o n f e a t u r e s !

In 1977 security guard John Schweer was murdered in Harrington's presence at a car dealership in Council Bluffs, Iowa. He was seventeen, and a year later convicted of first-degree murder, primarily on the testimony of a juvenile accomplice although the status of that accomplice was already disputed at the time of the trial. 24 years later, during the turmoil of new brain scanning techniques and other means of visualization, specific activities of his brain produced clear images, which were acknowledged as a valid marker in criminal law. The acceptance of that marker could only become effective on solid legal grounds, certainly not as the direct result of new readings of brain activity. Dr Farwell who discovered the technique called "Brain Fingerprinting Test" explains how the brain does emit characteristic electrical wave responses.[9] "P300" is the name for a scientifically accepted response to brain stimuli, and a measurable part of an embracing electroencephalographic response activity. Admissibility of the P300 test by US Courts is based on criteria pertaining to the science utilized in the technology: the science must be tested, peer reviewed and published, accepted and proven accurate in the scientific community. The P300 provided evidence in Harrington's case because, as the Iowa Supreme Court stated in its Footnote 6,[10] it

[7] *Harrington v. State of Iowa* (2003), 659N.W.2d 509.

[8] See also Jan M. Broekman 'Trading Signs: Semiotics Practices in Law and Medicine' *International Journal for the Semiotics of Law* 20 (2007) 3, pp. 223–236.

[9] See 'Brain Fingerprinting Testing Ruled Admissible in Court' at <www.brainfingerprinting.com/Ruled %20Admissable.php>.

[10] *Harrington v. State of Iowa* [note 7].

> was introduced through the testimony of Dr. Lawrence Farwell, who specializes in cognitive psychophysiology. Dr. Farwell measures certain patterns of brain activity (the P300 wave) to determine whether the person being tested recognizes or does not recognize offered information. This analysis basically 'provide(s) information about what the person has stored in his brain'. According to Dr. Farwell, his testing of Harrington established that Harrington's brain did not contain information about Schweer's murder. On the other hand, Dr. Farwell testified, testing did confirm that Harrington's brain contained information consistent with his alibi.

The question of admissibility implies a straightforward translation and relocation of meaning into the language of Law. In Harrington's case the translation is from psychophysiology and neurology ("brain") to law ("fingerprint"). Legal criteria were declared to sustain the Court decision at hand, and they did by no means exclusively refer to Farwell's test result. When confronted with the results of the "Brain Fingerprinting" test in April 2000, the accomplice recanted his testimonies and admitted to have lied in the trial. After more than two decades of imprisonment, during which he maintained his innocence, the reversion of Harrington's conviction by the Iowa Supreme Court in 2003 set him free. The new scanning techniques and the qualification of their result had to be intertwined with matters of legal procedure, and this is decisive for legal discourse and its reception of non-legal issues, as Harrington's case in the context of criminal law demonstrates. It is most remarkable that legal theory has not reflected upon the dynamics of this case. But the Court had spoken, what should legal theory do after that verdict, one could say.

Harrington has demonstrated the fact that new and different realities and types of case materials draw the attention of 21st century judges. And what is more, conflicts carry new materials and are thus in need of different solutions. Of course, legal institutions and procedures show new ways of dealing with today's facts, as for instance *Alternative Dispute Resolution or Affirmative Action* show. But is that enough to meet the needs of a modern world and its concept of reality? We mention three actual tendencies to change those views on reality and ask whether traditionally conceived legal concepts and procedures are going to be effective in that new context.[11] A first is the surprisingly powerful reinterpretation of one's own identity influenced by modern genetics, a second is the consequence of the fact that exponential instead of linear progress creates new, or different, categories becoming subject of law, and a third is in the effects of hitherto unknown measurements, in particular the development of nanotechnology and in its footsteps nanomedicine. All these themes in human sciences, which now cherish the broader denomination 'human life sciences', require an in-depth analysis of multiple components and of "the new jargon that comprises fragments from biology, neurology, psychiatry, genetics, electrophysiology and computer sciences" as introduced in a preceding paragraph.

Let us concentrate on one example that fits this new jargon. Today's widespread generalization of genetics creates an untraditional understanding of one's

[11] Jan M. Broekman *Intertwinements of Law and Medicine* (Leuven: Leuven University Press 1996), pp. 55ff and 206ff.

own individuality, which leads to new generational experiences. The latter are important for our Courts of the future, but do Law and genetics really fit? For instance, in his analysis of the US Supreme Court under Roberts, Rosen writes how the Chief Justice "was sensitive to the unpredictability of history and the surprises that the future tends to bring." But the lesson of history, he added, "was that politicians—and judges, for that matter—should be wary of the assumption that the future will be little more than an extension of things as they are."[12] Does the US Supreme Court stand that test?

The example shows the crux of an actual problem, especially if one is aware of the pace and scope of changes that the new human life sciences are about to bring: how will Law react, and can Law react appropriately? Take Law's presupposition about the autonomy of the subject in law: is it in the light of genetics realistic to refer to an autonomous subject in legal discourse as if possessing a rigid structure? And if unrealistic, what then is there to say about individuality and privacy as essential components of legal discourse? The list of legal concepts that seem threatened by genetics and related human life sciences can be extended considerably. Do not forget how, together with electrophysiology and imaging techniques, genetics enter our consciousness as if they were already at home in the normality of social life. Daily conversations show how procreation issues, aging, or new therapies go hand in hand with great expectations for curing as well as for improving life quality by means of these new techniques. Their moral implications enter politics and public morality, and do not diminish the intensity of expectations they created in our welfare state. There is neither a public worry nor a moral problem when it becomes evident that genetic profiling of an individual does not support the individuality of the person involved, but rather that the individual is engrossed in its genealogical tree. The uniqueness of the individual appears a conceptual reality, which is becoming less and less relevant in actual genetics. The uniqueness of one's identity seems no more than a concept that is passed over in the course of generations. Such a process is psychological and social as well as biological as legal and moral debates on designer babies show.

3 . . . and as a Narration

Moore's law discloses a universe of new insights into the substance of human life, particularly through new technological means and methods to design hitherto unthought-of images of man. Legal semiotics emphasizes the narrative component in law and legal discourse. That component highlights such semiotic perspectives, since narrations are embodiments of images of man in legal discourse. Understanding narratives in law is a key to grasp changes in the foundations of law. The Harrington case might be perceived as one of modern Law's cases, which imply new images of man and technological means, so that narrative qualities of science fiction seem appropriate to study the case and bridge the gap between traditional legal narratives and those of today's world.

We propose the thesis that "science fiction" is the genre that fits the world for which Moore's law was designed best. As a consequence, we urge legal theoreti-

[12] Rosen [note 1], p. 26.

cians and philosophers to study this literary genre that grounds modern legal discourse.

Why has especially science fiction been so neglected for decades? Three answers come to the fore: (1) A first motive is in the fact that legal theory has not given full attention to the theme "Law and Literature" as it was developed in the 70s and 80s of the last century.[13] (2) Another, more poignant answer, is in the fact that science fiction as a literary genre has not been given priority in the codex of modern literature, so that it did not claim any privileged position. (3) A third consideration is that the world, which was depicted by science fiction, did mot match the world of daily legal practices. Is the HARRINGTON case an exception, and does the case because of its new technologies and fundamentally changed image of man challenge to introduce science fiction rhetoric and worldviews?

There are reasons to support our thesis about the importance of science fiction for a narrative analysis of modern Law, especially for Law that fits the world of MOORE's law. They focus fundamental features pertaining to our modern image of man and his world—all of them considering the world in a new and scientifically revolutionary perspective, and referring to language as a human skill. Language and storytelling are on a universal scale. Indeed, human stories, not physical atoms appear to be the building blocks of the universe! The language that is used by our contemporary sciences of human life has already changed our understanding of stories, which we now perceive as structured patterns and call information.[14] However, narrations were discovered to be constitutive for law, but the talk about narrative features of law understands the constituting stories mostly as normative but not as solely constituting information. In other words, narrations are given normative power as soon as stories enter the discourse of law, which is not the case when we understand narrations as building blocks of the universe!

This is what MOORE's law makes clear. His law culminates in an interpretation of history and its laws of progress. But legal discourse focuses patterns of behaviour without implying a comprehensive interpretation of history: the case in connection with other significant fragments of legal discourse constitutes the universe of Law. This is an old and longstanding insight in the essence of Law. Yet, historical dimensions and the concept of history are changing. As a consequence, the life span of a human individual is given a different value or scale. This difference is clearly readable in the literary genre that is compatible to the world of MOORE's law: Science fiction. Science fiction is reigning in the mid-seventies in cinemas, TV screens and game halls, and entered in the eighties the domain of literature. STANLEY KUBRICK and RIDLEY SCOTT show even today that there is science fiction outside our libraries, but all bookstores have now their special section on the literary genre. The genre produced epic stories, which

[13] See for instance the groundbreaking work of James Boyd White *The Legal Imagination* (Boston/Toronto 1973) or Richard A. Posner *Law and Literature* (Cambridge, Massachusetts: Harvard University Press 1988).

[14] William Gibson *Pattern Recognition* (London: Penguin/Viking 2003). Pattern recognition is on the operation and operation of systems that recognize patterns in data, including image analysis, person identification or speech analysis. Everything today, GIBSON argues, is to some extent the reflection of something else.

reminded its readers of More's *Utopia* or Swift's *Gulliver's Travels*. They constructed the past, present and future of artificial cultures and fantasy societies, all events embedded in those narrative structures named science fiction. S c i e n c e was not the issue, but f i c t i o n was. Huxley, Stapledon, Lem and Orwell were the most known among them who proved this. Bulky history volumes on alien continents appeared with these authors. Fire, Earth, Water, Light, Time, Ice, Stars and Planets are still subject in three-or four to five or even six volume works of Jones, Goodkind, Feist, Williamson and others. Yet, our reference to s c i e n c e f i c t i o n literature as a necessary complement to l a w - a s - n a r r a t i v e pertains to only one segment of this voluminous literary production.[15]

We look at science fiction in particular as a literary counterpart to nanotechnology, genetics, electrophysiology, cyberspace and virtual experiences. This is the literature that supports not only Moore's law and its view on history in progress, but also the jargon of new sciences of human life, as contrast to the mid-twenties philosophical anthropology.

The comparison between past and present times is more or less an outline of t h e p r o c e s s o f c h a n g e t h a t t a k e s p l a c e i n c u l t u r e a n d h i s t o r y, which is the focus of Moore's law. Change has always been a motive in stories, whatever their cultural context, reaching from religious texts to virtual stories. Remember how for instance Biblical stories were there to r e a d and to h e a r in times where those two were the most effective means of communication. In contrast, stories in the 21st century are elements in networks of i n f o r m a t i o n.[16] Both focus change, but they do so in very different dimensions and on the basis of different assumptions.

The gap between the two has its consequences for our understanding of legal discourse in modernity. Should Law ever be able to bridge the gap? How can Law speak its voice so that legal stories unveil any Truth? Is there a Truth (an essentialist truth concept in action) in the modern multiplication through the appropriate wiring of stories, which reaches far beyond the boundaries of real reality?

Take the s t o r y o f M o s e s, one of the outstanding Biblical stories, which is closely related to the Law. His is embedded for us in many versions, reaching from school impressions, education about the Ten Commandments, children's Bible stories, regular readings of the Old Testament as well as a series of great films on the theme. Ideas about being knowledgeable about Moses and the Law are the product of stories. A breach with the main lines of that collection of stories exists where the person of Law about which the Moses saga tells us, is personified in a body metaphor: Moses appears as the Mouth of God. Moses' body is not his body, but God's body: the mouth, which is communication, is God and Human Body, Law and Human Conduct in One.

It was mentioned how stories are the building blocks of the universe, not atoms and particles. What contemporary stories should contrast for instance the great Biblical sto-

[15] Stephen E. Andrews & Nick Rennison *100 Must-read Sience Fiction Novels* (London 2006).

[16] See Bernard S Jackson 'The Semiotics of Religious Law' and Jan M. Broekman 'Reiterating the Literal' International Journal for the Semiotics of Law 14 (2001) 2, pp. 107ff and 121ff.

ries? We might need discourses with entirely different literary forms to find the expressiveness of our SCIENCES OF HUMAN LIFE and their newly opened dimensions. Those features are apparently at a great distance to Biblical and West European literary stories developed until the dawn of the 21st century.

Did Moses exist as a truly human figure? One doubts, as Freud explained.[17] He confronts us with a multilayered identity—not unlike many migrants in the European Union.[18] His story guides us, not the question of his real life. And that story relates to problems of identity as connected with the rebirth of Monotheism. He had the Egyptian Pharaoh AKHENATON's experiment in monotheism as predecessor, and thus became the embodiment of an old saga. Hence ASSMANN's clairvoyance: "Moses is a figure from memory but not of history, whereas AKHENATON seems a figure from history but not of memory."[19] Sinai's act of MOSES becoming the Mouth of God shows the dialectics between a human being representing God and God speaking as the representative of a human being. What identity, what type of reality, what story principle?[20] Reading a past is reading a future. But does reading a past unveil a future beyond the limits of our understanding, of our reading and its coordinates? Or is our act of reading representative for the urge to maintain linear conceptualizations of the past and deny exponential features of our future?

The stories that show the exponential developments and the nano measurements as well as the transcendence of the real are certainly not the legal stories of Law in modern culture. However, keep in mind FEYNMAN's credo: "There is plenty of room at the bottom"! Plenty of room: where is that space and pace to be found in literary forms that create the universe in which we live? Those forms are all around us. They are in libraries and city halls, in game halls and in the many regions of cyberspace. They are part and parcel of ads and showrooms where cars and cloths, watches and jewellery, fast food and iPods are seducing us to continue feeding the consumption machinery. But that is only a partial observation. Game halls are doors to cyberspace, and they find their counterpart in a literary genre (called science fiction) that never found response until now in legal theory or philosophy of law.

Science fiction is a modern identity, the voice of a newly developed science of human life, a wording that leaves 'plenty of room' for the tiny differences (example genetics) that create a huge diversity. Nano-scales and exponential growth became readable in that genre; powerful stories are told when transcending the real and exploiting the virtual. Science fiction has provided a name for the literary domain in which cyberspace and the virtual enter the hitherto almost exclusively philosophical debate on realism. As if fiction scans the powerful influence of the realism paradigm on our images and our minds! Does it? Not fiction in ARISTOTELian senses of space and time, even where we are challenged to rethink them in terms of nano's and exponential

[17] Sigmund Freud *Der Mann Moses und die Monotheistische Religion* in his *Gesammelte Werke* XVI & Imago Editions (London 1950).

[18] Jan M. Broekman *A Philosophy of European Union Law* (Leuven/Paris: Peeters 1999), pp. 33 and 75.

[19] Jan Assmann *Mozes the Egyptian* (Cambridge, Massachusetts: Harvard University Press 1997) as well as Avivah G. Zornberg *The Particulars of Rupture* (New York: Doubleday 2000), pp. 404ff.

[20] Jan M. Broekman *Recht uit Woorden* (Brussels: Larcier 2004), pp. 191ff.

growth. Science fiction's awareness of holographic personalities, of generated, projected, animated identities, redirects us from so-called natural towards artificial regions of reality. It offers personality-constructs instead of representations of historical figures.[21] Is this an element of a prophecy in Moore's law? Does his law force us to separate the natural and the artifice?

No, Moore's law does not, because it shows us how the meaning of the togetherness of the natural and the artifice is a product of linear but by no means of exponential thoughts on growth and development. The meaning of the linear dissolves in exponential growth just like the naturalness of our environment does in our cities and architectural landscapes. Whenever communication takes place, it is nowadays a disembodied communication in differently shaped environments, often beyond the boundaries of real reality. A loss of body does, however, not harm the quality of communication. It highlights communicative qualities in modern life and underlines the importance of science fiction as a literary genre: its subject remains communication and not science—in spite of all novelty of form and content. This implies the dynamics of a process in which the boundaries between the artificial and the natural become blurred. The artificial is, just like the natural, the man-made. In other words, the hardware is natural, and the software artificial. Computer codes became natural forms of life, and science fiction stories their literature. The latter represent a multilayered system of metaphors through which life itself, nature and the human artifice are redefined.[22] A redefinition of the artifice is an important consequence of Moore's law. John Markoff reports[23] how IBM researchers describe an advance in chip-making that paves the way for new semiconductors, designed with wires thinner than 30 nanometres, one-third the width in today's industry-standard chips. It proves today again the correctness of Moore's assumption that the density of chips doubles roughly every two years, and that this will continue through at least the middle of the next decade.

It is therefore not too farfetched to state, that those developments in research and industry find their literary counterparts in science fiction. An appropriate access for Law and legal theory to the world/universe/reality in the sense of Moore's is in science fiction stories. The narrative approach to understand Law in Western cultures will prevail and not annihilated or become (the fear of justices) dysfunctional. Legal philosophers fail to consider that approach, even in the context of Varela's initial biological and neurological ideas and Luhmann's sociological thesis about legal discourse as a form of autopoiesis. The challenge remains important despite incidental or even systematic repudiation in 21st century's legal theory.

The virtue of bringing Moore's law in connection with Law brings again our initial

[21] That is a predominant feature of the classical science fiction work by William Gibson *Neuromancer* (London: Harper Collins 1984), p. 145, in which the "I" functions in a metaphysical but 'post-consciousness' context and highlights the non-Aristotelian experience of an being actor without being the narration itself.

[22] See the various levels of narration as analyzed in N. Katharine Hayles *How We Became Posthuman* (Chicago: Chicago University Press 1999), pp. 222ff.

[23] In *The New York Times* (February 20, 2006).

question to the fore: is Law able to understand and functionally adapt the components of the contemporary sciences of human life? In order to properly analyze this issue, we focus the narrative structures of Law and in particular the science fiction literary genre. Why does it not play a role in legal theory? Why is that so? One could guess that it is because science fiction relates to another world than Law. A philosophical consideration is, that the science fiction genre is not, like legal discourse, based on representations of real reality and a true and one-to-one mirroring dynamics.

This requires future research in legal theory, for instance into the semiotics of the two types of discourse. It was also suggested that a semiotics of science fiction can be profiled at its most effective where that type of science fiction is studied in which virtual reality and electronic techniques of communication as well as brain scanning and other non-invasive computer driven technology plays a dominant role. The differences between today's standard legal discourse and discourses in the context of Moore's law are in that case clearly highlighted. Some major features should be mentioned, which are altogether referring to what is called 'a new world'. That new world is a world of cyberspace and the virtual integrated in daily life experiences, a world expressed in scientific developments, which progress according to Moore's law and build the new jargon of human life sciences, a world that corresponds to a literary genre for which the expression science fiction is the widest denomination.

Why does Harrington's case not read like a science fiction story? It has all ingredients of that literary genre: peering inside the brain as if the brain is a box that we finally open and close; the opened doors of a jail because of effective scanning methods and the fascination of latest technology, which is dominated by electrophysiology. Is this not a central motive in any reflection upon the scope and pace of modern Law?

A research project on this issue should restrict to a limited number of science fiction authors, among them the most outstanding, which is William Gibson. He combines cyberpunk with virtual reality, body modification, identity shift, artificial intelligence, computer terminology and urban blight to intensify the experience of contemporariness. His *Neuromancer* (1984) is the standard literary text of the genre, making it the most influential work of science fiction in the last quarter of the century.[24] He treats space, time and pace in a hyper enlarged manner so that even a classical space odyssey appears old-fashioned in the light of his stories and challenges us to reassess the coordinates of our daily environment. The stories make clear how daily life has been concentrating more than ever before on language, now that computer language has entered all electronic devices—even in the cases of (nano)medicine and medical imaging. Should Gibson not have been able to write the Harrington case?

[24] An important analysis of Gibson's work is in Dan Cavallaro *Cyberpunk and Cyberculture* (London: Athlone Press 2000).

Three themes in science fiction and Law[25] could be of interest here. The themes are (a) pace, scale, and progress; (b) identity; and (c) causality in legal discourse and science fiction *à la mode de* Gibson.

(a) Pace, scale, and progress are matters of changing dimensions. The main issue is, that dimensions appear in a multitude of contexts rather than in fixed measures to create the box in which we live. Their Kantian absoluteness has become replaced by electronic environments, which are in their turn constantly manipulated technologically. One aspect of Kant's intuition remains valid, though, even in cyberpunk—the fact that space and space concepts determine human relations and their sense of community. But those concepts include in science fiction literature a future as if they are an integral part of the here-and-now. Concepts-in-action create the powerful suggestion of a hitherto unknown world.

This world is fundamentally different from the world of legal discourse. Fragments of the unknown cannot be called real or virtual anymore since they are conceptual products: not of the human mind *tout court* but of media-based images and simulations rather than of a tangible materiality. All this clarifies how pace, scale and progress are no longer fixed entities but fragments of a rather unidentifiable amalgam of interconnections, in particular in a network of technology, culture and society. Germs of this connectedness are mainly images: our towns are not only constructed by stones and steel but rather by images, which were projected to make us live in interdependent and multifactor fragments. And if pace, scale and progress have time in common, then this commonness is semiotically relevant since that commonness pertains to the making of bodies and meanings.

That would also engage in a fascinating dialogue between Gibson and Moore: the pace of progress, as determined by Moore's law, pertains to facts established in a scientific and economic discourse, whereas the pace of events in Gibson's prose has by no means reference to observations of any scientific issue. His prose is prose of science fiction—but science is not the subject of his fiction! Science is the climate and jargon that characterizes the literary genre. It has no foundation in anything but human creativity, style, genre, fashion, imagination or suggestion.

(b) Identity should correlate with these thought patterns. It was mentioned before how the Harrington case was decided on "information about what the person has stored in his brain". That storage was firmly linked with personal identity. How correct is this insight? Personal identity is nowadays a changeable viewpoint, which enables relationships to function in so far as one's personality depends on acknowledgement of others. The game of constitutive affirmations and confirmations determines mind and body, the product of fundamental reciprocities. The difference between the legal case at stake and Gibson's prose is important: identities in legal discourse are a matter of formal registration, legal regulation and obligatory acknowledgement. In science fiction, they are floating and determined by correlative images. How could the two ever meet?

[25] Legal fiction, one could say.

Gibson's novel *Idoru* (1996) was praised as an amalgam of high-tech, virtual reality and kitsch, reaching far beyond the dyadic dimensions of law and becoming cyberspace poetry. Consider this scene:[26]

> Idoru [...] is a personality-construct, a congeries of software agents, the creation of information-designers. She is akin to what I believe they call a 'synthespian' in Hollywood. [...] Next to the idoru sat a dignified older man with rimless glasses, grey hair brushed back from his smooth forehead. He wore a very simple, very expensive looking suit of some lustreless black material, and a high collared white shirt that buttoned in a complicated way. When this man turned to address Rei Toei, Laney quite clearly saw the light of her face reflect for an instant in the almost circular lenses. Arley's sharp intake of breath. She'd seen it too. A hologram. Something generated, animated, projected.

The sharp intro of the holographic, itself a symbol for artificiality and animation, would have been unthinkable in the context of legal personality. This is not the case because law's linguistic means are lacking or deficient, but because that goes fundamentally against the structure of procedure and of formality, which is the basis for legal certainty. The latter seems the product of the first: certainty is because of the formal structure of legal discourse. An analytic comparison between Harrington and Gibson begins here!

(c) C a u s a l i t y is a vulnerable concept to maintain. Moore experienced this when conceiving the fact of accelerating processes in technological and cultural developments. He appeared to diagnose technology but at the end he had formulated a new concept of causality, which was about history rather than technicalities and measurements. Harrington experienced the same, when he could after 24 years in prison escape the classical features of man's image in legal discourse through electronic imaging of memory and brain. At the end, he walked away as the first man who had convinced his jury in a bionic manner—and became a witness of how causes are constructed by means of electrophysiology. Did he become a science fiction figure? Moore's subject was history whereas Harrington's was the image of man in legal discourse. Both are based on causality as a concept rather than a fixed law in science and culture. I n c a u s a l i t y i s t r a n s c e n d e n c e o f b o u n d a r i e s : between centimetres and nanometres or between laws of nature and laws of electronics respectively computers. Two issues are important for narratives in the age of science fiction and law. The *first* goes to the concept of l i f e , which is *secondly* linked to a dynamic concept of c a u s a l i t y .

A central issue is the implication of real and virtual reality issues as forms in daily life. Hayles describes outlines presented more than ten years ago at the *Fourth Conference on Artificial Life* in 1994.[27] The essence is still in the philosophical implications. Evolutionary biologist Thomas S. Ray contributed *A Proposal To Create Two Biodiversity Reserves: One Digital and One Organic*, the two being fundamentally complementary.

The organic biodiversity project embraced Costa Rican forest protection, thus extending biological diversity for protein-based forms of life. The artificial forms of life

[26] William Gibson *Idoru* (London: Penguin 1999), pp. 92 and 176.
[27] Hayles [note 22], pp. 230ff.

inside a computer, called "*Tierra*" should bring a software program on the Internet so that it could "breed" a diversity of species on computers all over the world. Protein-based forms of life should thus complement silicon-based forms of life (which are the technological domain of Moore's Intel activities that made him observe express his law). The togetherness of the two, a philosophical issue in its own right, produced a basis to see how a natural form and process of life would intrude artificial mediums. "Life" should through this project find an extension of its traditional definition as a protein-based form in silicon-based forms. Computer codes composing silicon-based "creatures" became in the course of the process natural forms of life, so that at the end only the medium would be perceived as artificial!

The philosophical issue at stake is very different, and touches the narrative concept of life. Why, should one ask, do we want to suggest that computer codes are alive like humans and animals? Why do we want to transcend the boundaries between protein-based and silicon-based forms of life? Why should silicon be like protein? It is because our narratives are multilayered systems of metaphors that constantly redefine life, nature and the artifice. If those three are not understood as manifestations of human qualities, then they do no longer function as a founding narrative. But Law withstands redefinitions of concepts such as 'life' or 'nature' because Law pretends to possess the power of definition in its proper discourse. Legal procedure is not unlike reality representations by means of software programs: the biomorphic creatures are alive through their presentation by visualization. Images suggest life like the Court sessions suggest justice. Both are conceptualizations defined by culture and science.

What is more: life as well as justice depends on causalities, which are created by narrative patterns. The bewildering observation is that the transitions of measurements (especially those from centi-dimensions to nano-dimensions) as well as progress (from the linear to the exponential) do not seem to challenge the concept of causality. On the other hand, we do not have any guarantee that the same causalities remain in function where nano measurements are operated. The power of causality is, however, dependent upon the structure of subjectivity. One should be aware how here is an issue of final confrontation between Moore's law and Law. The latter is founded in the ultimate indifference for the diverse forms of culture and its technology—a subject remains always a subject in law. But Moore's context includes exponential progress, electrophysiology enabling software programs to enter the brain, or transferring the human body and mind to informational patterns in computer space.

4 . . . and. . .

The title of this essay: *Moore's Law and Law* has one point of connection or disconnection, the "*. . . and. . .*" Will a subject in Law ever be a legal subject, (a bearer of rights and duties in the sense of the Civil Law) *and* be a field of data, lines of light ranged in the

nonspace of the mind, clusters and constellations of data? Subjects like city lights… as Gibson's *Neuromancer* suggests.

The Law-law comparison was not introduced light-footed, and was not a word play. If Law has to function in a future society, it should acknowledge the basic mechanisms, beliefs and assumptions of citizens in that society. Not the part of the population that lags behind electronics nor the dark number with a low IQ should be focused, but the structure of Law, which is open to all citizens in a globalizing world.

That was a burning question for Harrington! We described the rhetoric strategies that focused his brain scan images to have them accepted by the Court. Those images had to be presented as reliable representations of a natural reality. The major science fiction author, Gibson, shows how representations are essential for that literary genre. Cyberspace defines new regimes of representation, which take pattern as the essential structure of reality—no matter whether real or virtual: patterns fulfil the role, which physical entities did in the past century. Narration has made the real/virtual divide evaporate, as it does to many others. And evaporate is, in contrast to the Law and its discourse, the key word for Moore's law.

Moore laid the groundwork for the narrative about reengineering the human body and brain in a process of accelerating progress. Hence Kurzweil: "we are shrinking the key feature size of technology [...] at the exponential rate of approximately a factor of four per linear dimensions per decade." Seizes will enter the nanotechnology range so that obstacles evaporate once framework, patterns and designs for that technology are adapted. Legal discourse and its functionaries, lawyers and legal theoreticians alike, should be aware how Feyman's phrase *There's Plenty of Room at the Bottom* (1959) also concerns them!

DICKINSON SCHOOL OF LAW
PENN STATE UNIVERSITY
JMB56@PSU.EDU

Lon Fuller's Legal Structuralism

William E. Conklin

Anglo-American general jurisprudence remains preoccupied with the relationship of legality to morality. This concern addresses two different questions. First, are moral considerations incorporated into what jurists take as "legality"? And second, are legal units binding independent of the moral content of the units? Both questions are usually addressed separately and, of recent years, with a greater weight attributed to the first. More often than not, jurists have concentrated on the nature and identity of law as distinguished from something called "morality" without sufficient attention to what is signified by "morality". Lon Fuller's works suggest that legality is related to two different senses of morality and neither is shared by contemporary interpreters of Fuller. For Fuller takes morality as hanging upon the territorial-like boundary of a presupposed legal structure. Fuller's structuralist theory of law offers the opportunity to better understand the identity and nature of binding laws. I shall privilege several elements of his theory: the relation of legal units to a structure, the nature of a structure, the constituents of a structure (territorial space, its pillars and its matter); the forms of the legal structure; the centrifugal and centripetal structures, the structure and traditional theories of morality, the role of the legal official in a structure, and why the internal knowledge in the structure is binding.

Fuller relates legality to two different senses of morality. Both senses of morality depend upon the judiciary and the judiciary's construction of the structure. The one addresses the judiciary's prejudgments within the boundary of the structure.[1] The second concerns the exteriority of the boundary. Both presuppose a territorial view of legal knowledge. An appreciation of such a view of legal knowledge helps to explain why the most sympathetic early reviews of Fuller's *Morality of Law*[2] admitted to confusion about Fuller's sense of morality and further attributed fallacious arguments and incredible claims to Fuller.[3] In order to clarify Fuller's senses of the morality of law, I shall first outline what he means by a 'structure'. Second, how is the structure related to legal knowledge? Third, what are the various forms of the structure? Fourth, is the structure centrifugal or centripetal? And finally, why is the structure binding?

[1] The internal sense of morality as a prejudgment is examined in William E. Conklin 'Lon Fuller's Phenomenology of Language' *International Journal for Semiotics of Law* 19 (2006), pp. 93–125.

[2] Lon L. Fuller *Morality of Law* [1964] rev. ed. (New Haven: Yale University Press 1968).

[3] Ernest Nagel 'Fact, Value and Human Purpose' *Natural Law Forum* 4 (1959), pp. 26–43 on pp. 41 & 43.

1 A Structure

Fuller uses different terms interchangeably to describe the space inside the boundary of legality: "structure", "pattern", "legal order", "system", "a framework", "a network", and "processes". Without a presupposed structural boundary presupposed in an ethos, Fuller explains in the *Morality of Law*, a lawyer or judge would not be able to recognize a valid from an invalid law:

> "[a] total failure in any one of these eight directions does not result in a bad system of law; it results in something that is not properly called a legal system at all, except perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of contract."[4]

By themselves, according to Fuller, assumptions and expectations cannot guide officials. After all, they are unwritten in the sense of being unconscious. As Fuller argues in *Legal Fictions*, "[i]f we dealt with reality as it is, in its crude, unorganised form, we should be helpless."[5] Fuller continues this passage with the following point: "if we were surrounded by a formless rain of discrete and unrelated happenings, there would be nothing we could understand or talk about." Our words and writing are contextualised inside a pattern. And the role of the legal official is to identify that pattern, classify its boundary and pillars, and to fill in the gaps in its boundary.

Fuller examines the importance and nature of a structure in the judgement of Justice Handy in the infamous 'The Case of the Speluncean Explorers'.[6] Judge Handy claimed that there are "a few fundamental rules of the game that must be accepted if the game is to go on at all."[7] Although Handy is ambiguous as to whether these fundamental rules were procedural or substantive, he insisted that they were preconditions to the analytic enterprise of officials (and legal philosophers). The effect of the analytic method was that officials, such as Judges Tatting and Keen, analysed or decomposed the rules signified by statutes and precedents to the point that "all the life and juice have gone out of it and we have left a handful of dust".[8] As Judge Keen had expressed the objectivist character of the dead analytic method, the obligation of the judiciary is "to enforce faithfully the written law, and to interpret that law in accordance with its plain meaning without reference to our personal desires or our individual conceptions of justice".[9] Such shared assumptions bond individuals with each other and with the institutional authors of rules. Such a bonding was necessary for the analysis of rules. The critical problem was, according to Handy, that it was unrealistic to pretend that a judge (or a prosecutor, a jury, or the executive of a business or government department) made decisions "within a rigid and formal framework of rules that prevents factual error, excludes emotional and personal factors, and guarantees that all forms of the law will be observed."[10] According to Judge Handy,

[4] Fuller, p. 39.

[5] Lon L. Fuller *Legal Fictions* (Stanford: Stanford University Press 1967), p. 104.

[6] By Lon L. Fuller, 'The Case of the Speluncean Explorers' *Harvard Law Review* 62 (1949), pp. 616–645 and *The Problems of Jurisprudence* (Westport: Foundation Press 1949), pp. 2–27 on p. 21.

[7] Fuller 'The Case…', p. 638.

[8] Fuller, p. 638.

[9] Fuller, p. 633.

[10] Fuller, p. 640.

"forms and abstract concepts" were a means, not ends in themselves.[11] The ends varied from the social contingency of the aspirations in one structure as opposed to another.

There needs to be a science of legal structuralism, according to Fuller. Fuller calls such a science, "eunomics". Fuller himself defines "eunomics" as "the science, theory, or study of good order and workable social arrangements."[12] The *Shorter Oxford Dictionary* defines "eunomics" as "law abiding; (socially) well adjusted or ordered." *Oxford* contrasts this with "dysnomic". The word "eunomy" is defined as "a political condition of good law well-administered". "Eunomy" is considered synonymous with "good order which that constitution brought about." Eunomics aims to identify the form of a structure whose boundaries and baselines (*sc*. pillars), if exceeded, compromise the integrity of the structure. Such a form is not necessarily nor even primarily linked with the conscious intent of the founders of a structure. Indeed, as noted above, the condition of order or structure is not posited in a consciously willed act. Rather, the purpose of any one official, including the founders of a written constitution or the legislators of a coercive order, is entangled with the "purposiveness" of the structure as a whole.[13] This "purposiveness" links with Fuller's privileging of the intentionality of the subject. Intentionality emanates from the reciprocal expectations of the interpreters and addressees of texts. Legitimacy inheres in such intentionality. Minimal baselines or pillars set the conditions as to what rational choices to make and what choices not to make. Accordingly, the posit of a binding law is not possible without the implicit mutually accepted, intermeshing matter which confers structural form.

2 The Structure's Territorial Knowledge

In order to demarcate legal knowledge from non-knowledge, a structure needs three elements: a boundary, pillars for its foundation and matter with which to build the structure. The three elements work to induce territorial knowledge. Space is enclosed inside the boundary. The space is recognisable. What is internal is legal knowledge even if the internality includes desirable or "ought" purposiveness. What is exterior to the building-like structure is chaos or non-law. The pillars establish the foundation or constitutional law of a society. The matter of the structure is constituted from unwritten and unspoken assumptions and expectations.

[11] Fuller, p. 639.

[12] Lon L. Fuller 'American Legal Philosophy at Mid-Century' *Journal of Legal Education* 6 (1954), pp. 457–485 at p. 477.

[13] Because he also takes the structure for granted, Sturm erroneously associated purposiveness with a particular individual and the individual's particular act. Douglas Sturm 'Lon Fuller's Multi-dimensional Natural Law Theory' *Stanford Law Review* 18 (1966), pp. 612–639 on pp. 614–615. There was a "natural law" in each person. *Ibid*., p. 621. Indeed, Sturm went so far as to suggest that "the term 'law' designated the normativeness of the complex purposive system that constituted one's character; the term 'natural' indicated that this normativeness subsisted independently of one's acknowledgement of it, yet was more or less discoverable, as well as alterable, by means of one's powers of reflection and intuition." *Ibidem*. In like vein, Sturm claimed that "what Fuller seems to be saying" was that all human beings were "living, purposing and communicating beings" *Ibid.*, p. 618.

2.1 The Boundary and Territorial Knowledge

Fuller accepts that legal knowledge is territorial. He frequently uses territorial vocabulary to describe a structure. A structure, for example, is said to have a "surface" and a "depth". The structure has a "foundation". The foundation has heavy "baselines". The baselines function like the wall that surrounds a fortress.[14] The wall of the structure excludes non-law. The central task of officials is to identify and clarify the surface, depth, baselines and wall of the structure and, secondly, to fill the gaps in the boundary.

The structure takes the form of a "pyramid". The imagined shape of a pyramid encloses "mutuality of recognition" amongst officials on the pyramid.[15] A void lies external to the pyramid. Indeed, until there is a pyramidal legal structure, "space" does not exist. Disorder, rather than order, reigns. The pinnacle of the pyramid replicates the highest official. All subordinate officials and authorities in the pyramidal organization increase in number and decrease in authority.[16] Even commentators of Fuller, such as Gerald Postema, attribute territoriality to describe Fuller's legal theory. Postema reconstructs Fuller's legal theory in terms of "anchors", "the soil" and "roots".[17] Frederick Schauer also reads in territorial metaphors to describe Fuller's legal theory: the official is said to decide "to enter" into legality as if it had a basement door.[18] Without a consciousness of the structure as if it occupied a territorial space, the judge, lawyer and philosopher would be helpless.

Legal knowledge is only recognizable if it is believed to lie inside the boundary of the structure of legality. In *Legal Fictions*, Fuller writes that if we associate brute facts of a "crude, unorganised form" with what we take as legality, "we should be helpless".[19] Why? Because such brute facts are mere disorganised scriptive fragments. And they are disorganized because they cannot be located within the boundary of a prior structure. Their exteriority to the boundary of a structure renders them uncontrollable and uncontrolled by human agents. The structure is believed to precede what is later intellectualised as a legal unit.

It is this border or boundary of the structure that separates legality from disorder. Any instrument that claims to be legal but which is located external to the structure's boundary is described as "perverted law", in Fuller's view. The boundary of a structure separates legitimate from illegitimate interpretation. Interpretation is "reasonable" or "unreasonable" if it remains inside rather than outside the boundary.[20] The boundary of the implied structure delineates which institutional agency or official should decide a

[14] Fuller *Morality of Law* [note 2], p. 210.

[15] Lon L. Fuller 'Human Interaction and the Law' {reprint: *American Journal of Jurisprudence* 14 (1969), pp. 1–36} in *Principles of Social Order* Selected Essays of Lon L. Fuller, ed. Kenneth I. Winston [1981] rev. ed. (London: Hart 2001), pp. 231–266 at p. 237.

[16] See generally Fuller 'Human Interaction', p. 254.

[17] Gerald J. Postema 'Implicit Law' {*Law and Philosophy* 13 (1994), pp. 361–387 reprint} in *Rediscovering Fuller* ed. Willen J. Witteveen & Wilbren van der Burg (Amsterdam: Amsterdam University Press 1999), pp. 254–275 at pp. 378 & 361.

[18] Frederick Schauer 'Fuller's Internal Point of View' *Law & Philosophy* 13 (1994), pp. 284–312 on p. 306.

[19] Fuller *Legal Fictions* [note 5], p. 104.

[20] Note that, consistent with Edmund Husserl and the phenomenology of language generally, I use "mean" or "meaning" or "meant object" to denote the *praejudicia* and expectations, nested in the experiential body, that one brings *into* a sign. I use "signify" or "signification" to denote the cognitive construction of a concept

problem, how the problem should be resolved, the reasons that "count" as resolving the problem and the like. Legal rules "must be brought into, and maintained in, some s y s t e m a t i c interrelationship; they must display some c o h e r e n t s t r u c t u r e or a c o h e r e n t s y s t e m of thought", Fuller remarks at one point.[21] When the pattern of expectations and understandings is coherent, then one can say that a structure or order exists. The unwritten expectations have taken form, albeit an unconscious form.

Conversely, any self-conscious writing, such as a statute or a judge's reasons for decision, is not recognized as binding and, therefore, as a legal unit if it cannot be traced to the boundary of the structure. Even a social scientist, let alone a legal official, would be unable to comprehend the signification of social data "until the structure subject to it stands before him and he is able to comprehend its meaning", as Fuller put it.[22] And a scientist cannot predict (for example, "when *a* occurs *b* follows") unless the scientist can identify the analytical units, *a* and *b*. But "often we cannot even identify *a* and *b* except by some perceived s t r u c t u r e or causal connection which unites them."[23]

The boundaries demarcate how valid state action may proceed.[24] Fuller is conscious of this assumption and, moreover, he goes to great lengths to explain why law is morally good once one appreciates that it is the "legal structure" with which he identifies law. The implied structure constitutes what are legal units. And any text or interpretation that lies outside the boundary of the structure falsifies or perverts legality. Without the collectively shared significations which recognize legal knowledge inside the boundary of the structure, there would be no legality. It is precisely Fuller's focus upon the structure that explains why Nicolson considers that Fuller starts with "statements which merge fact and value, in the sense that they are classifiable as neither factual nor evaluative, and in which value statements are analytically contained."[25]

2.2 The Pillars of the Structure

A structure cannot exist without pillars. To this end, Fuller identifies several important pillars of a structure for it to be a legal structure.

A pillar is at the basis of the framework of a structure. The pillar, once cemented into the ground, establishes the referent for the walls (or boundary lines) that are to be constructed. Accordingly, the pillars address "aspirations" rather than rules. Without the "pillars", officials cannot reach a consensus that certain duties or rights are owed to the individual inhabitant. Without pillars, what one might consider as a contract or lease

that is the referent to the sign. See William E. Conklin *Phenomenology of Modern Legal Discourse* (Aldershot & Brookfield USA: Dartmouth/Ashgate 1998).

[21] Lon L. Fuller *Anatomy of the Law* (London: Praeger 1968), pp. 20 & 94.

[22] Lon L. Fuller 'Afterward: Science and the Judicial Process' *Harvard Law Review* 79 (1966), pp. 1604–1628 on p. 1619.

[23] *Ibid.*, p. 1624. Emphasis added.

[24] This point renders Nicolson's claim that "Fuller starts from the assumption that law is morally good" somewhat shallow.

[25] Peter P. Nicolson 'The Internal Morality of Law: Fuller and His Critics' *Ethics* 84 (1973–1974), pp. 307–339 at 319–320.

or by-law is unrecognisable. In the absence of pillars, the form of the structure is either "perverted" or "parasitic".[26]

The "larger" problem for officials and jurists is to clarify "the directions of human effort essential to maintain any system of law, even one whose objectives may be regarded as mistaken or evil."[27]

This is the point where Fuller's eight pillars of a legislative structure come into play: there be general rules; that the rules be promulgated; that the rules be prospective; that the rules be clear; that the rules not require one to commit contradictory actions; that the rules not require actions that are impossible to perform; that the rules remain relatively constant over time; and that there be a congruence of the rules as declared in writing and with those as practised.[28] The effect of these eight conditions is to ensure a vertical reciprocity between officials and subordinate agencies, on the one hand, and a horizontal reciprocity amongst officials and addressees of the officials' utterances, on the other.

In his initial statement of the eight pillars, Fuller suggests that the contradiction between any two pillars would lead to the consequence that a statute would not exist as a legal instrument.[29] Such a non-existent statute would be a mere fragment of writing. When Hitler was elected the Chancellor of Germany, according to Fuller, officials and citizens were said to share an implicit structure about the rule of law in a liberal democracy. The Nazi regime, under the pretence of a liberal regime in the Weimar Republic, constrained this structure, Fuller believed. Nazi statutes and military orders perverted the implied structure of social meanings that the Weimar officials had taken for granted. Nazi laws contradicted the collectively shared meanings of ordinary citizens.[30]

Fuller describes the invalidity of Nazi laws in different ways on several occasions. Why the Nazi statutes and actions did not exist as legally binding, according to Fuller, was that Nazi rules and actions lay exterior to the structure implied from the ethos of the Weimar republic of the 1920s. A legal structure, to be a structure in both liberal and communist societies, must have rules, certainty, predictability, accessibility and other conditions. If a formal legal order institutionalized such shared pillars of meaning, the officials could gain a closer access to the "best" or most solid legal order. Again, such a requisite is not an ideal of the rule of law, as Nigel Simmonds and others suggest. Rather, the eight conditions of a legal structure are the pillars or foundation of the structure. The structure is not good in the sense of the Greek virtues of Beauty or Wisdom or Courage or Justice as intrinsic ends. As Fuller writes in his posthumously published essay 'Means and Ends',[31] "while a quest for the principles that underlie good social order animates everything said in this book, it nowhere attempts to answer questions like the following: what

[26] The actions of the "Green Shirts" of the "Grudge Informer" case, for example, perverted any semblance of a structure. See generally Lon L. Fuller 'Means and Ends' [1960] in *Principles of Social Order* [note 15], pp. 47–64 on p. 48; as well as his *Anatomy of Law* [note 21], p. 20 and *Morality of Law* [note 2], Appendix.

[27] Fuller *Morality of Law*, p. 4.

[28] Fuller cautions that there may be more.

[29] Fuller *Morality of Law*, p. 39 and *Anatomy*, pp. 61–62.

[30] Fuller is unclear whether these were the expectations of German citizens or citizens of liberal democracies other than Germany.

[31] Fuller 'Means and Ends' [note 37]. Fuller intended this as an Introduction to a second edition of Fuller *The Problems of Jurisprudence* [note 6], pp. 2–27.

is the highest human good? What is the ultimate aim of human life"?[32] Rather, the legal structure is necessarily good in that one cannot have binding rules without a coherence of the rules with the boundary and pillars of the structure: "coherence and goodness have more affinity than coherence and evil".[33]

As such, the Nazi statutes of the 1930s could not be analysed and then reintegrated into analysable units of a coherent structure because the Nazi statutes were external to the Weimar liberal legal structure. As such, the Nazi statutes just did not legally exist. They were void for want of an implied structure to give them signification. In contradiction with the rule of law in a liberal democracy, only coercion could make the Nuremberg Laws "real". But such a "reality" was fictional *vis-à-vis* the implicit liberal structure of the Weimar ethos. The structure, not discrete and self-standing rules, constituted legal reality. As such, the Nazi laws were unreal or dead fictional constructs superimposed upon social reality. In particular, the Nazi laws were "perverted" or non-existent since they were artificially superimposed upon a liberal legal structure which presupposed a role for citizens and non-citizens.

2.3 The Matter of the Construction

If legality depends upon the boundary and pillars of a structure, what is the "matter" from which officials build its walls and pillars? Do officials construct the structure with rules? Principles? Policies? Arguments? This is the fundamental point that differentiates Fuller from the stream of general jurisprudence today. For, Fuller draws from the very anthropological morality that his contemporaries and ours excluded from legality. The "glue" to the structure involves the unconscious assumptions and expectations that participants take for granted as they interpret texts and analyse statutory and judicially created rules.

The matter of a structure is not made from rules, as Colleen Murphy has recently claimed.[34] Nor is the matter synonymous with "implicit rules", as Jeremy Postema claims.[35] Nor is it even recognized, without more, as "unwritten law", as Rod Macdonald claims.[36] The assumptions and expectations are what Georg Hans Gadamer described as *prejudicia*.[37] Any rule, implied rule, principle, policy, social interest or doctrine is legal by virtue of its relation to the boundary and pillars that give form to the structure within which the said unit is situated. And the matter of the structure is given form by the assumptions and expectations that participants take for granted.

The *prejudicia*, for Fuller, are constituted from collectively shared values which one shares with others to constitute a community or social ethos. So, for example, relying

[32] *Ibid.*, p. 48.

[33] Lon L. Fuller 'Positivism and Fidelity to Law – A Reply to Professor Hart' *Harvard Law Review* 71 (1958), pp. 593–672 at p. 630.

[34] Colleen Murphy 'Lon Fuller and the Moral Value of the Rule of Law' *Law and Philosophy* 24 (2005), pp. 239–262.

[35] See especially Postema 'Implicit Law' [note 17] discussed in Nigel Simmonds *Central Issues in Jurisprudence* (London: Sweet & Maxwell 1986), p. 118.

[36] Roderick A. Macdonald 'Legislation and Governance' in *Rediscovering Fuller* [note 17], pp. 279–311 on pp. 286 & 287.

[37] Georg Hans Gadamer *Truth and Method* trans. Garrett Barden & John Cumming (New York: Crossroad 1985), pp. 238–240.

upon Georg Simmel, Fuller suggests that even the state does not exist without a "tacit reciprocity" between ruler and ruled.[38] Such reciprocity is embodied by religious, political, social and ethical assumptions. One's duties to another are just one aspect of such an overall structure. A structure is constituted from a sense of obligation, not posited from external sources. Such a sense of obligation grows as officials and non-officials communicate, negotiate, mediate, bargain, intimidate and litigate against and with each other. I understand your request or your communication because we share assumptions that help to compose a part of the structure whose boundary, pillars and matter we take for granted.

If all ends are means to other means, then which means count as laws? Those ends are legal if they can be recognized as internal to the boundary of the structure that participants take for granted. The "purposiveness" of a rule or policy or social interest is constituted from collectively shared values. Such values are embedded internal to the boundary of a structure. Such collectively shared values, just as the structure itself, exist before the individual lawyer or judge ever comes on the scene as a professional.

The collective memory of participants is an important element of the matter of a legal structure. Carl Jung differentiates such collective memories from personal memories.[39] The latter can be remembered. Collective memories, however, cannot be remembered since they have not been personally experienced. Collective memories may well be formed through myths and symbols (as opposed to signs) framed with reference to the past. And yet, the myths and symbols are present in the consciousness of the participants. This presence inculcates a bonding through myths and symbols. The bonding temporally explains why one cannot fit the collective memories in a discrete time and place. "Made laws" manifest, institutionalize and embody the bonding. Fuller's sense of morality as aspirational, then, is not a speculative quest for an intellectually transcendent goodness.[40] The structure, even if it is constituted from gestures rather than from verbal and written language, limits what choices are available to an official. The structure legitimizes some issues and excludes others as illegitimate. Fuller shudders at the prospect that lawyers would inquire speculatively into a metaphysics about goodness and then claim that such speculation involves legal reasoning and that the Good is the ultimate source of legal reality.

The unconscious matter of the structure constrains the official to decide or to act in a certain manner. The matter does so in three circumstances. First, a family, contract or business relationship exemplifies a horizontal relationship in that the parties do not need some external institution, such as a parliament, to confer authority onto them. Second, officials may be vertically related so that those officials higher in a pyramidal hierarchy confer authority on lower officials to act legally. Third, in a governmental context, officials communicate with each other according to prior collective expectations about their respective roles. The collective values construct the boundary of a structure that the analysis of a rule ignores. What appears to be "juristic and normative", according to Fuller,

[38] Fuller *Morality of Law* [note 2], p. 61.

[39] Carl Jung 'The Concept of the Collective Unconscious' in *Literature in Critical Perspective* ed. Walter K. Gordon (New York: Appleton-Crofts 1968), pp. 504–508.

[40] Here, Cliteur simplifies and misdirects his association of Fuller's sense of morality with the Greek quest for the good life. See Paul Cliteur 'Fuller's Faith' [note 22], pp. 120–123.

"is in fact an expression, not of a rule for the conduct of human beings, but of an opinion concerning the structure. Before one can intelligently determine what should be, one must determine what is, and in practice the two processes are often inseparably fused."[41]

It might appear from the above that the social sciences could best identify the boundary, pillars and matter of the structure. Fuller insists, however, that this is not so. Rather, Fuller's intellectual heritage and his effort are phenomenological.[42] If the official empirically observed the matter, the official would presuppose that the matter is objective and detached from the official. This perceived objectivity, according to Fuller, is erroneous and misdirected. The matter of the structure lies behind the subject, not the object. The subject is the centre of the structure.

Indeed, Fuller's method is discontinuous with the sciences in that the sciences control decisions by virtue of the conditions of an experiment. On the one hand, the official's collective assumptions and expectations are like nature. Further, Fuller does not offer the jurisprude a rigorous methodology that characterises psychology or sociology. Further, consistent with Coleman, Fuller refrains from suggesting that philosophers must justify the content of the matter. On the other hand, Fuller's language hardly connotes a legal objectivity independent of the official or the philosopher.[43] The structure, however, is not a naturally created phenomenon. The assumptions and expectations that constitute the matter of the structure emanate from the subjectivity of the officials. As officials interpret texts—and Fuller gives great weight to interpretation—officials build the boundary and pillars of the structure.

Thus, the attribution of naturalism to Fuller closes off intellectual inquiry just when Fuller begins his analysis of a legal structure.[44] For, Fuller incorporates elements into legality that a scientist would exclude as subjectivist. Indeed, Fuller himself expresses a deep suspicion of naturalism. For naturalism excludes the possibility that a structure is humanly constructed. Naturalism, Fuller claims, postulates a hierarchical and objective code of axioms that ignores its human construction.[45] The usual association of the Good with transcendent forms misses Fuller's insistence that his sense of morality is grounded in social realism, not in some intellectually constructed objectivity. Indeed, when Fuller describes the eight conditions for enacted laws, he likens them to the naturalness of the skills of a carpenter who wishes to build a house to fulfil. The purposiveness of the house is to remain standing over the years.[46] Naturalism does not offer such a role for the carpenter. Fuller does.

[41] Fuller *Legal Fictions* [note 5], p. 131.

[42] See generally, Conklin 'Lon Fuller's Phenomenology of Language' [note 1], pp. 93–125, esp. pp. 106–107.

[43] For the possibility of a naturalist view of vocabulary, see Philippa Foot 'Moral Beliefs' in *Proceedings of the Aristotelian Society* 59 (1958–1959), pp. 410–425.

[44] Coleman especially attributes naturalism to Fuller's project. See, e.g., Jules Coleman *Practice of Principle* (Oxford: Oxford University Press 2001), p. 193, note 21. Raz attributes naturalism to Hart's method. Cf. Joseph Raz 'Two Views of the Nature of the Theory of Law: A Partial Comparison' in *Hart's Postscript* Essays on the Postscript to The Concept of Law, ed. Jules Coleman (Oxford: Oxford University Press 2001), pp. 1–37 at p. 6.

[45] Lon L. Fuller 'Reason and Fiat in Case Law' *Harvard Law Review* 59 (1945–1946), pp. 376–395 on p. 380.

[46] Fuller *Morality of Law* [note 2], p. 96.

3 Two Forms of a Structure

The forms of a structure vary with the genre of the assumptions and expectations of a social organisation. So, for example, dispute resolution is one structural form presupposed in certain circumstances. Here, Fuller has in mind mediation, contract formation and the exchange of goods and services. Another is legalism. Legalism involves adjudication, legislation, mediation, arbitration, voluntary associations, contract (of which property is a supplement), managerial direction, markets and elections. As society develops, a "creeping legalism" overtakes dispute resolution.

3.1 Dispute Resolution

Each form of a dispute resolution possesses its own implicit structure. Officials and parties proceed in each structure without necessarily reflecting about their role, how they reason, what evidence is admissible, what reasoning is *intra vires*, or what counts as closure to a dispute. The officials and parties just act. They take for granted how officials communicate within the particular form of meanings. The voice of the form is "silent" or "tacit". The silent meanings lie in the unconscious of the institutional milieu.[47]

A contract, for example, will stipulate the parties, the persons affected, the date of enforcement, remedies of enforcement and the like. But the contract may well codify the reciprocal expectations that the parties in the particular business or even society generally assume. The consequence is that the formal agreement might well distance the parties from their otherwise implicit expectations in the sub-structure. The old, friendly expectation that a party to a contract would be given the time to walk across the street to find an alternative source of funding for one's business might well formalize procedures and rules that must now be fulfilled to satisfy the formalities of legality. The risk, according to Fuller, is that an institution or its rules will become so formalized as to become estranged from the reciprocity needed for the parties to function effectively as partners in a business.

Similarly, adjudication takes for granted a style of communication that distinguishes it from the political genre and the mediation genres.[48] If a court failed to give reasons or if it gave reasons that were not argued by the parties, the decision would weaken the implicit structure.[49] Similarly, the silent language shared amongst inhabitants in a democracy would be undermined if the political process were effectively restricted to only some of the inhabitants or if the electoral process had serious financial constraints for the candidates. Similarly, for its part, mediation attempts to bring parties toward each other. Mediation helps parties to recognize each other as meaning-constituting, finite beings. With mediation they gain a new and shared perception of their dependence upon each other, according to Fuller.[50] This recognition of the other helps the parties to redirect their

[47] See esp. Fuller 'Human Interaction and the Law' [note 15].

[48] See generally, Lon L. Fuller 'Forms and Limits of Adjudication' {*Harvard Law Review* 92 (1978), pp. 353–409 reprint} in his *The Principles of Social Order* [note 15], pp. 101–139 at p. 109.

[49] Fuller, pp. 121–122.

[50] Lon L. Fuller 'Mediation – Its Forms and Functions' {*Southern California Law Review* 44 (1971), pp. 305–338 reprint} in his *The Principles of Social Order* [note 15], pp. 141–173 on pp. 151–155.

energies into a more constructive relationship. Mutual respect, trust and understanding thereby bond the parties together in mediation. They may well remain strangers to each other (and financially poorer) with adjudication. The adversariness of adjudication appeals to a third party to reconcile differences. But the recognition of the other is absent in the two monologues that continue until a settlement is reached or a judicial decision rendered.

3.2 Legalism

The second form of a structure, legalism, involves assumptions that crystallize as the rule of law. As one example, the institutional structure represents legalism, whatever the content of the rules posited by state institutional sources. The state's institutions posit objectives in "a downward thrust of control".[51] Fuller sometimes likens this downward thrust to "managerial direction". Each institutional level plays a distinct role in the whole structure.[52] *Gemeinschaft* shifts to *Gesellschaft*: formal procedures displace shared assumptions. Formalism is "the furniture", not the bonding glue, of society, he writes. We need to note at this point that Fuller's sense of a structure in his *The Morality of Law* is a structure of collectively shared assumptions rather than of institutions. Without formalism, we are stuck in the informal "opaque' and "open-ended bargaining" that we experience in as unwritten meanings.[53] With formalism, conscious reflection displaces the implied assumptions that had heretofore preceded the reflection.[54]

Against this background, the eight conditions of the enactment and adjudication or rules represent formalism at its best.[55] Behind the formalism there is a spectrum of interpretations that can be considered "fit" or "coherent" with the pre-institutional and pre-rule reciprocal assumptions. The latter guide the official as to her/his role as he or she interprets statutes and precedents. The legal "is" ultimately rests in what is unwritten, not in what is written. This "is" precedes legalism. Even statutes and precedents merely manifest the deeper structure of meanings which confer order to the otherwise scriptive fragments. As Fuller ends *The Morality of Law*, such unwritten understandings help us to communicate and to co-ordinate efforts with other human beings.[56] Through communication, "we inherit the achievements of past human effort". But by communicating, we expand or contract the "boundaries of life itself".

4 The Role of the Legal Official in a Structure

A legal structure only exists, Fuller claims, if the participants share certain assumptions concerning the legitimacy of judicial institutions. It is not a coincidence that Fuller's

[51] Lon L. Fuller 'The Role of Contract' in his *The Principles of Social Order* [note 15], p. 172. Also see Lon L. Fuller 'Some Unexplored Social Dimensions of the Law' in *The Path of the Law from 1967* ed. Arthur E. Sutherland (Cambridge, Massachusetts: Harvard Law School 1968), pp. 57–70 at p. 58.

[52] See esp. Fuller *Anatomy* [note 21], pp. 20–22.

[53] *Ibid.*, p. 75.

[54] *Ibidem*.

[55] Fuller *Morality of Law* [note 2], p. 170.

[56] *Ibid.*, p. 186. As quoted in text corresponding to note 74.

eight conditions of a structure exemplify precisely the sorts of factors that both the analytical method and a liberal legal order take for granted in the ordinary course of events. The eight conditions of rule-making do not address the question, "what is the good life?" Nor do they appeal to the ethical sceptic who might claim that any judgement expressing one state of affairs over another is emotionally grounded and, therefore, not a judgement at all. Nor might the eight conditions be characterized as issues of economic efficiency such as one might attribute to an expert of poisoning,[57] a carpenter,[58] or the assembler of a machine.[59] Nor might the eight conditions be considered intrinsically valued "moral canons" (or universal maxims, as Kant would call them). The eight conditions represent the pillars of a legal structure. If a particular state action or instrument were estranged from the pillars, state action would be seriously illegitimate. Such action would foster disorder.

A legal official's role, then, is immersed in meant objects of language.[60] Officials play different roles depending upon shared meanings about governance, private associations, and different forms of dispute settlement. The separation of their roles for different substructures is essential for there to be "a sound p u b l i c order of law."[61] Before an official declares that a legal duty applies to an individual, the official must make a deliberative judgement. To make such a deliberative judgement and to communicate it with others, though, there needs to be assumptions shared amongst dialogical partners.[62] If meanings are no longer shared, then duties no longer exist. Assumptions and expectations postulate an implicit boundary within which officials feel constrained when they make a decision. If the officials' role is linked with such assumptions and expectations, the role is efficacious.[63] The official acts with an internal sense of his or her role, as an ideal type, in the overall structure of expectations regarding institutions as ideal types. How does the official accomplish such a feat when the official is immersed in the ethos that is the object of analysis? Here, Fuller suggests that the justification of an action is very important because such a justification makes the unconscious meanings conscious.[64]

The justification of a judicial decision, then, rests less with the justice of the content of the particular decision and more with the relation of the decision to the boundary of the legal structure. As Fuller states in *The Anatomy of Law*:

[57] H. L. A. Hart 'Book Review: *The Morality of Law* by Lon Fuller' *Harvard Law Review* 78 (1965), pp. 1281–1296.

[58] Fuller uses the analogy, although it is shifted into the paradigm of economic efficiency in the interpretation of Maurice R. Cohen 'Should Legal Thought Abandon Clear Distinctions?' in his *Reason and Law* (New York: Free Press 1950) {reproduced as 'Law, Morality and Purpose' *Villanova Law Review* 10 (1965), pp. 651–666}.

[59] Robert S. Summers 'Professor Fuller on Morality and Law' {*Journal of Legal Education* 18 (1966), pp. 1–27 reprint} in *More Essays in Legal Philosophy* General Assessment of Legal Philosophy, ed. Robert S. Summers (Oxford: Clarendon Press 1971), pp. 101–130 at p. 129.

[60] What Fuller intends by a 'meaning' is examined in Conklin 'Phenomenology of Language' [note 1], pp. 104–107 & 109–111.

[61] Fuller *Anatomy of Law* [note 21], p. 20. His emphasis.

[62] Fuller *Morality of Law* [note 2], p. 21.

[63] Lon L. Fuller 'The Needs of American Legal Philosophy' [1952] his *The Principles of Social Order* [note 15], pp. 269–283 on p. 273.

[64] Summers especially emphasizes the role of justification for Fuller in Robert S. Summers *Lon L. Fuller* (Stanford: Stanford University Press 1984), p. 147.

> "Those responsible for creating and administering a body of legal rules will always be confronted by t h e p r o b l e m o f s y s t e m. The rules applied to the decision of individual controversies cannot simply be isolated exercises of judicial wisdom. They must be brought into, and maintained in, some systematic interrelationship; they must display some coherent internal structure. This is a requirement of justice itself."[65]

When a rule is contextualized in a structure, its "inconveniences" and "injustices" may possess virtues attributed to the system as a whole.[66] In like vein, if an official gestured, spoke or wrote in a manner that another official could not understand, the former would undermine the latter's dignity "as a responsible agent".[67]

5 The Structure and Traditional Theories of Morality

We are finally ready to address the structural displacement of the traditional theories of morality. Three such theories become apparent: deontological morality, the good and the subjectivist posit of arbitrary values. When one re-reads the interpreters of Fuller's contributions to legal theory, the structuralist character of Fuller's legal theory is amiss.[68] As a consequence, although interpreters invariably assume what they take as "morality", their assumption is read into Fuller's works. Sometimes, for example, "morality" is taken to involve deontological rights and duties. On other occasions, "morality" is said to involve a quest for the Good. On still other occasions, morality is held out as "naturalism" in the sense that morality is held out as resting upon objective social "facts" external to human control. A still further association is sometimes made between morality and posited subjective values. Fuller's view of morality is none of these, as I shall argue in section nine below. The precise understanding of "what is morality?" is invariably taken for granted and, in its stead, the jurist asks whether it is possible to have one coherent legal structure without the necessity of incorporating a factor exterior to the legal order for its validity or legitimacy. Fuller addresses each theory of morality in his writings. He openly challenges them as reflective of what he signifies by the "internal morality of law". For, a structure precedes any speculation about the nature of an individual's moral action. One cannot assess the goodness or the deontological duties of an individual without relating the action to the territorial space and the pillars of the presupposed structure. The boundary distinguishes an internal from an external morality. The internal morality includes "anthropological" or phenomenological elements.

Unless there is congruence between authored laws and the boundary, the statutes and precedents are characterised in two ways. For one thing, they may be considered "perverted" (Aristotle's term, as well as Fuller's). The writing is not recognised as knowable because it exceeds the boundary of the implicit structure. And it is unrecognizable because it dwells exterior to the boundary of the implied structure. Similarly, a rule is

[65] Fuller *Anatomy* [note 21], p. 94. His emphasis.

[66] *Ibid.*, p. 104.

[67] Fuller *Morality of Law* [note 2], p. 162.

[68] It is apparent that Nagel, a philosopher of science as well as of law, especially read Fuller in a manner which missed Fuller's structuralism. See esp. Ernest Nagel 'On the Fusion of Fact and Value: A Reply to Professor Fuller' *Natural Law Forum* 3 (1958), pp. 77–82.

"parasitic" if one form of a legal structure (say, mediation) draws "moral sustenance" from another form of a structure (say, adjudication).[69] Legislated and judicially created rules may be "perverted" and "parasitic" whatever the goodness in the content of the rules or the rightness of an individual's legislated action.

A perverted enacted law is a dead law. Fuller is bent on explaining how legality can be alive. As Fuller writes in the *Anatomy of Law*,

> "[w]hen the tree of law is dead from the roots up, a legal system has ceased to exist. When only a twig is dead, we not only do not declare the whole tree dead (which is understandable), but we treat the twig itself as if it were still alive (which is puzzling)."[70]

When does one know that a legal order is "dead"? What does it signify that a legal system is considered "challenged to its core" or that a legal order has "fundamental" qualities? We analyse the "branch" as if it remained an element of the form of a live organism but that the roots of the structure are dead? The relevant factor is the structure of implicit assumptions and expectations of the participants. Put differently, legal obligations must be knowable inside the territorial boundary and they must also be consistent with the pillars of the structure. Such boundaries and pillars demarcate what counts as good analysis and weak analysis, the legitimate role of the lawyer and judge as opposed to an illegitimate role, the sorts of legislated rules that exist and those that do not exist, how a judge should approach a social circumstance that has not arisen before, the purpose of a professional legal education, existent laws from perverted laws, and the like. One just cannot "understand reality without discerning in it structure, relatedness, or pattern", he writes in his essay 'American Legal Philosophy at Mid-Century'.[71]

This structuralist view of the relation of morality to legality radically differs from traditional theories of morality. One such theory is deontological ethics. A deontological duty, such as "respect the other as a person", is a-contextual. The duty is universal by virtue of its abstraction from social contingency. Fuller argues, however, that duties exist only when situated in context-specific circumstances. As a consequence, duties cannot be deontological. Three factors reinforce the context-specific circumstances that condition the possibility of a legal duty according to Fuller. First, the members of a group must voluntarily create the duty. Second, the duty must be shared equally. Third, parties must owe the same duty to the other over time. The legal official's role, according to Fuller, is to be able to advise whether officials have fulfilled the three conditions. If the conditions are met, then the duties are enforceable. As Fuller argues, "it seems absurd to say that such a duty can in some way flow directly from knowledge of a situation of fact."[72] Fuller claims, after all, to be describing a legal order as a situation of fact. Fuller associates "facts" with efficacy. In order to understand the notion of duty, in brief, there is "implicit" in the efficacy of the duty a notion of reciprocal expectations.[73]

[69] Fuller 'Forms and Limits of Adjudication' [note 15], pp. 101–139 on pp. 136–139.
[70] Fuller *Anatomy* [note 21], p. 10.
[71] Fuller 'American Legal Philosophy at Mid-Century' [note 24], p. 477.
[72] Fuller *Morality of Law* [note 2], p. 13.
[73] *Ibid.*, p. 21.

Aside from context-specific circumstances surrounding a duty's very existence, the official must make a deliberative judgement before the duty is applied to another individual. To make such a deliberative judgement and to communicate with others, there needs to be shared assumptions.[74] If meant objects are no longer shared, however, then duties cannot exist.

Fuller does not deny a role for deontological duties and rights in a legal structure. The question with which Fuller is concerned, as he says in *The Morality of Law*, asks

> "where does duty leave off and the morality of aspiration begin?"[75] An aspiration ontologically precedes a duty. Duties crystallize in legal consciousness when they are enforced according to a pattern or structure of reciprocal expectations. This pattern presupposes "an anonymous collaboration among men by which their activities are channelled through the institutions and procedures of organised society".[76]

In *The Anatomy of Law*, Fuller continues this line of thought:

> "[t]hose who participate in the enterprise of law must acquire a sense of institutional role and give thought to how that role may most effectively be discharged without transcending its essential restraints. All of these are matters of perception and understanding need not simply reflect personal predilection of inherited tradition".[77]

The role of tradition and of shared assumptions in that tradition contrast with the resolution of intellectual contradictions by the analysis of rules. The latter project, though, begs "what kind of order is it that we are institutionalising?" As with Michel Polanyi's study of the role that the scientist plays in interpreting scientific data, according to Fuller, so too the legal official plays a role that is integral to an interpretative "enterprise".[78]

If duties cannot be deontological, then might we rightly conclude that Fuller's theory of law sides with traditional natural law? The traditional natural view, grounded in Aristotle, Augustine and Aquinas, associates natural law with the Good. Many interpreters of Fuller's works have missed his structuralism by reading such a traditional natural law view into his works.[79] Fuller addresses such an approach in his 'The Needs of American Legal Philosophy' (1952).[80] Fuller insists that there is no one intrinsic Good valued in and for itself. It would be grossly misdirected to understand Fuller's structuralism as a traditional quest for the Good. Even an intrinsic Good, he claims, is a means to

[74] *Ibidem.*
[75] *Ibid.*, p. 10.
[76] *Ibid.*, p. 22.
[77] Fuller *Anatomy* [note 21], p. 116.
[78] *Ibid.*, pp. 120–122.
[79] Fuller's association of morality with goodness is sharply described in one Jurisprudence text, for example, as "secular natural law". George C. Christie & Patrick H. Martin *Jurisprudence* Text and Readings on the Philosophy of Law, 2nd ed. (St. Paul, Minnesota: West Publ Co. 1995), p. 214. Also see Anthony D'Amato 'The Limits of Legal Realism' *Yale Law Journal* 87 (1978), pp. 468–513 on 506–513. Cliteur most certainly associates Fuller's sense of morality with the Good life in Cliteur 'Fuller's Faith' in *Rediscovering Fuller* [note 17], pp. 100–123 at p. 122. Also see Peter Teachout 'Uncreated Conscience: The Civilizing Force of Fuller's Jurisprudence' in *Rediscovering Fuller*, pp. 229–254 at pp. 241 & 252; Wibren van der Burg 'The Morality of Aspiration: A Neglected Dimension of Law and Morality' in *Rediscovering Fuller*, pp. 169–192 on pp. 174–176; and also Douglas Sturm 'Lon Fuller's Multi-dimensional Natural Law Theory' *Stanford Law Review* 18 (1966), pp. 612–639 on p. 621.
[80] Fuller 'The Needs of American Legal Philosophy' [note 13].

other ends. Further, a Good is not posited by one's emotional or non-cognitive personal values. Because each end is a means to another end, it is inappropriate to say that an end (and therefore a means) is subjectively posited, he writes. We cannot exclude cognitive factors in the choice of ends since ends are the means to other ends. The means are merely "an internal convenience of thought", not "a pretended objective reality".[81]

Fuller's "original" use of the term "morality" is, finally, apparent if one read it as a disguised effort to privilege and rationalize subjective values. Robert Summers does do so.[82] So too, Karol Soltan[83] and Marc Hertough[84] adopt this reading of Fuller. Fuller insists throughout his works, however, that he is highly dissatisfied with the mere subjective posit of values as constitutive of legality. The values are undoubtedly elements of a structure. But Fuller's project suggests that the official and philosopher must endeavour to become conscious of such values. The values may well provide the foundation of a legal structure. But the role of the official in a liberal legal structure is to recognize such pre-legal values and question their coherence with others in the structure. The key question is whether the subjectively posited values reinforce the foundation and boundary of the implicit structure. We are left with the prospect that, as with Moffat, Fuller "tends to throw us off, because he seems to be pitting one kind of morality (procedural) against another (substantive). We begin to suspect that Fuller has used the term 'morality' the way I have defined M-2, as an honorific title and not really a matter of morality at all."[85]

Thus, for Fuller, one cannot distinguish the notion of a structure from the notion of Goodness or deontological action when one addresses the nature of a legal unit. One has to relate the unit to a territorial-like structure. And to be a structure, the structure necessarily possesses characteristics with which one might consider a Good structure: predictability, clarity, rules, prospectivity, an autonomous subject and the like. Unless legal officials address what Hart and Dworkin called "anthropological morality", they will not be aware of the all-important territorial-like structure within which they may reason. Legality, as understood through the language of the structure, fuses "oughts" with the "is", and necessarily so.

6 Competitive Structuralist Theories

Lon Fuller is not the only Anglo-American jurisprude to privilege the structure in which a legal unit is situated. H. L. A. Hart, Jules Coleman, Ronald Dworkin and Joseph Raz, to name only four, also discussed the relation of a legal unit to a structure. In the case of Hart and Coleman, the structure was composed of rules. Raz emphasised the role of an institutional structure in his early works and an inter-related structure

[81] *Ibid.*, p. 258.

[82] Robert S. Summers 'Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law' *Harvard Law Review* 92 (1978), pp. 433–449 at p. 448.

[83] Karol Soltan 'A Social Science that does not Exist' in *Rediscovering Fuller* [note 17], pp. 387–424 on p. 397.

[84] Marc Hertough 'The Conscientious Watermaster: Rediscovering the Interactional Concept of Law' in *Rediscovering Fuller*, pp. 364–386 on p. 385.

[85] Robert Moffat 'Lon Fuller: Natural Lawyer After All' *American Journal of Jurisprudence* 26 (1981), pp. 190–201 at p. 210.

of concepts in his later works. And Dworkin elaborated a theory of a narrative structure in his *Law's Empire* and accompanying articles. Fuller's structuralism, though, radically differed from these acknowledgements. For one thing, Fuller understood the content of the structure as drawn from what Hart and Dworkin excluded from legality as "anthropological morality". Although I shall elaborate what this sense of morality entails in my Section two, Fuller had in mind what Georg Hans Gadamer considered "prejudgements" or *prejudicial*. The matter of the structure is nested in the collective unconscious of a community. Second, in contrast with Hart and Coleman, Fuller privileges the interpretative act. Third, the role of the legal official is drawn from the socially contingent boundary and pillars of the structure. Finally, the official, as a subject, is the centre of the structure. This centre contrasts with the ready-made objectivism that characterizes the conceptual, institutional and narrative structures of his contemporaries.

As an example and only as an example, H.L.A. Hart emphasized the role of a s y s t e m in the concept of law. The system was composed of two types of rules: primary and secondary rules. The foundation of the modern legal order was grounded upon the rule of recognition. Having privileged the systematic character of a modern legal order, Hart proceeded to exclude the phenomenological experience of bonding that he categorised as "pre-legal". Hart described the phenomenological element as "psychological" and, as such, alien to the idea of a concept. Concepts alone constituted legality. His consistent example between the excluded phenomenological and the included conceptual character of legality distinguished between "feeling obliged" and a "legal obligation". Hart posited that the feeling of being obliged lay "buried" in the word "obligation".[86] So too, the psychological feeling lay "latent" in the word 'duty'.[87] Such a "buried" and "latent" phenomenological language presented "the figure of a b o n d binding the person obligated".[88] Despite the importance of the buried experiential bonding to the legal structure, though, Hart deferred to the cognitive legal unit as if it were self-standing, independent of the phenomenal experience. The system of primary and secondary rules was constituted from such discrete, self-standing concepts.

Jules Coleman, who claimed to have followed Hart, offered less energy in attributing a structural character to legality. What he shared with Hart, though, was a determined effort to exclude anthropological morality from legality. Both the legal official and the philosopher took concepts as the sole constituent of legality. Coleman emphasized that "practical lives" are "conceptually mediated".[89] Even legal philosophy, according to Coleman, concentrated upon the clarification and intellectual distinctions amongst concepts.[90] Social differences amongst human beings were excluded from such an intellectualist enterprise. Even the effort to justify intellectual distinctions was excluded from legality because a justification of the content of a concept could not be made without ad-

[86] H. L. A. Hart *The Concept of Law* ed.—with Postscript—Penelope A. Bulloch & Joseph Raz (Oxford: Clarendon Press 1994), p. 87.
[87] *Ibid*., p. 87.
[88] *Ibidem*. His emphasis.
[89] Coleman *Practice of Principle* [note 14], pp. 10–11, note 13.
[90] *Ibid*., p. 13.

dressing the phenomenal world presupposed in the content.[91] Essentialism characterised Coleman's description of legal methodology.[92] Concepts defined "essential features" of a concept and a context-specific experience was reduced to such features of the concept. If officials were to incorporate content-specific meant objects into legality, they would impute a subjective value to the object that the analysed concept denotes.[93] Indeed, any effort to associate legality with social behaviour was "not really a form of philosophical inquiry at all."[94] Anthropological factors must be excluded from legal knowledge.[95] Instead, the analysis of a concept was "the most familiar and fruitful way in which legal philosophy contributes to our understanding of legal practice."[96] What rendered the claim of philosophy to legal studies was that the study made "the normative language of law i n t e l l i g i b l e to us." The intellectual differentiation of concepts was the only possible philosophy of law: "[t]here is nothing else that needs to be done…"[97]

So too, Ronald Dworkin, who constructed his theory of legal reasoning in reaction to Hart's and who defended it against Coleman's,[98] shared with Hart and Coleman the refusal to recognise "anthropological morality" as a constituent of legality.[99] The interpretative act abstracted from beliefs and non-cognitive experiences.[100] Indeed, experience could only be "cognitive experience," Dworkin took for granted.[101] Dworkin is emphatic from his very first published essays that the "popular morality" (which would be an important element of anthropological morality), nested in unwritten values and assumptions, is excluded from binding laws. The referent of one argument was another concept, not the anthropological morality that Fuller privileged as the matter of the structure. Even aesthetics, for Dworkin, was a matter of conceptualising or intellectualising a b o u t the world of immediate experience.[102] Such an intellectualisation permitted judges and lawyers to justify, to argue, to rebut and to transcend their immediate personal convictions in favour of the chains of principles (justificatory arguments) of the narrative structure. The role of the official was to intellectualise a b o u t social practices: "creative interpretation takes its f o r m a l s t r u c t u r e from the idea of intention […] because it [the interpretation] aims *to impose* purpose o v e r the text or data or tradition being interpreted".[103] And again, Hercules

[91] Jules Coleman 'Methodology' in *Oxford Handbook of Jurisprudence and Philosophy of Law* ed. Jules Coleman & Scott Shapiro (Oxford: Oxford University Press 2002), pp. 311–351 on p. 314.

[92] *Ibid*., pp. 311–351.

[93] *Ibid*., p. 183.

[94] *Ibid*., p. 178.

[95] *Ibid*., p. 160.

[96] *Ibid*., p. 175.

[97] *Ibid*., p. 160.

[98] See generally, Ronald M. Dworkin 'Thirty Years On' in *Harvard Law Review* 115 (2002), pp. 1655–1687.

[99] See generally, by Ronald M. Dworkin, 'Does Law have a Function? A Comment on the Two-level Theory of Decision' in *Yale Law Journal* 74 (1965), pp. 640–656, 'Lord Devlin and the Enforcement of Morals' *Yale Law Journal* 75 (1965–1966), pp. 986–1005 {subsequently published as 'Liberty and Moralism' in his *Taking Rights Seriously* (Cambridge, Massachusetts: Harvard University Press 1977), pp. 240–258 and 'Philosophy, Morality and Law – Observations Prompted by Professor Fuller's Novel Claim' *University of Pennsylvania Law Review* 113 (1965), pp. 668–690.

[100] Ronald M. Dworkin *Law's Empire* (Cambridge, Massachusetts: Harvard University Press 1986), p. 112.

[101] *Ibid*., p. 235.

[102] *Ibid*., p. 236.

[103] *Ibid*., p. 228. Emphasis added.

> "tries to impose order over doctrine, not to discover order in the forces that created it. He struggles toward *a set* of principles he can offer to integrity, a scheme for transforming the varied links in the chain of law into a vision of government now speaking with one voice, even if this is very different from the voices of leaders past."[104]

What constrained the official's actions were the cognitive experiences which s/he incurred as a participant in the interpretative project.

Fuller's original theory of legal structuralism (at least in Anglo-American legal philosophy) is conspicuous when one turns to Dworkin's own review of Fuller's *Morality of Law* in 1965.[105] Dworkin complained that Fuller's "internal" sense of morality lacked a "derivative or reflective" character. Only self-conscious justificatory standards constituted morality.[106] Borrowing Hart's term, such moral standards were "criterial", according to Dworkin. Fuller's sense of morality was what Dworkin described as pre-reflective or even primitive.[107] Social bonding, for Dworkin, could arise from argument and self-conscious reflection rather than from inarticulated collective values such a Fuller held out, according to Dworkin. Beliefs were internal to the human being *as an interpreter* of the narrative structure. Fuller's appeal to unwritten assumptions and expectations opened the door to the arbitrary subjectivism or what Dworkin disparagingly earlier described as "prejudice."[108] Such prejudices drew from the emotional, not the cognitive; from the experiential body, not the mind[109] that the passions of the experiential body must be exiled from legal analysis. Even a "practice" was considered the justification about a social practice, not the embodied meanings which human subjects may share through a bonding practice. Dworkin restated the exclusion of popular morality when he distinguishes constructive interpretation from conventional interpretation:

> "[f]or when I speak of the community being faithful to its own principles I do not mean its conventional or popular morality, the beliefs and convictions of most citizens. I mean the community has its own principles it can itself honour or dishonour, that it can act in good or bad faith, with integrity or hypocritically, just as people can."[110]

Thus, from his earliest essays, Dworkin consistently excluded anthropological morality from the narrative structure.[111]

Joseph Raz, in his earlier and some later writings and in reaction to Dworkin, offered a third sense of a structure: namely a bureaucratic, institutional structure. Such an

[104] *Ibid.*, p. 273. Emphasis added.
[105] Dworkin 'Philosophy, Morality and Law' [note 86], pp. 668–690.
[106] *Ibid.*, 683. Also see pp. 684 & 685.
[107] It is interesting that Fuller compared his understanding of "interactional relations" with the bonding of what he called "primitive" tribes. See, e.g., Fuller 'Human Interaction and Law' [note 15], pp. 239–244. See generally, Conklin 'Lon Fuller's Phenomenology of Language' [note 1], pp. 93–125.
[108] Dworkin 'Lord Devlin and the Enforcement of Morals' [note 86], pp. 986–1005.
[109] Dworkin 'Does Law have a Function?' [note 86], pp. 640–656.
[110] Dworkin *Law's Empire*, [note 100], p. 168.
[111] See, e.g., by Ronald M. Dworkin, 'Taking Rights Seriously' in his *Taking Rights Seriously* (Cambridge, Massachusetts: Harvard University Press 1977), pp. 184–205 and 'Liberty and Moralism' *ibid.*, pp. 240–258.

institutional structure pre-existed judicial reasoning.[112] If a rule were posited by the appropriate institutional source—such as a government agency or minister or court—then the rule was considered valid or authoritative. Each rule belonged to a system of institutional sources.[113] All human beings and all physical objects within the border of the territory were potential legal category. Each category could be de-composed into increasingly minute categorical elements on the territorial space.

A social realism was said to cover the institutional structure in that the structure was synonymous with "social facts".[114] This rendered a non-contingent, objective character to legal reasoning. Contingency only occurred on the exterior to the structure: b e y o n d t h a t , a l l i s c o n t i n g e n t". The "social fact" of an institutional structure thereby rendered objectivity to what one would otherwise consider the arbitrary posit of a value by a judge. As Joseph Raz emphasises in different essays, "[w]hen we ask about the nature of law we aim to discover how things are independently of us [...] our preferences or value judgements are immaterial."[115] Once a judicial decision was rendered, the decision excluded any deliberative re-examination of the values imputed in the content of the decision.

The distinction between metonymy and metaphor is relevant here. With metonymy, the analysed concept or rule stands for the structure as a whole. Such a metonymy permeates the works of Hart, Coleman and Raz. In the case of Hart and Coleman, the concepts were inter-related into a system or structure of concepts (*sc.* rules). In his later writings, Raz also described how legality is "a system of reasoning or a network of intelligible connections between interconnected ideas…that manifest their intelligibility".[116] In Dworkin's case, the concepts are framed as arguments and each argument stands for a narrative structure. The structure, Dworkin writes, excludes and includes, underplays and privileges some ideas over others, "as if this [structure] were the product of a decision to pursue one set of themes or visions or purposes, one 'point', rather than another."[117] A structure even lies behind an individual text, such as a statute or a judicial decision. Even constitutional rights against the state are created, as Dworkin writes in 'Law's Ambition for Itself', "not by the bare text of the Constitution, nor by the specific, concrete intentions of the 'framers', nor by their own fiat, but instead by t h e c o n s t i t u t i o n a l s t r u c t u r e itself working itself pure". Only in his earlier work noted above, does Raz entertain that the legal structure, as an institutional social fact, is greater than the sum of its discrete members. The four jurists—and I take them only as archetypical examples of

[112] By Joseph Raz, 'Authority, Law and Morality' in his *Ethics in the Public Domain* Essays in the Morality of Law and Politics (Oxford: Clarendon Press 1994), pp. 210–237 and 'Two Views of the Nature of the Theory of Law: A Partial Comparison' in his *Authority of Law* (Oxford: Clarendon Press 1979), p. 269.

[113] Raz began his first book, the *Concept of a Legal System* for example, with the claim that "every law necessarily belongs to a legal system…" Raz *Concept of a Legal System*, p. 1.

[114] Raz *The Authority of Law*, p. 38. Here, he also describes his legal theory as positivist because the activities of human beings, through their institutions, posit the laws.

[115] Joseph Raz 'The Relevance of Coherence' [1992] in his *Ethics* [note 112], pp. 277–325 at p. 287.

[116] Joseph Raz 'Rights and Individual Well-Being' in his *Ethics* [note 112], pp. 44–59 at p. 47.

[117] Dworkin *Law's Empire* [note 100], pp. 38–39. Ronald M. Dworkin 'Law's Ambition for Itself' [McCorkle Lecture] in *Virginia Law Review* 71 (1985), pp. 173–187 on p. 175. Emphasis added.

contemporary Anglo-American jurisprudence[118]—recognize that "morality" is incorporated into legal reasoning without asking "what is on the other side of the boundary of the legal structure?" At best, one might find a reference to "morality" as lying on the other side of the boundary. I wish to address the nature of that structural boundary. Perhaps HART failed to recognize this factor when he described his fear that his starting-point (a rule) radically differed from the starting-point of LON FULLER (anthropological morality): "I am haunted by the fear that our starting-points and interests in jurisprudence are so different that the author and I are fated never to understand each other's work."[119]

7 The Centrifugal and Centripetal Structures

An ambiguity seems to overcome FULLER's structuralist theory of law. On the one hand, the boundary, pillars and matter of the structure pre-exist the official. The official enters the scene too late, as it were, to radically change them. The boundary, pillars and matter seem to be "out there", separate from the official and uncontrollable by the official. And yet, on the other hand, a legal structure, FULLER insists, is not ready-made as if a gift of nature. Rather, it is the assumptions of the officials that constitute the matter of the structure. In order to grasp how FULLER breaks from the apparent ambiguity, I shall distinguish between a centrifugal and a centripetal structure.

A centrifugal structure has a centre which magnetically attracts external matter as it swirls in a circle. The best example of a centrifugal structure is the candy floss that one purchases at a county fair. Like the candy floss, the floss swirls about a centre. Slowly, the centre gains in solidity until the floss takes shape. Chaos remains outside the stick of floss. The matter of the floss, its boundary and its pillar is attractive to any participant who perceives the candy as a structure. So too, when they have completed their project, the officials have constructed a structure from the chaotic matter. A boundary and pillars characterize the legal structure with the legal official at its centre. Once the boundary and pillars are constructed, there is a "constitutional law" that demarcates legal from pre-legal phenomena. Human agents construct the boundary, pillars and matter of the structure as they interpret texts, communicate with each, analyse rules, apply the rules and argue cases before arbitrators, judges and other officials. The interrelations and successions of rules and institutions are systematised into a coherent order.[120] As FULLER explains in *Legal Fictions*, "[i]nstead of that [ready-made structure], our minds have the capacity for altering, simplifying, rearranging reality." FULLER continues that our minds alter and simplify what we take as legal reality or the "is".[121]

The consequence of the centrifugal project is that we officials are the centre of the structure. This is so even though the structure seems to be objective and pre-existing of any legal official or the reasoning of that official. What may well have started out as the

[118] Also see, e.g., by Sean Coyle, 'Hart, Raz and the Concept of the Legal System' in *Law and Philosophy* 21 (2002), pp. 275–304 and 'Our Knowledge of the Legal Order' *Legal Theory* 5 (1999), pp. 389–413.

[119] H. L. A. Hart 'Lon L. Fuller: *The Morality of Law*' in his *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press 1983), pp. 343–364 on p. 343.

[120] Fuller *Morality of Law* [note 2], p. 105.

[121] *Ibid.*, p. 104.

subjective posit of a value or *prejudicia* is transformed into objectivity once such expression is located with similarly situated *dicta* within the boundary of the structure. Such a relationship excludes a special sense of morality from legality, then. There is an internal morality and an external morality. A valid judicial decision or action must be located inside the implicit structure of collective expectations.

Fuller's centrifugal structure contrasts with the centripetal structure where the former centre lies on the fringe of the structure. Instead, the boundary "out there" is taken as reality. The boundary, not the official, is the generating source of the structure. A ready-made objectivity characterizes the structure. The conceptual, narrative and institutional structures, as elaborated by Hart, Coleman, Dworkin and Raz, are centripetal in nature. In Hart's case, the primary and secondary rules are situated in an objective reality. In Coleman's case, the objectivity is so entrenched in the boundary that the structure never accesses the official's meant objects. In Dworkin's case, the official's subjective values would offend the objectivity of the narrative structure. Indeed, there remains a "law beyond the law" that presents the object of desire to complete the gaps in the narrative structure. In Raz's case, both the structure of concepts and the institutional structure are believed to exist beyond the subjectivity of the official. By Raz's sources thesis, a judicial decision or action is objective by virtue of its posit by an appropriate institutional source. Once again, the structure is centripetal. Only Fuller's structure is centrifugal. Herein lies the originality of Fuller's structuralist legal thought.

Only if the judicial decision or action lies internal to the boundary of the structure and only if the source of the decision is the official her/himself, only then will there be a "real right", as Fuller puts it. Fuller's implied legal structure, nested in assumptions and expectations, is centrifugal. An argument must be brought from a centre (the judge/lawyer) *to* the boundaries of the structure. The generation of the structure lies in this centre of the structure. The centre of a centripetal structure, in contrast, is located in the circumference of the structure. The circumference is real. The official merely supplements the real. The centripetal structure forgets about the collective *prejudicia* of the lawyer or judge or non-lawyer. Anthropological morality must be excluded from the structure as immaterial to the centripetal structure.

The anthropological morality is immaterial because the most objective unit purged of all socially contingent content. What is most important is not some speculation about the structure as a whole but the discrete, self-standing concepts that compose the centripetal structure. A judicial decision or statute functions as a metonymy *vis-a-vis* the structure as a whole. The interpretative act of the official stands for the structure. There is no room for metaphoric allusions to the boundary and pillars since the boundary and pillars are the God-given reality. Instead, the role of the official is to analyse the concepts which s/he knows as if they were walled in a centripetal structure. With a centrifugal structure, in contrast, officials, being the centre of the structure, create and alter what they would take in a centripetal structure as an externally independent of the subject. The boundary of the centripetal structure is taken as a "God-given" reality.

Despite the contingency of the official's interpretative act, Fuller claims that official assumes the boundary of a (centrifugal) structure as a "given". There must be some stability and determinativeness in the boundary or else one would not have a structure, even

a centrifugal structure. Accordingly, officials reach conclusions that are binding. For, the decisions are congruent with the boundary of the structure.

That said, the judicial decisions may be patently false or unjust conclusions. How so? First, officials appeal to rules and rules reduce context-specific experiential meanings into categories. Such a categorical world may construct a new reality.[122] But the new reality may fundamentally contradict the existing structure or be an aberration from its pillars and boundary. Second, "borderline cases upset our classifications".[123] Accordingly, a rule may be false if it is incongruent with the boundary of the centrifugal structure. If an official considers that a rule falsifies legal reality (that is, the rule does not join with the "practice" of deferring to the structure's boundary), this is only because the official pictures the rule as external to the territorial boundary of the centrifugal structure.

8 Why is the Structure Binding?

The most important aspect of an implied centrifugal structure is the bonding or "shared commitment" that holds its members together: the shared commitment to the boundary of the structure is "the g l u e that holds together […] the f u r n i t u r e of society".[124] H. L. A. Hart was "haunted" by such a bonding which he left behind in his exposition of the concept of a modern legal order. For, collectively shared assumptions constitute the glue. An individual's inclinations, dispositions and *Weltanschauung* will be at one with collective values. The unconscious is made conscious by the "repeated acts of human judgement at every level of the system".[125] The "structural constancies" that repeat themselves are treated as "uniformities of the factually given".[126] The constancies appear "natural" or ordered precisely because of their repetition. In this manner, a statute or other legal instrument is not efficacious unless one could relate the instrument to the structure of unwritten expectations.[127]

Such a social bonding sustains contracts and public institutions. Assumptions cement the social bonding necessary for the efficacy of a legal order.[128] What happens to a legal structure that lacks the requisite social bonding? Such a prospect is "disastrous".[129] Why so? Because legal formalism would prevail at the cost of the necessary social bonding that renders the formalism efficacious. The legal scholar must direct her/his studies to law in action rather than law in books.[130] The most important element such law in action asks "how are officials and the public bonded to the rule of law?" The rule of law is made conscious by such notions as due process, equality before the law, freedom of speech, the

[122] Fuller *Legal Fictions* [note 5], p. 115.
[123] *Ibid.*, p. 102.
[124] Lon L. Fuller 'Two Principles of Human Association' {in *Voluntary Associations* ed. J. Roland Pennock & John Chapman (New York: Atherton Press 1969) [Nomos XI] reprint} in his *The Principles of Social Order* [note 15], pp. 81–99 at p. 85. Emphasis added.
[125] Fuller *Anatomy* [note 21], p. 39.
[126] Fuller *Morality of Law* [note 2], p. 151.
[127] *Ibid.*, pp. 155–157.
[128] Fuller *Anatomy* [note 21], p. 47.
[129] *Ibid.*, p. 39.
[130] *Ibid.*, pp. 8–11.

requirement of evidence, adjudication, and the expectation that officials on the pyramid will be constrained by rules.[131]

Indeed, in a review of two Russian legal scholars, Fuller goes so far as to suggest that the felt bonding nested in a structure underlies the very existence of all legal systems, not just a bourgeois legal order.[132] To consider law as a "matter of the authoritative ordering of social relations from above", he continues in the review, is erroneous.[133] The belief that legality is artificially superimposed upon individuals misses "the essence" of law: namely, the reciprocal exchange or what I have called the addressive experiences that induce the social bonding necessary to have an authoritative legal structure. Fuller understands the term "morality" in just this sense of an immanent rather than a posited set of obligations.[134] Even socialist law is built upon unwritten meanings, he suggests. Such unarticulated meant objects characterize private trading, governmental relations with corporations, and the payment to workers who are compensated for their performance of work. Exchange, institutional relations and economic compensation disappear when the last vestiges of economic reciprocity dissipate.

One needs to appreciate that Fuller's antagonist is a legal method that is satisfied with the intellectual differentiation of concepts. Rules are a form of concepts. Hegel called this legal method, *Verstand*. Intellectual differences displaced social differences. Intellectual differentiation seemed to result in an inevitable or natural conclusion. But intellectual differentiation was only possible because of deeper unconscious assumptions about the structure boundary that excludes some forms of reasoning and includes others as relevant to legal knowledge. For a rule to be analysable, there must be constancy through time. Further, there must be congruence between the law in action on the one hand and the law in books on the other.[135] The whole analytic project could claim to represent the legal "is", Fuller insists, only if the participants collectively shared assumptions about the baselines, surface, depth, and boundary of the structure within which the analysing lawyers worked. Without shared interactional expectancies, the subject becomes a "stranger" or "true outsider" to laws.[136] Conversely, if a lawyer or judge interprets a text in the spirit of the shared structural boundaries, "interpretation can often depart widely from the explicit words of the Constitution and yet rest secure in the conviction that it is faithful to an intention implicit in the whole structure of our government".[137] "Is" and "Ought" become inextricably mixed.[138] And the shared "is" and "oughts" give form to the structure that officials take for granted when they parse and analyse rules.

[131] Lon L. Fuller 'Irrigation and Tyranny' {*Stanford Law Review* 17 (1965), pp. 1021–1042 reprint} in his *Principles of Social Order* [note 15], pp. 217–218.
[132] Lon L. Fuller 'Pashukanis and Vyshinsky: A Study in the Development of Marxian Legal Theory' *Michigan Law Review* 47 (1949), pp. 1157–1167.
[133] *Ibid.*, p. 1160.
[134] *Ibid.*, p. 1162.
[135] Fuller *Morality of Law* [note 2], pp. 33–41.
[136] Fuller 'Human Interaction and the Law' [note 15], p. 240.
[137] Fuller *Morality of Law* [note 2], pp. 102 & 104.
[138] See, e.g., Lon L. Fuller *Law in Quest of Itself* [1940] (London: Beacon Press 1966), p. 64.

9 Conclusion

Fuller leaves legal philosophy with a double sense of "morality". First, a phenomenology of language, constituted from assumptions and expectations, constructs the boundary and pillars of a territorial structure. What is known inside the boundary is a legal unit. This internal knowledge mixes the "is" and "oughts" so that the naturalistic fallacy collapses. There is a morality of law because of the subjective values and other "oughts" lie internal to the boundary of the implied structure. Legal knowledge, for Fuller, is a territorial knowledge despite his phenomenology of language. This sense of internal morality is enough to have confused Fuller's critics. But Fuller offers a second sense of morality. For, if there is a structure or order, there must be a disorder. Fuller leaves one with the prospect of a morality which remains exterior to the boundary of the legal structure. Such a pre-legal and non-legal exteriority is unrecognizable as law.

Despite the clarity of Fuller's structuralism, there remains a small paradox. Fuller presupposes that lawyers and judges construct the internal morality of a structure. But morality, as the exteriority to a structure, also hinges upon the construction of legal officials because the exteriority depends upon the judicially created territorial boundary. Lawyers and judges construct the exterior non-law in the same moment that they construct the boundary and pillars of the structure. They do so as they communicate, interpret, adjudicate and resolve disputes and posit social policies of the state. If that is so, the non-law is never a "given" which officials need accept as a "second nature", as Plato (in *The Laws*) and Hegel put it. The relation of law to morality is a misdirected enterprise. For, legal officials themselves contrast morality as they construct the structural boundary between law and morality.

faculty of law
university of windsor, canada
wconkli@uwindsor.ca

Natural Law & Fraternal Law

Paulo Ferreira da Cunha

"A tous mes amis, connus et inconnus"
Maurice Blanchot *Pour l'Amitié* (1996),
apud Eligio Resta *Il Diritto Fraterno* (2006)

1 Silence and Misunderstanding

Some theologians and philosophers speak about the silence of God.[1] The first image that occurs to us is precisely the silence of Natural Law. It is still a subject for study in some Jurisprudence chairs, but what is more paradoxical is that even jusnaturalists—at least many of them—neither teach Natural Law, nor use it in practical cases. For the most part, they ignore that same Natural Law they affirm to believe in. "Strange faith, d o m i n i c a l f a i t h and not the faith of every day of the week", reminds us of a quote from Aldous Huxley about democracy.[2]

This situation of just having d o m i n i c a l f a i t h in Natural Law leads us to a would-be theory of law, masking the philosophy of law. The best disguise of a positivist has become pretending to be a jusnaturalist. Affirming his or her belief in Natural Law, the new positivist (who may be an old one, even an old-fashioned one) appears to be defended against all accusations of being what he or she really is: a positivist. And normally this person is really a positivist, and a legalist. The admittance of a great heavenly vault above all sources of law, or the confusion between natural law and some already fully adopted principles of positive law is enough of a disguise.

Of course, it is important to state that most of these positivist jurists under jusnaturalist cover are not acting with *dolus*. It is not our aim to study their motivations or psychology, so, in a rather superficial analysis, we would just say that it may be possible—and we admit it without reserve—they are acting in complete good faith, as it is truly possible they really think they are what they are not, and they are not what they really are. By sacrificing rhetorically to the words, or some so-called "principles of Natural

[1] C.f., Robert Anderson *The Silence of God* (Grand Rapids, Michigan: Kregel Publications 1978).
[2] Aldous Huxley *Proper Studies* (London: Chatto & Windus 1927).

law", for example (and this is only one of the possibilities of positivist thinking being jusnaturalist), it appears they believe, genuinely believe, they are "jusnaturalists". No need, then, to ask if a so-called positivist, and even a legalist, does not feel obliged to respect and apply—sometimes more firmly and more rigorously—the same principles the former believes to be his or her own. To admit principles in Law, and especially in present day Constitutional Law, for example, does not mean anything in terms of the ontological law position adopted.

Even those scholars who feel obliged to speak about the question, in introductory disciplines to General Law, Jurisprudence, Philosophy of Law, History of Law, and so on, very seldom feel attracted to the question, and rarely develop it.

The knowledge of average students about Natural Law is a mystery. But maybe we can reveal it. We think they see it as a bizarre antique in the syllabus, a strange esoteric faith of certain professors, or simply an erudite footnote displaced, when it is not, in fact, a mere footnote…

The question of Natural Law is, thus, more and more, a very restricted, even confined question. But all the great questions are restricted questions, if we reflect on the opinions that really matter.

2 Malaise and Crisis

We feel, in the narrow scholarly field in which the question matters, a real m a l a i s e . Positivists, who do not know who they are, stay quietly using their cherished *dura lex*, without any pangs of conscience; positivists who think they are Natural Law devotees do not feel any guilt, either. They go on with their practice in exactly the same way, hopefully, in a certain sense, because how would the juridical practice of some "jusnaturalists" be if they ended in an enormous confusion between Law and other social normative orders and even politics? Better that they act as positivists than as fundamentalists. They are at that quiet level, and the m a l a i s e only invades people really concerned with real Natural Law.

Let us recall a couple of examples. M a l a i s e may be analysed in several crises and paradoxes:

First, the c r i s i s o f i d e n t i t y that may result in finding another name for the same thing—or another thing with the same name.

In order to avoid the negative connotation of the nominal syntagm "natural law", the jusnaturalist philosopher Virginia Black, founder of the Natural Law Society, and, in a sense, in a more acute way, Percy Black (both were professors at Pace University, New York), tried some dialogues with positivists, and, at the end of some years of effort, they suggested a new paradigm: the "vital law".[3] It was not an enormous success. Unfortunately: it is a lost opportunity for clarifying ideas and possibly saving philosophical natural law.

[3] Percy Black 'Challenge to Natural Law: The Vital law' *Vera Lex* XIV (1994) 1–2, pp. 48ff and, by Percy Black, 'Natural Law and Positive Law: Forever Irresolvable?' *Vera Lex* X (1990) 2, pp. 9–10 and 'Mirror Images behind the Rhetoric of Natural and Positive Law' *Vera Lex* XI (1991) 2, pp. 36 & 38.

Another example with the same name can be seen when we consider, for example, the claims to a certain Natural Law by political parties, or even a Nazi Natural Law. Antigone must be turning in her grave.

Secondly, we may consider the dichotomy between Natural Law and Jusnaturalism, and the c r i t i q u e o f e x a g g e r a t i o n of this last concept. As it is well known in these circles, a strange antinomy exists between the defenders of Natural Law and Jusnaturalists. Some accept the first idea, but refuse or have some doubts and fears about the second. After all, it is another "ism". And "isms" tend to be ideological. That was the case of one of the patriarchs of Natural Law European continental thought, Michel Villey, from the University of Paris II. Some years after having considered himself a jusnaturalist (these labels are important for other people to recognize us), with more consideration and thought, and perhaps also due to the misuse of the concept, he wrote a critical article, in medical style, considering "jusnaturalism" as a "pathology of the organs of natural law", derived from their "hypertrophy".[4]

Another problem that Natural Law must face today is the c o m p l e x o f u s e l e s s n e s s. From the neo-constitutionalist point of view, Natural Law may be considered as a useless antique. Since Natural Law principles were accepted and glorified in constitutional texts, why should jurists search in p r o l o g u e s i n h e a v e n for what is now a matter of plain positive law? The Philosophy of Law and even the "esoterism of law" have now become hermeneutics…

It is also important to mention the p a r a d o x : for instance, the "paradox of game" discovered by Francisco Puy, of the University of Santiago of Compostella.[5] To express the differences between sensibility and the distinctive connotations, he argues that some people love football (futbol), and some other people love to play with a ball (ballonpié). The latter hate the first of the two sports and the former hate the second sport. So, analogically, some people love human rights and hate natural law, and others love natural law and hate human rights. The connotation of human rights is in general vague but positive in our occidental societies.

On the other hand, there is no public connotation of natural law, and in some specific subcultures and sociolects, the connotation of the expression is not good: Natural Law is associated with a mainly protestant or atheistic vision of a conservative Roman Catholic church, and a progressive and left wing perspective about fascist or authoritarian capitalist regimes, etc. Of course, from the other side of the ideological spectrum, these same qualifications function as positive… Not with this connotation, but in a more softened version… For example: Natural Law as part of *philosophia perennis*, and a comfortable justification, as a facade, for anti-communist regimes. As the apology of fascism or dictatorship is not in fashion nowadays, things may be adapting to democratic times. And they are, quite easily…

Apart from the need for reviewing and renewing some aspects (bearing in mind the progress of science and change in society, and, of course, new ideas) the ideals of ratio-

[4] Michel Villey 'Jusnaturalisme: Essai de définition' *Revue Interdiscipinaire d'Études Juridiques* 17 (1986). See also Paulo Ferreira da Cunha *O Ponto de Arquimedes* Natureza Humana, Direito Natural, Direitos Humanos (Coimbra: Almedina 2001), p. 87.

[5] As his major work, see Francisco Puy *Tópica Juridica* (Santiago de Compostela: I. Paredes 1984).

nality and the values of Liberty, Equality and Fraternity proclaimed to the world by the French Revolution—no doubt deriving from the classical legacy of natural law—are still a plan to pursue. And they remain the just and correct answer.

The relationship between classical legacy and modern revolutionary legacy is not collision or exclusion, but, on the contrary, a perfect combination and derivation. In fact, Natural Rights (and therefore, Human Rights) should be seen as a consequence of Natural Law, while modern Human Rights were born in 1789.

But we live in times of amnesia. Even the liberals (not the neoliberals, who are neo cons, but the social and democratic liberals) seem to have forgotten this important legacy which they should, at least historically, preserve and be proud of. This must be classified as another Natural Law paradox: the political one. One of the most important ideas responsible for the French Revolution, Natural Law has been used later to try to legitimise conservative and even authoritarian right wing regimes.

It is a fact that Natural Law is a topic of very different uses, according to the times and to opportunity, as Francisco Puy states. But it should also be a fight for the tradition of Natural Law: a vindication of true, progressive and enlightened Natural Law; not only the silent resistance of the old and sometimes deformed visions of Natural Law.

Among all the possibilities, the Enlightenment legacy of Natural Law is more recent, more comprehensible, and, besides, it is not clear and evident that we must divide Natural Law into ancient and modern, as Leo Strauss did.[6]

3 Ancient and Modern Freedom: A Parallel Mystery

A parallel work about freedom and concrete liberties before the modern revolutions and after them seems to lead us to the conclusion that freedom and liberties are united, in all their specificities. And the more we progress in the study of a specific pre-modern paradigm of freedom and liberties, such as the Luso-Spanish one, developing at least since the 6th century AD, the more we understand that all the ways of protecting the political rights, dignity, life and property of people are aspects of the same reality.[7] So, the division between old and new constitutionalism, old and new liberties (not to mention Benjamin Constant's more concrete question about *Antiques* and *Modernes*), seems more and more an ideological one: old liberals and very old conservatives and traditionalists did not want to mix in the defence of the same liberties. And in many cases their common enemy was the comparatively "recent" Leviathan state. So, *frondisme* and revolution met, at least when neither one nor the other actually took place on the real stage of history… Besides, do not we all remember the political destiny of the aristocrat Montesquieu? And, in Portugal, António Ribeiro dos Santos is for the same reasons considered either a liberal *avant-la-lettre*, or a paladin of the old traditional monarchy.[8]

[6] Leo Strauss *Natural Right and History* (Chicago: The Chicago University Press 1953).

[7] Paulo Ferreira da Cunha, Joana Aguiar e Silva & António Lemos Soares *História do Direito* Do Direito Romano à Constituição Europeia (Coimbra: Almedina 2005).

[8] Cf., Paulo Ferreira da Cunha *Temas e Perfis da Filosofia do Direito Luso-Brasileira* (Lisboa: Imprensa Nacional – Casa da Moeda 2000), pp. 137ff and José Esteves Pereira *O Pensamento Político em Portugal no Século XVIII.* António Ribeiro dos Santos (Lisboa: Imprensa Nacional – Casa da Moeda 1983).

These problems or discoveries in a parallel question opened some windows to a new consideration of Natural Law periods (and styles). Why attack the old while chanting hymns to the new Natural Law? Why ignore or be ironic about the "law of Reason" while divinising the Aristotelian-Roman-Medieval Natural Law? Both attitudes seem to stem more from the religious and political commitments of the interpreters than from the scientific division, originating from the nature of the studied entities themselves.

Perhaps jusnaturalism should be divided in the future not into ancient and modern, as it still is, but into two new different branches: political and religious jusnaturalism, on one side, and methodological-juridical jusnaturalism, on the other.

Jusnaturalism in politics seems to have its future compromised by the desistence of the old liberals and almost all the left (Ernst Bloch is mentioned as a Marxist jusnaturalist, but almost as a bizarre and erudite reference), and by the defeat of conservative-authoritarian regimes, which used it more in a "religious" system of legitimacy than as a juridical doctrine itself. At least, the proclamations of jusnaturalism never served to dulcify the severity of authoritarian law.

Jusnaturalism as a religious meta-ethics or para-ideology is not experiencing good times. It may remain as the proclaimed orthodox legal "ideology" for some churches, mainly the Roman Catholic Church, and a theoretical source to Roman Catholic Canon Law. But does Natural Law really embody the teachings in Catholic Universities and religious Seminars charged with the priests' education? How many chairs of Philosophy of Law in Catholic Universities remain, after the Bologna trial? And how many among them really study Natural Law? Furthermore: Which Natural Law? Even the classical Aristotelian or Aquinas' Natural Law is subject to many different interpretations, and Roman Law, even just Classical Roman Law, is the object of many disputes among specialists.

Michel Villey was an Aristotelian and a Thomist, but he proclaimed that Natural Law is nothing but a method. Francisco Puy is also a Roman Catholic and, after having written manuals of Natural Law, he preferred in later decades to see Law from the perspective of Topics, and to connect Natural Law with Human Rights.

What happened concerning Villey and Puy—as far as we can interpret their theories—is that, by not letting their religious faith (or their political beliefs) interfere with their scientific works, they really killed Natural Law. But they also resurrected it. Natural Law is alive now in Methodology and Topics. And if we join the purposes of neoconstitutionalists, we have the third resurrected body of Natural Law: Constitution. The new conception of Constitution, really presiding and directing the juridical order, at the very top of the Kelsenian pyramid, is now becoming more and more consensual.

Natural law is now alive in Methodology, and, specifically, in a Juridical *Topica*, and in the body of the Constitution, especially by the application of the constitutional principles, in many cases by constitutional or supreme courts—also joining with, in some aspects, positivism in law, since the principles are positive law themselves.

But Natural Law is more than its new three parts. We may say that something remains in the substance of Natural Law, a divinity that always transcends its avatars: and that we may easily find in the old description of justice, by Ulpian.

Describing Justice as a constant and perpetual will to give each one his or her due (*constans et perpetua voluntas suum cuique tribuere*), this classical Roman jurist teaches

us the ontological *topica* of Law: *Suum*, *Persona*, and *Iustitia*.[9] And a relevant feature of this seminal sentence is the fact that the *will of Justice* will never stop, because Justice will never be fully achieved. The quest for Justice is and always will be a constant and perpetual will.

So, the remaining jusnaturalism is minimal. But only minimal in its description. The substance of it is gigantesque. To be jusnaturalist, today, after the methodological *traditio*, the topical *traditio* and the constitutional *traditio*, means to preserve what is at the heart of Justice itself: the constant and perpetual will of Justice, an aim that cannot ever be achieved by means of any other way or "avatar". And it remains the essence of Justice itself: the judgment of the real juridical realities, in order to evaluate them and to aim and fight for a better Justice.

Of course, there already are some other juridical and jusphilosophical axes, some of them we may consider as twins of Natural Law (for example, juridical pluralism possesses some of its aspects and versions), even to the point that jusnaturalism should perhaps be considered one of the different legal pluralisms, in contrast to the positivistic *monism*. Other examples are the movement called judicialism, against the also monistic group of normativism, and the topic-problematic thinking, against dogmatic thought.

Natural Law, in times of so much alternative law thinking, must be a critical neojusnatural way of thinking about Law, open to all new possible contributions.

Natural Law, to those who felt its flavour in the early mornings of Aristotelian Greece and its lightning in the glorious days of the 18th Century, Natural Law that has nothing to do with Generalissimo Franco or Pinochet, nor may be argued against free will, is still a strong argument and a very beautiful and powerful name. Let's not surrender this trademark to obscurantism and let's preserve its useful effect. Otherwise, we can do nothing but agree with those who find the concept obsolete.[10]

4 Quest of a New Paradigm

Positive law and legal positivism—as well as subjective rights theory and practice—do not seem to be attractive at all, except to power-seekers, grey jurists, and refined scholars. The transcendent paradigm of Law still surviving nowadays is, after all, Natural Law, in spite of its many misuses and its strict aristocratic understanding. But, at the same time, we feel that our times need something more. And we well know that, for those who do not vibrate with the echoes of History, some more tangible concepts are needed. And we already have the star of the law products: Human Rights.

In fact, we don't feel comfortable with only a Natural Law, rather philosophical and under suspicion, and Human Rights, sometimes too corrupted by excessive *media* and use and abuse by political parties.

Let's say that in the "middle" (or halfway) and also as a bridge and a confluence of Natural Law (in its progressive and rational facets) and Human Rights (real Human Rights and not just propaganda and unidirectional thought) it may be

[9] Paulo Ferreira da Cunha *Filosofia do Direito* (Coimbra: Almedina 2006).

[10] Otfried Hoeffe *Gerechtigkeit* Eine philosophische Einführung (München: Beck 2001).

constructed—by discovering what is already silently growing under our eyes—a new paradigm of Law.

For more than seven years, we have been personally trying to find a name for it.

S o c i a l L a w[11] seemed at first to be a good expression, to face the enormous and aggressive individualism of our society, armed with egotistical law. But it would be misunderstood, and it would not be large enough.

S o c i a l - p e r s o n a l L a w was a strange hybrid. Although it balanced the two aspects of society (*proprium* and *commune*) that should be considered, it had really no denotation of its own *differentia specifica*.

Other possibilities were tried (like H u m a n i s t L a w[12]) without success and, in fact, still not very accurate.

5 Fraternity and Fraternal Law

The solution came later, reflecting on the heavy veil of amnesia with which our societies are hiding the legacy of the French Revolution, and especially the values of Liberty, Equality and Fraternity, all in danger nowadays.

Furthermore, the new Law, more than a free Law or a Law of Equality (both tried already, and having, as a result, possessive individualism and anti-personal collectivism, when not reciprocally combined), should be a F r a t e r n a l L a w, combining, of course, both Liberty and Equality, but in a superior way, with Fraternity.

Neither the liberty of the dispossessed, nor the equality of slaves, this is Fraternity in Law in a new society (and here comes the inevitable utopianism, not necessarily Utopia itself) that does not see the other person as a stranger, or a potential enemy, but as a member of the same Family. The idea is not new. Its roots are ancient and respectable.

The proclamation of the new paradigm is already out there. The question is to assemble and connect and bring together all those *membra disjecta*.

As a proposal of a new paradigm and of a new flag, it is not very wise to limit at the beginning the borders of the "thing".

We are simply indicating some of the flowers in the possible large garden of the future. We hope these few examples may excite our juridical imagination, and bear fruit.

First of all, some i n s t i t u t i o n a l c h a n g e s: courts on the European continent are not the same, in many ways. The European Courts of the European Union —whose jurisprudence is and should be a general example—are more intervenient (namely in Human Rights), and we may say the European Union (and its "Constitution", the material one) was to a great extent a creation of the courts.

Furthermore, the *modus operandi* of European courts is a mixture of the Roman-Germanic system and of the Common Law system. We also saw a Spanish judge pursuing

[11] Paulo Ferreira da Cunha *Teoria da Constituição* I: Direitos Humanos, Direitos Fundamentais (Lisboa & São Paulo: Verbo 2000).

[12] By Paulo Ferreira da Cunha, see *Direito Constitucional Aplicado* (Lisboa: Quid Juris 2007), pp. 229–230 and *A Constituição Viva* Cidadania e Direitos Humanos (Porto Alegre: Livraria do Advogado Editora 2007), pp. 119–120.

a Chilean dictator, Pinochet, and the institution of an International Court of Criminal Law. The idea of an international order without police and a national anti-democratic and criminal order free from the menace of penal retribution belongs to the past, in spite of the many incoherencies and mistakes committed and to be committed, naturally.

Even the law itself is no longer under the myth of a "necessary relation derived from the very nature of things", as Montesquieu put it, in his *De L'Esprit des Lois*. Of course, we must emphasise that Montesquieu was by all means right. But what was not right at all was the misleading nature of the procedures and of the substance of law that occurred before and after his book—a situation we still have in a great measure. Nevertheless, legislation may improve. First of all, by diet, strong exercise in diminishing the vain legislation. Also, by codification (at least in the Roman-Germanic system or family of Law), organising coherently all the possible fields of Law: not prematurely, not just with voluntarism, but considering all the roots and all the implications, as far and as soon as possible and reasonable. By increasing better procedures in making the law, especially consulting real experts and real people concerned. Listening to them, not just fulfilling the due process mechanically…

And, of course, there is still always the hope of better lawgivers, better governments and better parliaments…

What is changing now? The desacralisation of law. Total and complete. This has many symbolic dangers, but some practical results: when people are no more attached to a romantic concept of law, and even less to a mystical idea of it, they discuss its justice in terms of authority and legitimacy and even utility. If the law is in question, and loses its mythic facade, then the law must be self-legitimated. We are on the way to having to create better laws. But never in a simply theoretical and bureaucratic approach.

Doctrine itself is desacralised. We wonder how there are still people and companies who spend big money paying for juridical statements from jurisconsults in countries where judges do not pay much attention to them… Doctrine has no chance of existing, engendering as it does new inextricable nets of thoughts, charades to be deciphered by "dear colleagues". Normal jurists have lost their veneration towards idols with feet of clay. And only very good experts can survive. The main demand is no longer a recognised signature, but an exceptional legal reasoning.

Old lost institutes may come into new life: to mention a few, for example, we are now improving our own law culture, Law abuse (excess), *Mala fides* litigation, getting rich without cause, and, in Criminal Law, besides self-defence, many causes of justification, exclusion of guilt, or even exclusion of the illicit.

But there are also new realities such as new forms of procedure: mediation, low causes courts, peace courts, consumer courts, etc. There are new forms of legal formalities: reforms in bureaucracy, certification, etc. and Information procedures, even electronic judgment of some much typified questions. There are many new contracts and new concepts of dealing with Law.

Mentalities are also changing. That is perhaps the most important of all.

One of the first things to appear is the increase in litigation, due to more awareness of rights, but also to a new anti-compromise mentality (the first aspect is positive, the second one negative), and, unfortunately, not always awareness of one's duties.

The substance of Criminal Punishment has now nothing to do directly with religion, although it still has aspects of vengeance and a dark grey shadow of death. Is it possible to keep a legitimate theory of prison (that criminogenic institution) in the 21st century? And what should the alternatives be? To labour in favour of the community is the more fraternal solution, for both sides…

Law about life and death is defied: depenalisation of abortion and euthanasia are questions that are on the political and juridical agendas from one country to the next.

The concepts of family, marriage, inheritance, etc. are also changing, not to mention the self-representation of people. Homosexual families and homosexual marriages, or, at least, special contracts for them are the order of the day. Adoption by these couples is a problem already in focus. At the same time, we have scandals such as paedophilia in institutions designed to raise and educate abandoned children, which makes the observer meditate deeply about the restrictive adoption laws.

A fraternal law does not discriminate against anyone according to any one of the known features (race, age, gender, sexual orientation, etc.) but still has to consider what is really different—so difficult, in some cases.

Contracts already emphasize a *bona fides* principle in several ways. But it is important to keep the *favor laboratoris* in labour law. The pilgrim idea that both sides are "equal" is an amazing backwards step, never a Columbus egg, discovered by genius contemporary neo-liberals.

Consumers are more exigent, and that awareness is a very important brick in the building of a general and active citizenship.

Fraternal law is not about treating as equal what is deeply and obviously different. Fraternal law is caring about our neighbour, who is virtually everybody in a "global" world, but should begin with our relationship with ourselves: we are not treating ourselves in a friendly way, but less fraternally. We are demanding too much from ourselves, we are imposing upon ourselves unnatural and non-fraternal rhythms and goals. Beginning with the universities, which should set an example, we are becoming machines, not people. Fraternal Law should demand that university people GET A LIFE, as some people shout on the Internet, very wisely.

At the public law level, and especially at the constitutional law level, the consequences of assuming fraternal law are immense and unique.

The perspective of constitutional evolution changes: in modern times, the first conquest was liberal law, liberal state, liberal constitutions, with Liberty as the main value; the second conquest was social law, social state, social-democratic constitutions, with Equality as the first value. What next? Of course, Fraternal Law, without rejecting the legacy of the two first values.

Between the idea of fraternity as a non-achieved promise of Enlightenment and a way out of global economism and egoism, the expression "Fraternal Law" is internationally known after the eponymous book from Resta.[13]

But the theorization does not stop there. A close concept, the new "Fraternal Constitutionalism", was proclaimed by the Judge of the Federal Supreme Court in Brazil Car-

[13] Eligio Resta *Il Diritto Fraterno* (Roma & Bari: Laterza 2006).

los Ayres de Britto, at the end of his Theory of Constitution.[14] It is symbolic for us that the closure of this circle of Time and Ideas belongs again to a Portuguese speaking (and Portuguese thinking) person. Let us remember that the sacred ternary was presumably created by Saint-Martin, under the influence of a Portuguese thinker, of Jewish origin, known as Martinets de Pasquallys.[15]

One of the most important features underlined by Carlos Ayres de Britto is the rise in affirmative action, to open opportunities to secularly discriminated and despised groups (previously called "minorities", but they may be majorities: such as the poor *proprio sensu* and women). Besides, Fraternal Law involves a fraternity towards future generations, the other inhabitants of the planet, and thus an ambient, environmental, ecological law, as well as urbanistic law, is developing. Also, the national appropriation of resources in developing countries, and a new independent mind about culture and identity, must be taken seriously. Unfortunately, cultural colonization has so many forms and disguises that some unprepared, naïve people aim to modernize and reach the future by merely forgetting their own culture and copying (of course never very well) the patterns of global fashion, even in General Education, the Arts, Culture and Universities. They go so far as to impose, for example, criteria for quotations or items for curricula. But Fraternal Law and Fraternal Knowledge live always together.

Fraternal law is the opposite of *dura lex sed lex*. But this is not a simple *diritto mitte* or Light Law. Fraternal law has a special strength and a true reason. We feel it when we speak about it, and we see the smile on the lips and in the eyes of our interlocutors, revealing that we are contemplating the kingdom of ends, facing true values: the only mental category that lets us deal with the unspeakable feeling of completeness. That is our legitimacy (remembering a statement of Foucault concerning human rights), and that is the reason why we should speak more about it. Far from being a closed theory, it is open to our ideas and to our reason.

Let's talk, then, and, through dialogue, contribute to building the new Law theory and practice for the future.

Positivists may argue that there is no text in many constitutions that would allow us to use such a principle. But fraternal law is more than a principle, it is a value and it may be the new general law paradigm. And just remember what Justice Stephen Breyer stated in this respect:

> On s'attend à dire qu'un tel principe [fraternity] n'existe pas dans la Constitution américaine — jusqu'à ce que l'on commence à penser sérieusement au sujet. Alors l'on se rend compte que le principe de la fraternité se manifeste au fond de la Constitution américaine. Certes on ne peut jeter aucun coup d'oeil sur le terrain du droit américain sans le trouver partout.[16]

[14] Carlos Ayres de Britto *Teoria da Constituição* (Rio de Janeiro: Forense 2006), pp. 216–218.

[15] As to the sources, cf. Paulo Ferreira da Cunha *Mysteria Ivris* (Porto: Legis 1999), pp. 251ff.

[16] Stephen Breyer Réflexions relatives au principe de fraternité Allocution prononcée au Troisième congrès de l'Association des cours constitutionnelles ayant en partage l'usage du français <http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_06-20-03.html>.

Law in our century would be fraternal, or it would be Law no more…—this is the *motu* we adopted, and that is the one we suggest as a debate keynote. But, in fact, Law is not the most important creature of mankind. So, our new century should be fraternal or it should not be at all: with Law or without it.

FACULTY OF LAW
UNIVERSITY OF PORTO, PORTUGAL
LUSOFILIAS@GMAIL.COM
PFCUNHA@CONSTITUCIONAL.COM.BR

Natural Law, Positive Law, and the New Provocations of Bioethics

Francesco D'Agostino

The reference to nature and, consequently (in a doctrinal perspective), to natural law in bioethical debates is significantly frequent. Biomedicine, and its provocative discoveries and achievements, manipulate, and so bring into question, a natural order that is traditionally considered (wrongly, as we know too well) immutable, but that is still felt by many (especially at the level of common sense) as just. A specific and preliminary duty for bioethics follows from this: that of subjecting, in its own analyses, the legitimacy of the appeal to nature (and to natural law) to critical assessment. In the considerations that follow I would like to limit myself merely to pointing out some difficulties in this regard, in general not perceived, or underestimated.

In these reflections I do not intend to go into the distinction between natural law and natural right, or to reflect on the specifically ethical values of the doctrine of natural law. Still less do I intend to review the traditional dialectic established (from multiple viewpoints) between natural law and positive law in the history of philosophy, or to suggest what a suitable reformulation for that dialectic might be today. I presuppose that the history of the doctrine of natural law is known in its essential lines and that it has become crystallized in a paradigm that, in my view, still remains as culturally powerful as it is culturally weak. However—and this is the first point to which I would like to draw attention—the emergence of the new bioethical problems, and more generally the new significance assumed by the problems of life and its defence, are not only opening new and problematic horizons to jurists, but more especially causing a profound, and in general little felt, alteration in the dialectic between natural law and positive law, in the way it has been generally conceived.

The first alteration is perceptible at the functional level. According to the traditional (and not only Catholic) doctrine, the fundamental and principal function of the dialectic between natural law and positive law is that of directing positive law according to justice, and consequently controlling and unmasking any arbitrary exercise of the legislative function. In this sense, to use an old expression, emphatic but not improper, of Giorgio Del Vecchio, natural law is the "enemy of any form of tyranny"; it is the point of reference, in the name of which objective legitimacy is given to the repudiation of power, whatever be the social and personal risk that such objection may incur for the

person making it. This doctrine undoubtedly retains its validity in our time, even though it has been reformulated in recent decades, using the paradigm of fundamental human rights, rather than that of natural law; it is not difficult to perceive, however, that the two paradigms are reciprocally convertible, even if at times at the price of not negligible and not always acceptable theoretical reformulations.

It should be pointed out, however, that the argument against the doctrine of natural law has never had as its objective that of legitimizing the self-referential nature of power (unless in extreme cases, whose examination might perhaps reveal surprises). When it has been expressed, it has rather been aimed at a critique of the abstract and anti-historical character (or, depending on context, metaphysical and/or religious character) of the principles of the doctrine of natural law. The hypothesis may even be advanced that in the Western tradition the knowledge of positive law has been structured as a science precisely and exclusively because it has always been conceived on the basis of its foundation in natural law: this foundation—authentic ghost in the machine—is allegedly demanded by the functional logic of law Itself, because It is the only force able to activate the necessary dynamics of normative innovation in law. (Another question—in this significant context—is whether this foundation should be conceived and theorized as psychological, ethical, political, or at any rate pre-juridical: what would remain unprejudiced in any case is the necessary appeal of positive law to this foundation as to a force outside itself, such as a motor, or a fuel, or to a principle of endowing the positive system with meaning.)

In the current bioethical debate, or at least in a large part of it, the scheme presented above has almost dissolved. Many of the strongest and more widespread bioethical claims[1] are in general characterized by libertarian impulses that are transformed, at the level of positive law, into claims for delegalization, at times to the point of creating what the German doctrine calls "a space free of law", a *rechtsfreier Raum*, i.e., a sector in which the law does not apply. It is argued that, in the bioethical field (but not only in that), the best law would be no law at all; or, subordinately, that the best source of law, to which some legitimacy could be granted, would be that calculated to produce mere administrative decrees. The right to control, or pass judgement on, claims and experiences that determine at their source the relation of citizens with life ought, it is argued, to be precluded to the legislator—i.e. to the one who is traditionally conceived as the subject institutionally called to guide citizens in a general, abstract and axiologically binding way. At most a merely technical function, i.e. that of strengthening the fluidity of self-referential social practices through decrees, i.e. through norms characterized by a purely pragmatic and hence (in the scale of values) significantly reduced rank, would be recognized to the legislator.[2]

On what theoretical and/or symbolic presuppositions are such claims based? I do not think that they should be referred to particularly structured horizons of meaning; those who formulate them do not incorporate them in general in the framework of more complex political or ideological arguments (a proof of this is the fact that many initiatives in

[1] I allude to the demands for the liberalization of abortion, sterilization, euthanasia, assisted fertility, sex change. But I also allude to the calls to modify consolidated opinions on eugenic questions, to pre-determine the sex of children, or not to obstruct research on cloning, as well as claims for the compensation of a *wrongful life*, etc.

[2] Here a complex question is touched on, long felt by the most subtle sociologists of law. Cf., e.g., J. Carbonnier *Flexible Droit* 2e éd. (Paris: Librérie Générale de Droit et de Jurisprudence 1992).

this field cross party divides in parliament). Nor are there very many who consider that the hard cases can be resolved in bioethics by resorting to merely procedural criteria. It also seems to me that not even the utilitarian perspectives can provide an adequate foundation to these claims, given that in many of these situations it is doubtful whether the hoped-for permissiveness corresponds to the optimization of the interest of the greater number of beneficiaries or other of the classic canons of the various schools of utilitarianism. I think that we are faced, on the contrary, with an unexpected variant of the paradigm of natural law, with a renewed, even if confused and far from explicit, appeal to the symbolic code of nature. Nature, to which reference is made here, is not understood in an always coherent or unambiguous way. At times it is identified with the pre-logical (and in some sense impersonal) dynamics of the subjective desire; in such cases one arrives fairly rapidly at forms of bioethical sacralization of the principle of autonomy, as when for example the so-called rational suicide is defended as a fundamental human right. In other cases the appeal to nature is manipulated to make it coincide with that of the defence of female subjectivity as a specific good in itself (e.g., the claimed irrevocability, or incontestability, of a woman's choice to have an abortion). The biological good of the species, as natural good, is increasingly invoked to justify eugenic practices (many abortions, besides, are of this character). And the appeal to campaign for the defence of the biosphere is also becoming ever more widespread; the biosphere is seen as the one authentic source of values (these and similar positions are frequently encountered also among animal-rights activists). The calls to recognize voluntary non-therapeutic sterilization as a private and unchallengeable decision are also rooted, in the last analysis, in a curious motivation of naturalistic character: human sexuality, it is argued, could only be fully expressed in its more authentic dimension, hence the only one that is truly n a t u r a l , if (technologically!) it were freed from any procreative risk. By d e c e i v i n g nature, i.e. by procuring an a r t i f i c i a l sterility, it would in short be possible for nature to regain control over herself. Similar arguments have been used to formulate various paradigms to refute the unnatural character of homosexuality. Bioethics and the appeal to nature thus seem to be combined, according to objectively disconcerting procedures. And since the appeal to nature has always coincided—at least psychologically—with an appeal to justice, we ought not to be surprised by the fact that many new libertarian requests in bioethics are formulated with remarkably passionate intensity, by subjects who feel themselves morally in the right: they claim not that their subjective desires be socially gratified, but that the voice of nature, that is instinct in them and that is expressed through their desires, be not suppressed.

In the context of the bioethical controversies of our time, new and unprecedented tensions therefore seem to be emerging in the relation between natural law and positive law. The claim for a "new libertarian doctrine of natural law" in bioethics is therefore not that of constituting the foundation of legitimacy and justification of positive law (according to the models of the "traditional" defence of natural law), but that of operating on positive law, and forcing it progressively to retreat from its socially normative function and reducing it to a mere and extrinsic guarantee of new dimensions of autonomy. A presupposition for this project to become credible and possible is that the "new doctrine of natural law" should formulate a suitable strategy of attack against positive law.

This strategy is increasingly taking the form of an accusation: the indifference, or worse the hostility, to the new bioethical claims of libertarian character is proof, it is argued, of the unacceptable intention of the positive law to unduly ignore and injure the needs of "material life". Subjected to such an unexpected attack, the system of positive law is taken off guard. It reacts in confusion; it either succumbs to indecision or tends to enter a situation of instability and contradiction, testified by the jurisprudential oscillations of many countries, when judges, called to resolve complex and unprecedented disputes of a bioethical nature, use (perforce: they would not know how to do otherwise) their traditional and antiquated conceptual arsenal.

From what forces does this new paradigm of natural law draw? The question is not prompted by a vague curiosity of historiographical type (however legitimate), but by precise theoretical needs. It is surely not irrelevant to ascertain where this new paradigm may have its historical roots: to examine, for example, whether it may have its roots in sadist libertinism, or at any rate in the spirit of "modernity". I put forward the hypothesis, however, that mere historiographical investigation is insufficient to understand the *novum* we must come to grips with. I think that, through what I have called the "new libertarian defence of natural law" we unexpectedly find ourselves confronted by the emergence, in current culture, of dynamics that need to be referred not to a specific epoch of *Weltgeschichte*, but to the formation itself of the human identity in general—and consequently of the ethical and juridical conscience.[3]

These dynamics can be reconstructed more through the work of philosophers than that of historians; and more particularly through the analysis of the language of myths or of the potential for expression of the psyche.[4] They are dynamics comparable to those chthonic, telluric or subjective forces, whose exploration cannot be entrusted to the mere resources of the calculating reason and that refer to a beginning that should not be confused with a point of departure, but should rather be identified with an *arché*, which does not possess chronological but ontological character.

Nature as a foundation of law cannot be grasped in these a r c h a e o l o g i c a l dynamics; and neither continuity nor correlation can be established between *jus naturale* and *jus civile* (according to the dominant line, as we have said, in the history of the West). The relation between them is neither more nor less than conflict. *Jus naturale* expresses—in this horizon—the needs of material life, a warm and unreflecting life, characterized by repugnance to constraints, rules and institutions—the dimension al-

[3] Some authors consider that this *arché* is prolonged in the present and assumes historico-empirical forms of expression. Describing what is in his view one dimension of the Indian spirit, R. Pannikar—*La India* Gente, cultura y creencias (Madrid: Rialp 1960)—writes:

"Man here is not pure conscience, nor is his life ruled by c l e a r a n d d i s t i n c t ideas; it might be said that his reactions and decisions are motivated neither by pragmatic ideas, nor by expressed convictions, but by cosmic instincts, or, if you will, by telluric forces, by chthonic factors. Man, for the Hindus, is just one thing among others, he is but one being more in the creation and forms an inseparable whole with the universe [...] what guides him, or what makes him a man, is not only his reason, and not even his self-interest: he is man with all his being. He accepts the gift of his simple life and of his total and undivided existence. He has developed no view of nature, nor does he consider himself lord of the creation: with a lordship of divine service. It follows that he is not even a spectator of nature, but part of nature itself".

[4] An excellent example is furnished by the work of E. Neumann *Ursprungsgeschichte des Bewusstseins* (Zürich: Rascher Verlag 1949).

luded to when we speak for instance of the "female principle", the "maternal code", or psychoanalytically of the world of the *Es* (the *Id*)—while *jus civile* would express those of the spiritual, cold and reflecting life, amenable to the sacrifice of natural spontaneity and to the acceptance of rules and institutions, in the name of the higher needs of civil life—psychoanalytically the world of the *Ich*, that must occupy, no matter the cost, the magmatic space of the unconscious: *wo Es war, soll Ich werden*[5] or, if we prefer to express it, the "male principle", the "paternal code".[6] Imagining conciliation—other than provisional and occasional—between the two worlds is not possible: their antinomy can be removed or concealed, but is in principle incurable. A splendid exemplification of this antinomy is provided by the unequalled clarity of the words of a great Latin poet, and an attentive investigator of myths. "Nature" had aroused in Myrrha an invincible love for her father Cinyras, king of Cyprus; the woman is very conscious that her incestuous passion is sinful [*nefas*], but cannot but wonder whether it could be considered a crime [*si tamen hoc scelus est*], given that this love is permitted by nature to all animals, whereas only man does bind it: and yet it is man, and not nature, who had given himself this law and prescribed it: *humana malignas / cura dedit leges et quod natura remittit/ invida jura negant*.[7] Centuries later, Michel Foucault made the same point, albeit with less expressive force: "What desire could be contrary to nature, since it was instilled in man by nature itself, and since he was taught by it in the great lesson of life and death that the world does not cease to repeat?"[8]

Should the new paradigm of the natural law be opposed? Undoubtedly yes. It should be opposed for a fundamental reason: because its ascendancy (perhaps even against the intentions of those who allow themselves to be fascinated by it), i.e., the imposition of such a *jus naturale* over *jus civile*, would remove from subjectivity the possibility of conquering itself, of assuming, as Hegel would put it, an erect position.[9] It should be opposed in the name of the specific dignity that man has conquered in the course of his history and that has become incorporated in the principle of law, in that *jus civile* through which the human being, without renouncing his telluric nature, rises to the recognition of his identity as *zoon politikon*, as *civis*, in other words as relational subject, constrained by the objective duties of interpersonal relationships. The very ancient intuition, according to

[5] As is well known, this is the extraordinary and pregnant formula with which S. Freud—*Neue Folge der Vorlesungen zur Einführung* in his *Gesammelte Werke* XV (Frankfurt 1940–1953), p. 86—sums up the dynamics of the *archaeological* maturation of subjectivity.

[6] On the dialectic of the two principles, or, if you prefer, on the antinomy between maternal right and paternal right, the obligatory point of departure remains J. J. Bachofen *Versuch über die Gräbersymbolik der Alten* and *Mutterrecht*. On Bachofen, cf. U. Wesel *Der Mythos von Matriarchat* Über Bachofens Mutterrecht und die Stellung von Frauen im frühen Gesellschaft (Frankfurt am Main 1999).

[7] Ovid *Metamorphoses*, 10, 321ff., especially 329ff.: "Human anxiety / issued evil laws and that what nature grants / invidious laws forbid".

[8] M. Foucault *Histoire de la folie à l'âge classique* (Paris 1961), p. 296. Whatever may have been Foucault's specific theoretical intentions (of little concern to us here), it should be pointed out that his observations would suffice to justify fully what Hegel once called "*der ungeheuerste Unglaube an die Natur*", or the most unbounded disbelief in nature, in his *Der Geist des Christentums und sein Schicksal*. G. W. F. Hegel *Theorie Werkausgabe* I in his *Frühe Schriften* (Frankfurt am Main: Suhrkamp), p. 274.

[9] That, said Hegel, is the first thing that man must learn: "*Das erste, was hier gelernt werden muss, ist das Aufrechtstehen*". Hegel *Enzyklopädie der philosophischen Wissenshaften*, § 396.

which the *bios* of man has a need for the *polis*, because only in it is the *nomos* given[10] effectively, summarizes this whole issue.

With what strategies should the new paradigm of natural law be opposed?

They may be significantly different. A first possible strategy is characterized by its specifically philosophical character. By showing the ambiguity of the category of nature, and emphasizing the need for a rigorous theoretical control of all its thematic implications, we may seek to divest the "new defence of natural law" of its foundation, i.e. its essential link with nature. In this line it is possible to show, albeit with different terms, the distance, if not the contradiction, between empirically ascertainable nature and metaphysically construable nature; the consequence would be that the question as a whole would be modulated according to the criticisms that a theoretically "good" form of defence of natural law may mount against a "bad" one. This approach possesses, in my view, interesting theoretical potential, but seems somewhat ineffective. It is hampered by the fact that in present-day bioethical debates the "new defence of natural law" is not the result of victorious theoretical constructs, but represents the collective emergence of private forms of sensibility that powerfully qualify the culture dominant today and that are expressed through symbolic codes instead of through speculative paradigms. Just one example will suffice to show the scale of the problem. The long debate on abortion, which exploded at the world level some thirty years ago, had begun by bringing into question the ontological status of prenatal life, whose intrinsically "human" character was denied. Rigorous speculative endeavours and intensive debates have led, without the shadow of a doubt, and with the decisive help of scientific reason, to the demonstration (or, rather, to the confir-mation) of the authentically human, individual and personal character of prenatal life. The inference that ought to have been drawn from this is the need to reinforce the juridical protection of prenatal life that traditionally formed part of the positive law of almost every country in the world, even if with diversified "technical" formulations. But that did not happen: the logic of liberalization, in more or less explicit form (or more or less hypocritical form, as would be more correct to say), won the argument, in the space of a few years. How could that happen? With a subtle change of strategy, the new defence of natural law no longer called for (as it did at the beginning of the debate) the liberalization of abortion by denying that foetal life has the character of genuinely human life. Instead, it simply postulated that the mother's right to choose for herself whether to have an abortion is irrevocable: that such a choice cannot be challenged and is therefore not subject to the parameters of the law.[11] It is not difficult to show the ascendancy of

[10] Democritus, fr. 248.

[11] Exemplary—genuine *Holzwege*—are Natalia Ginzburg's agonized reflections ['Dell'aborto' in *Non possiamo saperlo* Saggi, 1973–1990, ed. D. Scarpa (Torino: Einaudi 2001), pp. 28–29] on abortion:

"To abort is to kill, but it is a killing that cannot be compared with any other… Since this choice (to abort) is different from any other, our usual considerations of a moral order cannot enter into it: here they seem unusable. We know very well that killing is evil; but here, in the presence of a possibility that is alive but enveloped in darkness, even the idea of good and evil is enveloped in darkness. In such a choice, the light of reason, the light of logic, the customary light of moral considerations, cannot enter; they would not bring any aid, because they are not logical responses or considerations when everything is enveloped in darkness; it is a choice in which the individual and destiny confront each other, in darkness. Such a choice therefore can only be individual, private and shrouded in darkness. Among all the human choices, it is the most private, the most anarchic, the most solitary. It is a choice that belongs to the mother's right. It belongs only to her. And it belongs to her alone not

the same guiding dialectic in almost all the other burning issues of bioethics. The new paradigm of natural law thus came to prevail as a new and powerful symbolic code of interpretation and management of everything that pertains to life.

If we want to adopt an alternative approach, we need to recognize the need to proceed to the elaboration of new symbolic codes. In the context of symbols, however, it is *not* necessarily the case that the new should be irreducibly different, in an antagonistic logic; the new is what has the potential to express meanings that the old is no longer able to express. Nor is it necessary to posit or insist on the antinomy between *jus naturale* and *jus civile*: an open conflict between the two principles would confirm, or at most foment, what is already under everyone's eyes, namely the factual precedence of the former over the latter. We need on the contrary to affirm that *jus civile* does not falsify *jus naturale*, nor does it necessarily lead to its delegitimization or demystification, but rather to its overcoming/corroboration. *Jus naturale* has a genuine grasp of reality and, at least in some respect, is incapable of mystifying it (just as it is incapable of legitimizing it); but it is also incapable of comprehending it; and that is so for the simple reason that the reality that it is able to perceive is spiritually blind and obtuse. *Jus civile* is not the proponent of a good that is alternative to that proposed by *jus naturale*, because their antinomy does not consist in the perception and defence of different goods, but in the capacity of the one (*jus civile*) to perceive human good, in contrast to the total incapacity of the other (*jus naturale*) to perceive good in general. The antinomic nature of the two dimensions of law is real, but only in the sense that it is impossible to elaborate them contextually. But it does permit (or even demands) a kind of dialectical synthesis between them: for the cold and normative force of the principle of *jus civile*, even though it seems to violate the warmth of the principle of *jus naturale*, in fact guarantees its survival. On the other hand, the undifferentiated expansion of *jus naturale* at the expense of *jus civile* may indeed give the illusion of the rightful triumph of spontaneity over artifice, individual freedom over social constraints, love over legality, but in the long run it produces undifferentiation, in other words, the negation of subjectivity. In the famous metaphor of Aristotle, the spirit (nature) feels the weight of the body (the laws) with the same repugnance with which a living body would feel the fetters that kept it chained to a corpse.[12] But man is incarnate spirit; and the fetter that seems repugnant to the new libertarian defence of natural law is in reality the one condition far the possibility of life itself, for the life of the *bios* as for that of the spirit.

because there exists, in every circumstance of life, a free right of choice; and not because m y b e l l y b e l o n g s t o m e and I'll do with it just what I like: I think that never as in such a choice do persons feel that nothing belongs to them, least of all their own bodies: all that belongs to them is a horrible faculty to choose a form without voice and eyes, life or nothing. It's a faculty as heavy as lead, a freedom that drags behind it irons and chains: because the person who chooses must choose for two, and the other is mute. What it means is to lacerate a part of oneself, murder a part of oneself, tear out from one's own body for ever a precise possibility of unknown life. It is a choice that is mute and dark, just as the understanding that runs underground and that is bound up with that hidden life is mute; and the relation between the mother and that living, unknown and hidden form, is in truth the most immured, the most fettered and the darkest that exists in the world; it is the relation that is the least free of all relations and concerns no one. Such a choice concerns no one, least of all the law. It is clear that the law has the right neither to prohibit nor to punish it…"

[12] Aristotle *Protrepticus*, 10b.

If this dialectical synthesis between *jus naturale* and *jus civile* is not achieved, experiences of insoluble contradiction are activated: *jus naturale*, so warmly vindicated, instead of opening doors to the abolition or sublimation of law—according to an ever recurring dream in the history of humanity—is revealed as, or transformed into, a regressive Utopia and *jus civile*, in its inability to resist the libertarian pressures of the new defence of natural law, rapidly assumes a doubly hypocritical face, or as André Gide puts it, it begins to "lie with absolute sincerity", altering and distorting the meaning of the practices that it liberalizes. The liberalization of abortion has been historically revealed not only as a practice in substitution of the abandonment of the newborn,[13] but as a real form of *anticipated infanticide*—to use a rough, but objectively correct term.[14] The liberalization of euthanasia, claimed and approved as a measure of paradoxical aid of the terminally ill, has led, in the huge laboratory of libertarian experiences represented by the Netherlands, to the legal endorsement of the suppression of elderly persons devoid of specific pathologies, but simply depressed or "tired of life".[15] The inability to continue to qualify human sexuality in an objective way, and the substitution of the category of sex by that of gender,[16] has had a chain effect, including, in growing order of gravity, those concerning the endorsement of practices of voluntary sterilization; the justification of practices involving the manipulation, or even the mutilation, of the human body;[17] the spurious equivalence drawn between homosexual and heterosexual relationships—with the consequent mess in defining the juridical status of cohabiting couples[18]—and, last but not least, the significant argumentative void that is being spread in terms of paedophilia (a void that the politicians fill, for the time being, with declarations of intent sufficiently comforting in substance, but depressing in terms of their lack of logical vigour).

While it is our duty to hope for the formulation of the new symbolic codes of bioethics which I mentioned above, and which I consider essential for opposing the new libertarian defence of natural law, it is not easy to perceive the signs of their possible emergence in the current bioethical debate. It is however possible to identify some signals, some traces to which it is useful to draw attention. It is easy to perceive that the consternation caused in public opinion by extreme biomedical practices does not tend to diminish, as the years pass, as many had hastily predicted, assuming that the healing process of time would re-absorb what was considered as no more than a culture shock. To such pathetic and in their way (as we have already pointed out) genuine and fervent claims, the common human intellect, to which Kant rightly gave so much credit, does not succumb; it continues to rebel, even if it hardly ever succeeds in expressing in exact terms the reasons for its instinctive rebellion, or in adequately opposing those claims that disturb it so

[13] Cf. the wide-ranging and impressive research of John Boswell *The Kindness of Strangers* (Chicago: The University of Chicago Press 1988).

[14] Cf. L. Boltanski *La condition foetale* (Paris: Gallimard 2004).

[15] See the figures reported by G. K. Klimsma 'La dolce morte e la misura della sofferenza' *Janus* (2001) 1, pp. 80–92.

[16] Cf., among others, J. Lorber *Paradoxes of Gender* (New Haven, Connecticut: Yale University Press 1994).

[17] They are practices that public opinion has difficulty of grasping and that are in general dis-guised as phenomena of fashion, attributable to extreme forms of tattooing or piercing. The reality is very different. It's enough to look at the photographic documentation collected in an American cult book like *Modern Primitives* 2nd ed. (Re-Search Publications 1989).

[18] Cf. F. Leroy-Forgeot & C. Mecary *Le couple homosexuel et le droit* (Paris: Odile Jacob 2001).

much. The fact is that the bioethical issues generate a sense of anguish and loss, and not fear. If it were only fear—that is that providential mechanism of defence with which we are all biologically provided to defend ourselves against foreseeable and particular dangers—there is no doubt that the biomedical sciences themselves, which arouse this fear, would equally be able to manage it and even dominate it. But since what is aroused here is not fear, but anguish—that is, the ontological consciousness of our finiteness, which is also expressed in our absolute vulnerability to the unpredictability that is structurally inherent in possibility—no "scientific" response that comes from biomedicine and from the sciences connected with it, however reasonable, however reassuring, can ever be adequate. It may help us effectively to control our anxiety, but will be powerless against the emergence of our anguish. Neither the symbolic code of progress, nor that of subjectivity, may give a response to anguish. For the code of progress enters into contradiction with what is the very essence of anguish: given that biomedical progress is undifferentiatedly opening to the future, it will necessarily foment that anguish rather than reduce it; for the anguish we feel is aroused precisely by the unpredictability of an open future. But not even the code of subjectivity may furnish an adequate response to bioethical anguish, because it presupposes a subject stable in its identity, strong in its demands, and determined to obtain their realization: precisely the contrary, that is, to present subjectivity, weak, uncertain, fragmented, dismayed by the multiplication of possibilities, "multiple".

If what I have said has any sense, it may be argued that a new symbolic code of bioethics will succeed in emerging and prevailing only if, with an effort that must be at the same time theoretical, cultural and spiritual, it succeeds in taking seriously the fact that what contemporary man is seeking is not only a pragmatic response to his own fears, but a wise response to his own anguish: a response that may not have any operative character, but that absolutely must have a revelatory character. Revelatory of what? Of the fact that when he comes to the consciousness of its own finiteness (in existentialist terms, of that void that comes to light through anguish) man expresses the whole of himself in a single great, indeterminate demand for help. Whoever succeeds in understanding the depth of this demand, and in not confusing it with the banal need of the individual to be relieved of his own anxieties, very soon acquires the consciousness that in response to this great, indeterminate demand for help, scientific thought is powerless: its symbolic code is necessarily objectifying, and does not enable it to perceive this demand adequately, still less to manage or assuage it. The new symbolic code we hope for must move in another dimension: in that technically not easily definable, but psychologically perceptible sphere represented by comfort; a synthesis of understanding, solidarity, sympathy, care, concern, sharing, support, aid, disinterested friendship. I do not know whether comfort may help someone suffering from the sense of loss, of uprootedness, induced by anguish to regain his place. But I imagine that this is its real task and that merely the act of consciously assuming it is tantamount to furnishing a compass to someone who is moving without a map in an utterly unfamiliar territory.

FACULTY OF LAW
UNIVERSITY OF ROME TOR VERGATA, ITALY
DAGOSTINO@LETTERE.UNIROMA2.IT

The Cultural Context of Illness, Death and Transplantation

Michael Fischer

Coping with morbidity, aging, dying and death is the challenge of the 21st century. Empirical studies related to this topic are demonstrating that individuals as well as societies have clear ideals, and, according to them, ethical research should focus on practical orientations of human beings and their expectations in real life. Where are the specific problems to be found? In brief, I want to single out five points of view: 1. the economisation of life; 2. the new role of dying; 3. ethics as social technology; 4. cultural views about transplantation; 5. future perspectives.

1 The Economisation of Life

In the common culture of our days, the economy is the dominant key-note in all developments. Life is no mere fate any longer, but the artificial and economic shape of time. Human creative impulse has overcome traditional domains of nature like conception, birth, gender, health and death. The economic aspect becomes more and more prevalent, in the ethical controversies concerning the quality of life and death as well as in the fierce debates over the definition of human life; at the same time, the exigencies of instrumental efficiency are hardening. Counter-positions being predominantly occupied by religious fundamentalists make things by no means easier.

Promises of medical art and the pharmaceutical industry are part of our present, in a way substituting the search for the idea of human life after the general disenchantment caused by the demise of political utopia. Indeed, irreversible malady amounts to total disillusion and bankruptcy of our individual dream of life. Illness is the great challenge of our Ego, an existential jeopardy we have to react against. In a strange experience, men combine biomedical bodily knowledge and self-perception constituting aesthetics in its original sense. Eventually, that may result in many frictions. Treating existential issues as aesthetical issues inevitably brings about a tendency to convert observed facts into values that ultimately dominate discourses.

Illness opposes the desire of evolution and durability. Fashion, bio techniques, and cosmetic surgery—all of them strive incessantly for continuance of life and against death. What is more, one even could say: the "milliner Lamort" (according to R. M. Rilke) serves that society as an outfitter: by continuous and swift change she evades and denies

the gradual decease and painful decay that advancing in years signifies. Unlike bodies, fashion does not become old, it simply disappears. It seems as if fashion forestalls death and even makes it look ridiculous and superfluous. Fashion promises beauty, vitality, immortality, but just for one single season.

But exactly these components constitute the societal picture of the body and the value judgements connected to it: wellness, fitness, beauty, and health and body consciousness. The main paradigm of aesthetics consists of a body young, slender, strong and athletic. Central cultural values revolve around youthfulness, autonomy, strength, power, competitiveness and constant bodily self-control as ideals of happiness. Health is due to personal engagement and the consumption of salutary offers and services warrants fictitiously eternal life and happiness. On the contrary, illness is increasingly attributed to personal failure.[1] What a change of paradigms! The consequence: a sick body is no longer in accordance with societal ideals and therefore, in the near future, there won't be a place for it in this performance-oriented society.[2] Nevertheless, illness, body and death are entertaining huge markets of goods and services manifesting, thereby, substantial cultural and economic change.

These markets are full of contrasting offers provided by medical promises in endless self-service malls. In illustrated magazines, the misery of eternal youth through surgery catches the eye, marking new mortal fears in bizarre syndromes: it is the necessity of having to be beautiful, fit and young that leads to bulimia and anorexia. Death becomes elusive and dying is an omnipresent menace to individuality. It creates panic and fear since we have lost the capability to cope with death in traditional ways. In the course of medical professionalisation, death has been removed from everyday life and banished into separated spaces (in 90 per cent of cases!). Mortal disease, dying and death are no longer visible, except for next to kin or professionals who have access to this secluded world of dying. For the public, they do not exist! But nevertheless, this economy of death is trading a commodity everybody will sooner or later be.

The market of related constructs is gigantic, above all in connection with euthanasia, mercy killing or dying arrangements. There is plenty to be found on Internet Sites.[3] This "Dying Market" allegedly serves a clientele of 300 million people per year and is realizing over 30 billion Euros (8 billion in Germany alone). In this death industry of professions, numerous offers and providers are bustling about, among them religious people fighting for otherworldly monopoly and operating hard "god selling". It is the objective of so called "religious economics"[4] to study this competition on religious and significance markets of modern times. The offer embraces laser shows for funerals and converting the ashes of the deceased loved ones into diamonds.[5]

[1] A process described by Nancy Scheper-Hughes & Margaret Lock 'The Mindful Body: A Prolegomenon to Future Work in Medical Anthropology' *Medical Anthropology Quarterly* 1 (1987), 1 pp. 6–41 at p. 25. Cf. in general Pascal Bruckner *Verdammt zum Glück* Der Fluch der Moderne (Berlin: Aufbau-Verlag 2001).

[2] Cf. para. 3.

[3] E.g., in "Growth House" or "Yahoo: Death & Dying".

[4] Robert Laurence Moore *Selling God* American Religion in the Marketplace of Culture (Oxford & New York: Oxford University Press 1994).

[5] Cf., for Algordanza,<http://www. algordanza.ch/>.

2 A New Role for Death

Civilisation imprinted by medical art and pharmaceuticals generated new settings of mortality and death and this, for one, has also transformed ethics. The rhetoric of metaphysical sensitivity set apart, mortality constantly imperils the relevance of life. At the same time, fear of death functions as mainspring for social and cultural activities as continuous measures of defence against death.[6] The awareness of being mortal is always imparted by cultural means: "The consciousness of mine never experiences death, but through all my life it lives with the empirical appearance of death and the gradual withering away of the society's members."[7] In most cultures, death is equivalent with social exclusion and acts as confirmation of the living's order.

The indicative of irreversible failure for definitive human death (brain death) takes its meaning from the living human being defined as social actor: "It is not earlier than with his death that a patient loses the status of a social person, regardless whether there still are signs of life to be seen." The equation of brain death and end of life in humans makes finally evident that death is at once a cultural definition and an imprint of biomedical practice. By that, death obtains a processual logic that allows a redefinition of frontiers.[8] Death takes the floor in a new guise: it appears no longer in a dead body, but in a biologically living one.

Transplantation medicine caused a cultural revolution by availing itself of the Grim Reaper. It has managed to transform and, at the same time, instrumentalise death as a means of healing and preservation of life by making one death play against another.[9] Life or survival, respectively, can be experienced as a zero-sum gamble associating in a fatal manner one condition with the other. This adds a further dimension to the question how and why are men dying and what are the specific causes of death. Phrases like "death for lack of available organs" or "death on the waiting list" may demonstrate that death was not to be inevitable or, as a consequence of mortal disease, sheer destiny. As Vera Kalithkus records, this led the son of a mother who died of liver disease to the following obituary notice: "A missing donor organ tore her out of our midst".[10]

By utilisation and instrumentalisation of brain dead who, in pursuance with legal def-

[6] Comprehensively Philippe Aries *Geschichte des Todes* 10. Aufl. (München: DTV 2002).

[7] Jean Ziegler *Die Lebenden und der Tod* [1982] (München: Goldmann 2002), p. 37.

[8] According to the medical reference book—Willibald Pschyrembel *Medizinisches Wörterbuch* [Sonderausgabe Pschyrembel: Klinisches Wörterbuch] 261. Aufl. (Berlin & New York 2007), ed. 1993, pp. 1541–1542—, the process of death is subdivided into four phases: 1. Clinical death, typically identified with the cessation of heartbeat and cerebral activity, however potentially reversible; 2. cortical or cerebral death; 3. brain death, typically accompanied by necrosis of the cerebrum; it is the normal criterion for death; 4. biological death: mortification of all organs. As Michael Foucault *Die Geburt der Klinik* Die Archäologie des ärztlichen Blickes, 5. Aufl. (Frankfurt am Main: Suhrkamp 1999), p. 156 has pointed out, this process logic of death is resulting from the accumulation of medical expertise and brings about a growing split up of death: "So death is multifarious and dispersed over time: it is by no means such an absolute and privileged point where time comes to a hold and retreats".

[9] Werner Schneider 'Vom schlechten Sterben und dem guten Tod – die Neu-Ordnung des Todes in der politischen Debatte um Hirntod und Organtransplantation' in *Hirntod* Zur Kulturgeschichte der Todesfeststellung, hrsg. Thomas Schlich & Claudia Wiesemann (Frankfurt am Main: Suhrkamp 2001), pp. 279–317, p. 304.

[10] Quoted at Vera Kalitzkus *Leben durch den Tod* Die zwei Seiten der Organtransplantation: Eine medizinethnologische Studie [2003] (Frankfurt am Main, etc.: Campus 2004), p. 94.

inition, belong definitely to the category of deceased, the biomedical system and society itself includes once again whoever died in a symbolic cycle, that is: "Death now is a servant of life in this world".[11] For all that, even the most sophisticated high-tech medicine is not capable of changing the fact of death as definite final point of life.

3 Ethics as Social Technology

In a macroeconomic perspective, illness, aging and death are problems that can be resolved by employing social technologies like rehabilitation, restitution or final laying to waste. In our society, it is a hard fact superficially veiled by the mournful rhetoric of "irreplaceability" that in the functionally differentiated and rational modern world everybody has become interchangeable, being nothing more than a modest element of optimisation in a productive machinery that works efficiently even without him. In his novel *The Modern Death*, Carl-Henning Wijmark reports about a symposium bearing the title "The Last Stage of Man" organised by a project group of the Swedish Ministry of Social Affairs.[12]

As the experts agree upon, it has to be made clear to the general population what detrimental consequences an egotistic insistence on the preservation of single lives could have, especially for the economic future of the country. Stowing away the elderly as a humanitarian project is a task of social bureaucracy. Extracts from the dialogue between Persson, director of the ministry, and professor Storm of the Institute for Medical Ethics are casting a more than realistic picture:[13]

> Long-term care and the care of hopeless cases amount to 74 per cent of all care costs; for ten, fifteen years, we have reached the apex and are now over and above it. A more or less desperate discontent prevails among those twenty-five per cent of active people bearing the whole burden. But this discontent is muzzled in a twofold way, on one side by suffrage that reduces politicians to silence. The elderly remain in possession of their voting rights even when a hundred years old and no political party can afford to lose two million voters. On the other hand, we have got to do with a veritable taboo called reverence for human life, and by that, everybody is silenced. So things stay calm although the pressure by taxes becomes ever more insufferable, unemployment is on the rise and depression, seemingly everlasting, bites through to the bones of our society. To put it bluntly, we urgently need more dead. A new attitude towards death and the old is required, not only by the old themselves. Once more, it must become natural to die when the active time is over. How to increase the readiness to die? The main task for the next decade, I am convinced, will be to introduce a new ethic of life and death (an ethic of reality).

It would be naive to believe that such projects are just literary fiction.

[11] Werner Schneider »*So tot wie nötig – so lebendig wie möglich!*« Sterben und Tod in der fortgeschrittenen Moderne: Eine Diskursanalyse der öffentlichen Diskussion um den Hirntod in Deutschland (Münster, etc.: LIT Verlag 1999), p. 303.

[12] Carl-Henning Wijkmark *Der moderne Tod* [original: 1978] [2001] 2. Aufl. (Berlin: Gemini-Verlag 2005).

[13] Wijkmark; cf. 'Ein Methusalem-Komplott aus dem Jahre 1978; Carl-Henning Wijkmark hat vorhergesehen, mit welcher Art von Sterbehilfe wir zu rechnen haben' [excerpts with comment by] Hans Magnus Enzensberger *Frankfurter Allgemeine Zeitung* (January 13, 2005), No. 10, p. 1.

4 What does Transplantation Mean?

Since 2003, I myself have had bilateral lung transplants and, of course, that poses for me the radical question: What does transplantation really mean? In our individual life, we become dead serious when alternatives come to a pass. The more singularity we attribute to our life, the harder the confrontation with our fragility. "The endeavour for human dignity fails if the body forsakes us", is the verdict of the surgeon and medical historian Sherwin B. Nuland. There is a correlation of real and potential worlds of dying that outsiders may deem unbelievable: desire of transplantation, expectation of explantation. It is a strange atmosphere between fear of dying and euphoria of living well described by Monika Wogrolly-Domej.[14]

Of life, we know much and little at the same time. We definitely know that human bodies sustain themselves by biochemical communication in a complex network of relations. Explantation: The accident, the dying person, the cut, the transplant. The world outside of the sheltering body. The survival box. The other who I am and who hopes that communication with the new organ will be successful at the outset. The experience is stored in the transplant. We do not know how exactly. But we have a foreboding occurring in existential borderlands like the presentiment of a volcanic eruption or cosmic protuberances.[15]

Scientific findings of psycho-neuro-immunology prove "that there exists a direct neurochemical and electro-chemical communication between heart, lungs and the brain exceeding already known simple neurological correlations". After that, thoughts, emotions, fears and dreams do not take place only in the brain, but also in other bodily regions where it is coded, stored and forwarded. This "cellular memory" invades together with the transplant the body of the receiver: "Pain memory", "cellular consciousness".[16]

Our philosophical and cultural tradition heightens the drama. The heart as "seat of emotions" and the lungs as "pneuma", as seat of vitality for Stoa (as spirit of God or, later on, as Holy Spirit of Christianity) or as "breath of life", are strongly connected with the existence of the individual and with the identity of human beings. Every heartbeat and every breath is a perceptible reminiscence of the transplanted organ signifying any moment its existential relevance. It is not reasonable to worry about the transplant. An "instrumentalist reason" Horkheimer has described to the point would not suffice for solving the problem.

For the transplanted person, only successful biochemical communication promises future. That means communication is the therapy. Conscious and subconscious biological substances connect in a memory track providing the traumata of the other with a reaction scenario. In this way, it can placate and, at the same time, assure life as a successful communication. Communication represents more than a moral value, perhaps, even more than a cosmic context! But certainly, there are conflicting problems, like the fol-

[14] Monika Wogrolly-Domej *Abbilder Gottes* Demente, Komatöse, Hirntote (Wien: Styria Verlag 2004).

[15] Cf. the contribution of Hendrik Jan Ankersmit, Stefan Hacker, Ernst Wolner & Walter Klepetko in *Medizin- und Bioethik* hrsg. Michael Fischer & Kurt S. Zänker (Frankfurt am Main: Peter Lang 2006), pp. 225–235.

[16] Cf. Lynn Margulis & Dorion Sargan Leben Vom Ursprung zur Vielfalt (Heidelberg, etc.: Spektrum 1999) and Delef Bernhard Linke *Die Freiheit und das Gehirn* Eine neurophilosophische Ethik (München: Beck Verlag 2005).

lowing: We speak in culturally shaped pictures and metaphors of ourselves, determined by biomedical paradigms that not only form but constitute our anthropological nature. For example, our immune system is abundant in metaphors. It plays an outstanding role fulfilling the function of (as immunologists would formulate) "the differentiation of self and non-self by maintaining self and by repulsing non-self", a function that, eventually, decides the success of transplantations. The immune system "recognizes" the transplant as "strange", "combats" and "destroys" it. It is called an immune response and, in transplantations, it would take a lethal turn without medicinal intervention.[17]

However, could it be possible that these notions hide pathogenous or pathogenic implications? I ask this question while personally concerned: does the picture of the immune system as a "combat machine" really still makes sense? In the meantime, we tend to draw the more complex picture of a connected and flexible body. As Donna Haraway asserts, the functions of the immune system are not "to defend a coherent biological identity, but to maintain and regulate the balance and integrity of the body." Terms of art do more than just describe the human being; they are substantially constitutive of it by determining it psychically and ethically.

This becomes clear in the books of Jean-Luc Nancy, at the same time philosopher and transplantation surgeon. Already the titles of these books are revealing: *The Intruder: The Strange Heart* and *Corpus*.[18] For him, the necessary immune suppression is kind of a self-alienation or a violation of the immunity characterised as the essential physiological signature: "Identity stands for immunity. Immunodeficiency means also deficiency of identity. Therefore, alienation becomes a common everyday experience."[19] Is Nancy just caught in the labyrinth of discursive imprisonment because the process of biomedical modernisation is, as Michel Foucault points up, equally a process of human disciplination? This process, whenever it happens, seems to transpire in the shadow of a religious concept of sin. footnoteVergil Beck in *Medizin- und Bioethik* [note 15], pp. 141–158. Or have we only got to do with an ethical vacuum made manifest in this use of speech or in the patterns of attitudes conditioned by it? What are the visions that are or will be forming our expectations?

5 Visions for the Future

The 20th century began with unprecedented visions. Around 1900 Russian authors outlined the radical project of a total restructuring of life; regarding that background, today's debates about bio-politics appear plainly moderate. So Nikolaj Fedorov came up with the "Project of Joint Action" having in mind to resurrect artificially all the dead by deployment of modern techniques! The "Biocosmists" proclaimed communism as a way to reach immortality. Constantin Tsiolkowski, father of soviet rocket programs, had the vision to people planets with resurrected beings.

[17] It is no earlier than with the invention of the immuno-suppressive drug Cyclosorin at the beginning of the eighties that the immune response could be effectively treated.

[18] By Jean-Luc Nancy, *Der Eindringling* Das fremde Herz (Berlin: Merve 2000) and *Corpus* 2. Aufl. (Zürich: Diaphanes 2002).

[19] Nancy *Eindringling*, p. 35.

In our times, scholars, physicians and neurologists are underway to conquer the "Royal Organ" of mankind. By implanting cerebral cells, they intend to cure Alzheimer's and Parkinson's disease, apoplexy, deafness and blindness. After such interventions, is the person still the same? "The identity is thoroughly questionable", declared Detlef Bernhard Linke, a recently deceased neurologist.[20] "At last, we do not know who governs thinking, emotion and movement—the own or the alien tissue". In this century of biological revolution, medical art is going on to develop perspectives of fulfilment of wishes.

Under the pressure of various shifts in the cultural context of modern societies, traditional boundaries of medical knowledge and practice begin to decompose. Bound by strict indications, the anthropological mission of medicine used to be that of treating ill or imperilled women or men, and not to elicit desire and push up demand which, on the contrary, modern "wish-fulfilling" medicine is more and more inclined to do. Such a cultural change of medicine occurs in close connection with a sweeping economisation of all sectors of life, among them that of the health system as well. Many observers fear that this advancement of wish-fulfilling medicine will, in the end, lead to the abandonment of central medical values; others believe there is a better future for patients, clients and consumers if medicine is adapted to a demand-driven service industry. How could we evaluate such a development?

Perhaps, it will be possible to make implants of biotechnologically changed alien cells or of electronic brain-chips to stimulate whatever brain area is requested. By that, one could become an intellectual or athletic superman by surgical operation. Is it part of the human rights guarantee of a free development of personality and its wishes to be brain-surgically "modelled"? In the future, should there be cosmetic surgeons for mind and intellect? Are there boundaries of the species to comply with or can man write a script of his own? Questions over questions to be considered substantially and practically.

In the biological and medical-ethical discourse, it looks as if the times of hysterical reactions are gone as well as those of frightening people on the basis of their ignorance and of productions overstated by media. With all those iconoclasts resisting scientific progress, one has to ask this question: What is the essence of human? It certainly has to be man as an autonomous and self-realizing project as taught by a humanistic tradition from Pico della Mirandola through the Enlightenment up to our days. In face of the huge potential of genetics, a realistic calculation is not possible. Pandora's Box is open and anthropo-techniques are anything but science-fiction by now. Anyway, an abstract negation of scientific progress contains more contempt toward mankind than an "active participation in the game".

We have learned that juridification when overdone contains the danger of moral and legal short-sightedness. A transplantation case-law—so to speak between scalpel and Petri dish—that every new experiment or fresh publication would overtake leads absolutely to nothing. Ethics as well as law have to be durable; norms regulating dynamic fields like transplantation surgery or bio-technique must be abstract and leave open latitudes. An appropriate regulation has to be characterised by normative restraint and austerity, and that in radical contrast to palliative care as shown above.

[20] Cf. Linke [note 16].

A provisional summary could, perhaps, read as follows: The discussion in medicine and bioethics is already globalised. To an astonishing degree, Europeans as well as Americans discover how deeply they are all together determined by Christianity, comprising agnostics as well as progressives.[21] Tension exists between the scientific curiosity that has made Europe and the inheritors of her civilization great and the unconditioned reverence of the human person. This heritage constitutes a double ethical matrix and may lead us, sometime, into paradoxes. But that cannot justify renouncing this heritage, just on the contrary: we should take it up creatively and save it.[22]

FACULTY OF LAW
UNIVERSITY OF SALZBURG, AUSTRIA
MICHAEL.FISCHER@SBG.AC.AT

[21] In Israel, embryonic research has relatively wide margins; that may be explained by the differing status of unborn life according to Jewish religion: as opposed to Christian beliefs, it does not enjoy full rights from the moment of conception. In China, they are digging after Confucian guidance for bioethics under the ruins of wrecked communist ideology and come to the conclusion that the human being is bound to birth and the entry into the human community. Comparatively, it looks as if the liberal United Kingdom allowing research in the first 14 days of life stays still in the shadow of the Vatican. For western society and its science, be it Christian or not, the early stages of human life remain morally mined grounds. Each tread has to be set with the highest caution and needs a thorough examination; and all this happens under the eyes of an attentive and distrustful public.

[22] Translated from German into English by Johann J. Hagen.

Felix Somló's Legal Philosophy: Content, Critique, Counterparts

Andreas Funke

Somló Bódog, outside Hungary also known as Felix Somló, is one of the most outstanding writers of Hungarian legal philosophy. Born in 1873, he abandoned a highly productive academic career by committing suicide in 1920. Following Csaba Varga's report of Somló's dramatic end, "he hanged himself at his mother's grave".[1] Somló wrote in Hungarian and in German. Neither his publications have been translated into English yet, nor is there profound secondary literature available in English. Somló's main work is a large volume published in German under the title *Juristische Grundlehre* in 1917.[2] Although this work has broadly received respect as a milestone of jurisprudence, especially of analytical jurisprudence, its reception sometimes seems to be a bit one-sided. Furthermore, there are still some controversial understandings and, to some extent, misleading depictions. In the following article I undertake to give a concise and systematic understanding of the legal theory embodied in the *Grundlehre*, taking into account some of Somló's other publications and placing emphasis on some of his counterparts. In doing

[1] Csaba Varga 'Curriculum vitae' in Felix Somló *Schriften zur Rechtsphilosophie* hrsg. Csaba Varga (Budapest: Akadémiai Kiadó 1999), pp. xiii–xiv at xiv. Although Csaba Varga by word of mouth refuses to be a legal historian, he in fact has earned great merits in the field of history of Hungarian legal philosophy. He has edited several considerable volumes in his *Philosophiae Iuris* series. Somló's *Schriften zur Rechtsphilosophie* forms a part of this series. After it the following volumes have been published so far, all edited by him: *Aus dem Nachlass von Julius Moór* (Budapest: ELTE "Comparative Legal Cultures" Project 1995) xv + 158 pp.; István Losonczy *Abriss eines realistischen rechtsphilosophischen Systems* (Budapest: Szent István Társulat 2002) 144 pp.; Barna Horváth *The Bases of Law* (Budapest: Szent István Társulat 2006) LIII + 94 pp.; *Die Schule von Szeged* Rechtsphilosophische Aufsätze von István Bibó, József Szabó und Tibor Vas (Budapest: Szent István Társulat 2006) 246 pp.; Julius Moór *Schriften zur Rechtsphilosophie* (Budapest: Szent István Társulat 2006) XII + 485 pp. Further volumes—especially the three-volume collection of Barna Horváth's writings—are in preparation. For the Somló-volume, see my review 'Die Definition des Rechts und die Brille auf der Nase der Juristen' *Rechtstheorie* 36 (2005), pp. 427–433; for the other volumes, see my 'Verlorene Spuren' *Rechtsgeschichte* 14 (2009), pp. 224–226.

[2] Felix Somló *Juristische Grundlehre* (Leipzig: Felix Meiner 1917) ix + 556 pp. The second edition (Leipzig: Felix Meiner 1927) is in fact a reprint of the first edition with a foreword by Julius Moór; the paging remaining the same.

so, I will to a large extent draw on my German doctoral thesis which in effect forms a thorough discussion of Somló's legal theory.[3]

1 The Contemporary Context: German Allgemeine Rechtslehre

Somló's *Grundlehre* is aimed at what he calls *juristische Grundlehren* and *juristische Grundbegriffe*: fundamental legal doctrines and fundamental legal concepts.[4] At the time this endeavour had not been unique. In writing on this subject, Somló queued himself into a relatively broad academic formation in contemporary German legal writing, which is probably best indicated as *Allgemeine Rechtslehre*. Its most important writers are Adolf Merkel (1836–1896, a disciple of Rudolf von Ihering, and not to be confused with the Austrian Adolf Merkl),[5] Karl Magnus Bergbohm (1849–1927),[6] Ernst Rudolf Bierling (1841–1919),[7] and Somló. At the turn of the century these writers were united in rejecting both the idea of a natural law and the traditional metaphysical attitude towards law. They tried to supplement—and not to substitute—the traditional thinking in legal philosophy with a non-metaphysical understanding of positive law. The discussion started at the latest when Merkel published his groundbreaking programmatic essay *Über das Verhältnis der Rechtsphilosophie zur "positiven" Rechtswissenschaft und zum allgemeinen Teil derselben* [About the relationship of legal philosophy to "positive" legal science and to its general section] in 1874.[8] Hence, when Somló entered the scene, one can say, the climate had already been a little bit open-minded about theories like that. What is more, another line of thinking, which later turned out to be much more important und having much more influence than Somló's, had already caught attention: Hans Kelsen's

[3] Andreas Funke *Allgemeine Rechtslehre als juristische Strukturtheorie* Entwicklung und Bedeutung der Rechtstheorie um 1900 (Tübingen: Mohr Siebeck 2004) xii + 338 pp.

[4] Somló *Juristische Grundlehre* [note 2], pp. 8 and 26.

[5] See, e.g., Adolf Merkel 'Über das Verhältnis der Rechtsphilosophie zur »positiven« Rechtswissenschaft und zum allgemeinen Teil derselben' [1874] in his *Hinterlassene Fragmente und Gesammelte Abhandlungen* Zweiter Teil: Gesammelte Abhandlungen aus dem Gebiet der allgemeinen Rechtslehre und des Strafrechts, Erste Hälfte (Straßburg: Trübner 1899), pp. 290–323; Adolf Merkel 'Elemente der allgemeinen Rechtslehre' in his *Fragmente* Zweiter Teil, Zweite Hälfte (Straßburg: Trübner 1899), pp. 577–647; Adolf Merkel *Juristische Enzyklopädie* 5. Aufl. (Berlin: Guttentag 1913).

[6] Karl Magnus Bergbohm *Jurisprudenz und Rechtsphilosophie* Kritische Abhandlungen, I (Leipzig: Duncker & Humblot 1892).

[7] Most notably Bierling is not less interesting than Somló. Cf., by Ernst Rudolf Bierling, *Zur Kritik der juristischen Grundbegriffe* I–II (Gotha: Friedrich Andreas Perthes 1877/1883) and *Juristische Prinzipienlehre* I–V (Freiburg, Leipzig & Tübingen: J. C. B. Mohr "Paul Siebeck" 1894–1917). Bierling wrote an article which is addressed more or less to Somló, trying to come to terms on the concept and the purpose of legal theory, see Ernst Rudolf Bierling 'Zur Verständigung über Begriff und Aufgabe der Juristischen Prinzipienlehre' *Archiv für Rechts- und Wirtschaftsphilosophie* 11 (1917–1918), pp. 205–221. On Bierling, see my thesis *Allgemeine Rechtslehre...* [note 3] and, in addition, Andreas Funke 'Allgemeine Rechtslehre als Lehre von den juristischen Grundbegriffen: Ernst Rudolf Bierling (1841-1919)' in Greifswald Spiegel der deutschen Rechtswissenschaft 1815 bis 1945, hrsg. Joachim Lege (Tübingen: Mohr Siebeck 2009), pp. 94–110; on Bierling and Somló, see Neil Duxbury 'English Jurisprudence between Austin and Hart' *Virginia Law Review* 91 (2005), pp. 1–91, especially at 6ff), and Andreas Funke 'Läßt sich juristische Objektivität auf eine »Allgemeine Rechtslehre« stützen?' in *Objektivität und Flexibilität im Recht* hrsg. Carsten Bäcker & Stefan Baufeld (Stuttgart: Franz Steiner 2005), pp. 26–37.

[8] Merkel *Verhältnis...* [note 5].

Hauptprobleme der Staatsrechtslehre was published in 1911. The further development of that story is well-known.

The term *Allgemeine Rechtslehre* has plenty of connotations. An *Allgemeine Rechtslehre* can be a philosophical study attaching to a more KANTian tradition, being an idealistic, metaphysical understanding of law. Aside from this, it has been conceptualised as a division of comparative law, or as an integrative theory embracing legal sociology, legal philosophy and legal dogmatics as well, or even as a particular way of teaching the law. But SOMLÓ's and his associates' understanding is different. It focuses on a structural analysis of a legal order.[9] In English, *Allgemeine Rechtslehre* in this sense is referred to as Jurisprudence, General Jurisprudence, General Theory of Law, Legal Theory or similar expressions. This way of legal thinking forms an important intellectual tradition, which may be pictured by reference to writers like HANS KELSEN, HERBERT HART, OTA WEINBERGER, ROBERT ALEXY, or RALF DREIER.[10]

2 The Concept of a juristische Grundlehre

SOMLÓ states that there are two basic questions of legal philosophy.[11] On the one hand, it has to demonstrate what law is. This is the task of the *juristische Grundlehre*, thus it is a subsection of legal philosophy. On the other hand, legal philosophy has to argue about the evaluation of law. Consequently, the *juristische Grundlehre* is not devoted to the axiology of law.

The fundamental legal concepts, which are the matter of the *Grundlehre*, are, strictly speaking, neither concepts of law nor legal concepts. They are in fact j u r i s t i c concepts. That means the concepts are not part of the law, but of the conceptual body with which law is treated by jurists. These concepts are generated by the science of law, not given by a positive legal order. SOMLÓ thereby relies on a basic distinction. He distinguishes *juristische Grundbegriffe* or *Rechtsformbegriffe* (formal legal concepts) and *Rechtsinhaltsbegriffe* (substantial legal concepts).[12] Within the scope of legal theory conceptualised as a *Grundlehre*, one has to restrain from the substance of a given positive law. One is only allowed to speak about what is necessarily given when a particular positive law is identified as law. For, following SOMLÓ, there are certain essential legal concepts besides the concept of law itself, which are necessarily given with the definition of law. Those concepts constitute the form of law and thus are independent from any positive legal order. Just to reveal these concepts should be, following SOMLÓ, a vital aim of legal theory. Hence, it forms a major part of his treatise. Thus, the composition of the *Grundlehre* becomes self-evident; it has to be divided into two parts: (1) the concept of law and (2) the elements and consequences of the concept of law [*Glieder und Folgen des Begriffs des Rechts*].

[9] See the bibliographical survey of the structural theory of law—including SOMLÓ—in Ota Weinberger *Logische Analyse in der Jurisprudenz* (Berlin: Duncker & Humblot 1979), p. 220.

[10] See Robert Alexy & Ralf Dreier 'The Concept of Jurisprudence' *Ratio Juris* 3 (1990), pp. 1–13.

[11] Felix Somló 'Das Verhältnis von Soziologie und Rechtsphilosophie, insbesondere die Förderung der Rechtsphilosophie durch die Soziologie' [1911] in *Somló Schriften*... [note 1], pp. 59–64 at 61 and Somló *Juristische Grundlehre* [note 2], p. 15.

[12] Somló *Juristische Grundlehre*, pp. 26–32.

There is much to say about such a strict and somehow ascetical conception of legal theory as this. Scepticism arises especially in respect of the design of part two. One might ask how concepts or doctrines can be drawn, derived, or deduced from another concept—the concept of law—at all. Isn't this an odd thing? Moreover, is it scientifically possible? And lastly, can it actually provide the knowledge legal theory is searching for? Somló subjects legal theory to the means of legal dogmatics anyhow[13]—but can it be useful for legal dogmatics at all? These questions cannot be pursued here. After all, conceptual analysis has always been the business of analytical jurisprudence. And Somló has definitely revealed striking insights, as will be demonstrated below.

3 The Concept of Law

Somló's concept of law is probably one of his most famous and—due to its radical positivistic consequences—sometimes doomed doctrines. "Law thus stands for the norms of a habitually obeyed, extensive and persistent supreme power."[14] He calls this power *Rechtsmacht* (or "supreme" legal power). This definition is in fact a condensed version of a highly complex conceptual, methodological, and empirical arrangement, and cannot be discussed here in detail. However, some remarkable points have to be mentioned.

a) Without doubt, Somló's definition of law was inspired by John Austin (1790–1859). In this respect it is broadly recognised that Somló paved the way for Anglo-American analytical jurisprudence on the continent.[15] It is noteworthy actually, that Somló has been able to comprise Austin. Contrary to this, Bierling, Somló's German counterpart, was obviously not able to do so. Thus, Bierling missed the opportunity to get further inspiration for his own elaborate version of an *Allgemeine Rechtslehre*, which he called *Juristische Prinzipienlehre*.[16]

Following Austin, every law is a command, and a command is always followed by a sanction in case of disobedience.[17] Austin defines law, then, as follows: "Every positive law […] is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme."[18] Sovereignty, in turn, is to be found in a particular constellation: "The b u l k of the given society are in a h a b i t of obedience or submission to a d e t e r m i n a t e and c o m m o n superior […]."[19] Indeed there is an eye-catching resemblance of Somló's and Austin's definitions of law.

Considering Hart's classic criticism of Austin,[20] this resemblance appears in a bad

[13] Somló, pp. 1 and 16–20.

[14] Somló, p. 105.

[15] See, e. g., Alf Ross *Theorie der Rechtsquellen* Ein Beitrag zur Theorie des positiven Rechts auf Grundlage dogmenhistorischer Untersuchungen (Leipzig & Wien: Franz Deuticke 1929), pp. 80, 85 and 98. For a broader perspective, see József Szabadfalvi 'Some Reflections on the Anglo-Saxon Influence in the Hungarian Legal Philosophical Traditions' *Acta Juridica Hungarica* 42 (2001), pp. 111–119.

[16] See Funke 'Bierling' [note 3], note 39.

[17] John Austin 'The Province of Jurisprudence Determined' [1832] in his *Lectures on Jurisprudence* Or the Philosophy of Positive Law, 5th ed. (London: John Murray 1885), Lecture VI, pp. 88–89.

[18] Austin *Lectures*... [note 17], Lecture VI, p. 220.

[19] Ibidem (with emphasis by Austin himself).

[20] H. L. A. Hart *The Concept of Law* (Oxford: Oxford University Press 1961 [2nd ed. 1994]), Chs. III–IV.

light. But Hart's criticism cannot just be attached to Somló. Even though both definitions have a lot in common, there are striking differences, as I will demonstrate immediately. Thus, Somló is not merely Austin's "mirror image"[21] or "a sort of 'Continental carbon-copy'".[22]

First of all, unlike Austin, Somló does not fail to take into account that law is more than just an order backed by threats.[23] Drawing a sharp line between both definitions, Somló denies the notion of a rule being necessarily connected with a sanction.[24] Law has to been seen, Somló stresses, as a unity of rules, thus as a legal order[25]. It is not possible to speak about law and to abstain from this fact at the same time. Sanctions are embraced by the definition of law only insofar as the general obedience will be regularly accompanied by a general possibility of enforcement. From this it follows that, if a power is supreme, it will be generally able to enforce and to sanction its rules. But it is not the single rule that is necessarily to be enforced or to be sanctioned. Nor did Somló overlook that some rules serve other purposes than imposing duties or conferring rights. A legal order consists—not necessarily but regularly—of secondary rules which are rules only on the basis of primary rules (it has to be noted that this distinction is far from Hart's distinction of primary and secondary rules).[26] Such secondary rules may be a constitution, a statute, or even an individualized directive or a judgement, and all these rules are often stratified in the form of a complex hierarchy.[27] Hence, Somló determined the f u n c t i o n of creating norms anyway.[28] He solely ignored how norms are created in reliance to other norms. In other words, he missed what in modern legal theory is treated as norms of empowerment or power-conferring rules.

Secondly, Somló's concept of a supreme legal power does not obscure salient features of a modern legal system to the extent Austin's does.[29] Truly, the figure of a supreme law-giver will never be sufficient to analyse a modern legal system. But Somló noticed, I guess, the inadequacy of that notion, since he often stresses that *Rechtsmacht* was a sophisticated concept and the *Rechtsmacht* of a particular legal system would not be fixed easily.[30] All in all, this point remains crucial. But it is noteworthy, above all, that Somló took into account the legal limitations a legislator has to consider. In a very subtle analysis he puts forward that a supreme power can violate its legal limitations and nevertheless can create law.[31] This law-making might be called illegal or unlawful, but if the conditions of the definition of law are fulfilled, the law is valid. "It's a feature being symptomatic for

[21] Stanley L. Paulson 'On the Early Development of the Grundnorm' in *Law, Life and the Images of Man* Festschrift for Jan M. Broekmann, ed. Frank Fleerackers et al (Berlin: Duncker & Humblot 1996), pp. 217–230 at 217.

[22] Stanley L. Paulson 'The Neo-Kantian Dimension of Kelsen's Pure Theory of Law' *Oxford Journal of Legal Studies* 12 (1992), pp. 311–322 at 316.

[23] This is one major point of Hart's criticism of Austin, see Hart *The Concept of Law* [note 20], Ch. III.

[24] Somló *Juristische Grundlehre* [note 2], p. 65 note 2 and pp. 145 and 200–203; Felix Somló *Gedanken zu einer Ersten Philosophie* hrsg. Julius Moór (Berlin & Leipzig: de Gruyter 1926), p. 32.

[25] Somló, p. 98.

[26] Somló, p. 318. See Hart, Ch. 5.

[27] Somló, p. 332.

[28] Somló, p. 327.

[29] This is another point of Hart's criticism, see Hart, Ch. 4.

[30] Somló, p. 119.

[31] Somló, p. 117 and 119.

the nature of law, that even an unlawfully created norm can be a valid norm; in other words, that the precondition of its lawful making can't be enclosed within the concept of law."[32] Only if the unlawful (primary) rules are no longer habitually obeyed due to their unlawfulness, legitimacy becomes a condition of law-making. But anyway this analysis remains incomplete, since the legal limitations are not explained as limitations of legal power.

b) Somló's theory was a target of Kelsen's criticism. Actually, one of Kelsen's most famous and presumably most controversial ideas, the *Grundnorm* [basic norm], was unfolded first in an argument with Somló.[33] Kelsen objected to Somló's definition of law, claiming that it would fail to explain the normativity of law. It would just remain restricted to the field of facts. Kelsen stated the necessity of what he called the *Ursprungsnorm* [norm of origin].[34] This norm is a normative statement, expressing that certain acts are to be obeyed. But Kelsen's critique is misleading. Somló and Kelsen share, to this extent, the same point of departure. Somló's definition of law is stated within the scope of an epistemology of law, and so is Kelsen's basic norm.[35] Somló's concept of law is supposed to be one of the preconditions of jurisprudence; hence, it may be called an *a priori* concept.[36] It is dangerous to lose sight of this context. Both Kelsen's basic norm and Somló's definition of law are designed to be an answer to the same question: how is law recognised as law? It is this feature that might be Somló's often stressed (in my opinion, too often) neo-kantian impact.[37] This feature can already be observed in one of Somló's early papers, where Somló states that jurists, while seeking for the definition of law, are looking for the glasses they wear on their nose.[38]

But Somló views the concept of law as an empirical concept [*Erfahrungsbegriff*]. Thus law is a social fact.[39] Do these statements contradict the affinity between Somló and Kelsen? In my view, they are the most confounding passages we can read in the *Grundlehre*. They have to be taken with great diligence. Speaking about empirical con-

[32] Somló, p. 117.

[33] Hans Kelsen *Das Problem der Souveränität und die Theorie des Völkerrechts* Beitrag zu einer reinen Rechtslehre (Tübingen: J. C. B. Mohr "Paul Siebeck" 1920), pp. 31–36. See also Paulson 'On the Early Development...' [note 21], pp. 217 and 228. For a detailed comparison of Somló and Kelsen, see *Funke Rechtslehre...* [note 3], pp. 206–208 and 254–257.

[34] Kelsen *Das Problem...* [note 33], p. 33 note 1.

[35] See, e.g., Hans Kelsen *Reine Rechtslehre* Mit einem Anhang: Das Problem der Gerechtigkeit, 2. Aufl. (Wien: Franz Deuticke 1960), p. 205. Sure enough, this point is still highly controversial, see, e.g., by Stanley L. Paulson, 'Läßt sich die Reine Rechtslehre transzendental begründen?' *Rechtstheorie* 21 (1990), pp. 155–179 at 169, 'On the Kelsen–Kant-Problematic' in *Normative Systems in Legal and Moral Theory* Festschrift for Carlos E. Alchourón and Eugenio Bulygin, ed. Ernesto Garzón Valdés et al. (Berlin: Duncker & Humblot 1997), pp. 197–213 at 205 and 'The Neo-Kantian Dimension...' [note 22], pp. 323–324. A closer account of the epistemology of law is to be found in Funke *Rechtslehre...* [note 3], pp. 156–188.

[36] Somló *Juristische Grundlehre* [note 2], p. 127.

[37] By József Szabadfalvi, 'Bódog Somló' in Somló *Schriften...* [note 1], pp. xi and xii, as well as 'Wesen und Problematik der Rechtsphilosophie: Die Rechtsphilosophie von Gyula Moór' *Rechtstheorie* 30 (1999), pp. 329–353 at 337 and 352–353 and 'Portrait-Sketches from the History of Hungarian Neo-Kantian Legal Philosophical Thought' *Acta Juridica Hungarica* 44 (2003), pp. 245–256 at 246. Cf. also Wilhelm Sauer *Lehrbuch der Rechts- und Sozialphilosophie* (Berlin: Rothschild 1929) 442 pp. See also Funke *Rechtslehre...* [note 3], pp. 156–157.

[38] Somló 'Verhältnis...' [note 11], p. 61.

[39] Somló *Juristische Grundlehre* [note 2], p. 127.

cepts, Somló is constructing an opposition to an ethic or philosophical concept of law. The juristic fundamental concept of law has to deal with the law which is positive here and there.[40] But it is not meant to be the result of a mere sociological analysis. Actually, Somló's sophisticated nomology—which is not explicated here in detail—can be understood as one of the first attempts of legal theory to establish the specific normativity of positive law, a normativity that is neither grounded on law in an ethic sense, nor identified with sheer facts. As Somló states, legal theory has to deal with normative entities he calls *Sollensbedeutung* [meaning of an ought]. This *Sollensbedeutung* he grasps as follows: "It is namely not a mere will, for this would be something internal, nor a notification of that will, since this would be a pure matter of fact, but something else, that is linked with that will by all means, and to that the peculiar meaning of an ought is attributed."[41] And, he continues, the meaning of an ought "is not to be reduced to other elements".[42] This thrilling doctrine which Somló had already treated in his early study *Das Wertproblem*, was explained a bit further in the posthumously published fragment *Gedanken zu einer Ersten Philosophie* [Ideas about a First Philosophy].[43] But sure enough, Somló may have fixed the problem properly, but he did not solve it satisfyingly.

From all this follows that the *a priori* character of the concept of law must not be exceeded. Because the positive law is of an empirical nature in the sense stated above, the *a priori* character of the concept of law cannot be absolute. The concept of law is only a "relative *a priori*" of legal science.[44]

Finally, there is one important difference between Kelsen's basic norm and Somló's definition of law. Somló holds that it was a platitude that the last fundament of a system of norms could not be a norm of this system.[45] So his definition of law does not express a norm, but, as already mentioned, an assertion about the normative character of an order which is effective. Why should this assertion be a norm likewise? In this context, the notion of a basic norm proves, as Somló's disciple Julius Moór and other writers have criticised, to be superfluous.[46]

[40] Somló, p. 125 and Felix Somló 'Rechtsbegriff und Rechtsidee' [1914] {reviewing Julius Binder's *Rechtsbegriff und Rechtsidee* in his *Schriften*... [note 1], pp. 67–70 at 69.}

[41] Somló *Juristische Grundlehre* [note 2], p. 197.

[42] *Ibidem*.

[43] Felix Somló 'Das Wertproblem' *Zeitschrift für Philosophie und philosophische Kritik* 145 (1912), pp. 129–158 & 146 (1912), pp. 64–100; also Somló *Gendanken*... [note 24].

[44] Somló *Juristische Grundlehre* [note 2], p. 127 ("relatives Apriori der Rechtswissenschaft"). The notion of a "relative *a priori*" was picked up by Hans Kelsen *Reine Rechtslehre* Einleitung in die rechtswissenschaftliche Problematik (Leipzig & Wien: Franz Deuticke 1934), p. 23, and is further examined by Robert Alexy 'Hans Kelsens Begriff des relativen Apriori' in *Neukantianismus und Rechtsphilosophie* Mit einer Einleitung von Stanley L. Paulsonm hrsg. Robert Alexy et al. (Baden-Baden: Nomos 2002), pp. 179–202.

[45] Somló, p. 253.

[46] Julius Moór 'Reine Rechtslehre, Naturrecht und Rechtspositivismus' in *Gesellschaft Staat und Recht* Untersuchungen zur Reinen Rechtslehre [Festschrift. Hans Kelsen zum 50. Geburtstage gewidmet], hrsg. Alfred Verdross (Wien: Julius Springer 1931), pp. 58–105 at 70–71, reprinted in Moór *Schriften*... [note 1], pp. 108–155 at 120–121; Werner Krawietz *Das Recht als Regelsystem* (Wiesbaden: Franz Steiner 1984), pp. 134 and 185; Rainer Lippold *Recht und Ordnung* Statik und Dynamik einer Rechtsordnung (Wien: Manz 2000), pp. 505 and 532–533; Ross *Theorie der Rechtsquellen* [note 15], p. 356; Hart *The Concept of Law* [note 20], p. 293.

4 Structural Analysis in Detail: Salient Features

As mentioned above, Somló does not only try to provide a definition of law, but aims to unfold the concept of law by deriving the particular concepts and doctrines given with the concept of law. Realizing this plan, Somló examines virtually the whole course of legal theory and legal methodology. Even psychological and sociological topics are discussed insofar as they are relevant for legal theory. To be precise, Somló is, again like Kelsen, determining the range of those disciplines within legal theory. Somló touches also upon the theory of state, which in the German-speaking community is discussed under the label *Allgemeine Staatslehre* and was flourishing at the time.

There are quite a number of fundamental legal concepts and doctrines. There are, for example, the concepts of norm, will, society, state, sovereignty, association of states, constitution, statute, duty, legal addressee, source of law. Furthermore, there are certain fundamental doctrines of legal interpretation. However, these concepts and doctrines are not easy to spot, because they are spread across the whole volume of the *Grundlehre*. Complaining about the absence of a table of fundamental legal concepts, Franz Weyr even criticised that it would not in either case be clear if a concept was of a fundamental kind or not.[47] Let us examine some of the most distinctive features:

a) As already mentioned above, Somló does not reduce legal rules to imperatives. Following Somló, legal norms are *Befehlsnormen* (imperatives) or *Versprechensnormen* (promises). The latter is a matter of particular interest for us. It might be Somló's most autonomous contribution to legal theory. But admittedly, it is hardly convincing. The criticism most commentators raised shall not be concealed here.[48]

An imperative is the expression of a will and it is set by someone.[49] It is either a prohibition or a prescription (again, these statements rest on an elaborate nomology that cannot be reflected here in detail). A promise, on the other hand, is a norm set by someone too, but referring to the norm-setting person's conduct and being addressed to another person.[50] Unlike promises, Somló states, imperatives form a necessary part of every legal system. For we cannot imagine a legal order that does not oblige people to do something or to abstain from it. But a supreme legal power is not able to impose self-addressed imperatives. So if in a given legal order there are norms imposing duties on the supreme legal power, if, in other words, there are norms that oblige the supreme legal power itself—for example, a constitution—, another analytical tool is required: the promise. So, constitutional regulations are the main field of application for the category of a promise. But due to the methodological restrictions the *Grundlehre* imposes, it cannot take into ac-

[47] Franz Weyr 'Zur Frage einer juristischen Grundlehre' *Philosophie und Recht* Zeitschrift für Philosophie und Rechtswissenschaft, philosophische Parteienlehre, juristische Erkenntnistheorie (Rechtsfindung) und Pädagogik 1 (1920–22), pp. 45–49 and 112–118, especially at 116.

[48] See again, e.g., Weyr, p. 115; furthermore Leonidas Pitamic 'Eine »juristische Grundlehre«' [1918] in Somló *Schriften*... [note 1], pp. 77–96 at 85–86; Ernst Beling 'Besprechung: Felix Somló, Juristische Grundlehre' *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* [3. Folge] 21 (1925), pp. 50–83 at 71–72; Kelsen *Das Problem*... [note 33], p. 34. For further references and a more detailed criticism, see Funke *Rechtslehre*... [note 3], pp. 270–272.

[49] Somló *Juristische Grundlehre* [note 2], pp. 191–192.

[50] Somló, p. 193.

count the substance of a given constitution. It only allows analysing the logical structure of this kind of norms.[51]

Now we have reached the most crucial point. Why is Somló talking about supreme legal power and duties at the same time? For we have seen the function of the supreme legal power is to set law, and therefore it cannot, from the start, behave in accordance with law. To put it differently, within legal relations we can only speak about legal subjects. The supreme legal power has been designed as an empirical fact, which stands *per definitionem* outside the law. Once the norms are enacted, and insofar as the substance of those norms is taken into account, there is no longer a legal supreme power, but only a legal subject. To put it yet differently, Somló mixes up two ways of analysing a legal order. Such an analysis may grasp the law as a system of rules valid at a particular time (Kelsen calls this analysis *nomostatics*), or it is aimed at how the law is generated, changed, or annulled (what Kelsen calls *nomodynamics*).[52] While the idea of a promise or *Versprechensnorm*—and, by the way, an imperative norm as well—is an element of the former, the idea of a *Rechtsmacht* is part of the latter. I guess, at this point Somló eventually proves to stand under Austin's fatal influence. When constructing legal relations, he does not depart far enough from Austin's raw, imperative-based arrangement. Somló finally mixes up empirical and normative views.

b) A legal order consists of legal relations. Somló does not develop a comprehensive theory of legal relations. But nevertheless, we can find a lot of valuable contributions to that theory in the *Grundlehre*. The starting point is a simple statement: every norm expresses a duty.[53] The concept of duty allows picturing the meaning of a norm from the addressee's point of view. In other words, it allows a subjective view of the norm as an objective entity. In addition, Somló states, every duty is correlated with another subjective normative position. He does not label this position exactly; we can call it here title [*Berechtigung*]. Instead, Somló names the holder of that entitlement, which he thinks to be the law-giver. But as has been stated above when criticising Somló's theory of promise, this notion is misleading. Though, Somló is able to draw some interesting conclusions.

Legal norms express normative relations.[54] Drawing on his theory of imperatives and promises, Somló grasps three basic normative relations which are logically possible: *Befehlsverpflichtung* [imperative-based duty], *Versprechensverpflichtung* [promise-based duty], and *Versprechensanspruch* [promise-based claim].[55] Due to the constructive failure of the category of promise, we will not follow this distinction in detail. But firstly it is remarkable that Somló eventually tries to construct the entire legal order as a multitude of legal relations. For instance, constitutional liberties and the distinction between public and private law are analysed utilising the three basic legal relations. Bierling's *Prinzi-*

[51] Somló, pp. 205 and 207.

[52] This distinction can be traced back to Franz Weyr 'Zur Frage der Unabänderlichkeit von Rechtssätzen' *Juristische Blätter* 45 (1916), pp. 387–389, and was consequently opposed to Somló by Weyr in his review of the *Grundlehre*. See Weyr 'Zur Frage...' [note 47], p. 115. Cf., furthermore, Hans Kelsen *General Theory of Law and State* (Cambridge, Massachusetts: Harvard University Press 1949), p. 39; *Kelsen Reine Rechtslehre* [note 35], p. 72; Peter *Koller Theorie des Rechts* Eine Einführung, 2. Aufl. (Wien, Köln & Weimar: Böhlau 1997), p. 65; Barna Horváth 'Comment on Kelsen' *Social Research* 18 (1951), pp. 313–334 and especially at 318.

[53] Somló *Juristische Grundlehre* [note 2], p. 430.

[54] Somló, p. 440.

[55] *Ibidem*.

pienlehre definitely is the archetype. Bierling has developed a very complex theory of the legal order as an order of legal relations [*Rechtsverhältnisse*]. Somló thus obviously seeks to resume this endeavour. Kelsen, in contrast, always paid less attention to legal relations, although legal dogmatics, in my opinion, relies on this conception—often unexpressed—to a large extent. Moreover, the strict correlativity of legal relations is maybe a distinctive feature of law in general, and it may distinguish law from morality much more sharply than other features. But this consideration cannot be further pursued here.

Within his theory of subjective normative positions, Somló reaches another important insight, concerning the understanding of a right. As already mentioned, Somló does not clearly denominate the subjective position which is correlative to the duty. But by all means Somló clarifies that it is not an *Anspruch* [right]. To create a right, Somló demonstrates (in relation to distinctions which are drawn from his three basic relations; we can leave this aside here), there has to be an additional normative content.[56] Legal phenomena of public and of private law can be explained much better building on this setting.[57]

c) Somló's analyses are permeated by a recurrent idea, which is of great importance particularly for the doctrine of the sources of law and for the doctrine of legal interpretation. In these analyses, the methodological design of the *Grundlehre* gets a somehow new significance. Again, the *Grundlehre* tries to determine the province of statements which can be made about law with disregard to its content. This province is defined by the concept of law and the concepts respectively the doctrines derived from it. From this follows that, on the other hand, each and every juridical statement, which is not native to that province, has to be related to any content of the legal order at stake.[58] So, every juridical statement, which is not drawn from the content of a norm, needs a particular justification. This conclusion is still demanding. I would even say it is the sting Somló has left in legal theory.

Concerning the doctrine of legal interpretation, Somló has to conclude with exploring a kind of constitution-based or statute-based legal methodology.[59] There has been a lot of discussion of this idea and it may still be a challenge.[60] Most notably, Somló benefits from his comprehension of a legal order as a complex hierarchy (see above, Section 3, para. a) when analysing the procedures of legal application. He demonstrates persuasively, that every law-applying act—judgments, administrative decision, but statutes as well—consists of several elements: setting an individual norm, observing a higher norm, and interpreting a higher norm.[61]

On the field of the sources of law, Somló unfortunately falls behind a little. Although he demonstrated that the concept of law does not embrace the precondition of its lawful

[56] Somló, pp. 441–444.

[57] See, e.g., on the one side, Norbert Achterberg *Die Rechtsordnung als Rechtsverhältnisordnung* Grundlegung der Rechtsverhältnistheorie (Berlin: Duncker & Humblot 1982), p. 39, and, on the other side, Martin Avenarius 'Struktur und Zwang im Schuldvertragsrecht' *Juristische Rundschau* (1996), pp. 492–496.

[58] Somló *Juristische Grundlehre* [note 2], pp. 331 and 377.

[59] Somló, p. 384. Somló first introduced this idea in his paper 'Die Anwendung des Rechts' [1911] in Somló *Schriften*... [note 1], pp. 44–58.

[60] See Karl Engisch *Einführung in das juristische Denken* 5. Aufl. (Stuttgart, Berlin & Köln: Kohlhammer 1983), pp. 93–94; Friedrich Müller & Ralph Christensen *Juristische Methodik* Europarecht (Berlin: Duncker & Humblot 2003), p. 180; Funke *Objektivität*... [note 3], p. 36.

[61] Somló *Juristische Grundlehre* [note 2], p. 371.

making (see above, Section 3, para. a), he overlooks the fact that this statement actually not only applies for the highest norms of a legal order (which are created by the supreme legal power),[62] but it can apply—depending on the content of the positive norms—for each and every norm, as Merkl demonstrated later.[63] Due to his own premises, Somló should have seen that a statement about the unlawfulness of a secondary norm depends on the content of the legal order. If Somló had allowed himself to look a little bit closer to the content of a modern legal system, he would have been able to elaborate a much more convincing doctrine of void legal acts.

5 Conclusion

It should have become clear why Somló is still appreciated as a legal theorist.[64] Many of his insights are of enduring significance. He stands in line with important writers of analytical jurisprudence. However, this way of legal thinking is of a particular kind. Without doubt, the way Somló and his counterparts studied jurisprudence has had a tremendous impact on legal philosophy. But it is deeply rooted in its time of origin. In a manner of speaking it was born in the 19th century and grew up in the 20th century. So it is ineluctably connected with certain political and legal surroundings, and it relies on certain philosophical and legal presuppositions. So it is questionable whether analytical jurisprudence will be of analogue importance in the 21st century. Its fixation on a legal order might be a drawback in times of trans-national emergences of law,[65] and its preoccupations with norms might be less interesting when we have a look at today's fundamental discussions about values and cultures.[66] Still, its rich body of analytical tools might prove to be useful for the new challenges. But at least its methodological clarity, its lucidity, its sobriety, and its scientific impartiality are definitely qualities we can still benefit from.

FACULTY OF LAW
UNIVERSITY OF COLOGNE, GERMANY
ANDREAS.FUNKE@UNI-KOELN.DE

[62] Somló, p. 345.

[63] Adolf Merkl *Die Lehre von der Rechtskraft entwickelt aus dem Rechtsbegriff* Eine rechtstheoretische Untersuchung (Leipzig & Wien: Franz Deuticke 1923), p. 293 („*Fehlerkalkül*").

[64] See, by József Szabadfalvi, 'Transition and Tradition: Can Hungarian Traditions of Legal Philosophy Contribute to Legal Transition?' in *On Different Legal Cultures, Pre-Modern and Modern States, and the Transition to the Rule of Law in Western and Eastern Europe* ed. Werner Krawietz & Csaba Varga (Berlin: Duncker & Humblot 2002) [Rechtstheorie Sonderheft Ungarn], pp. 167–185 at 172 and 'Revaluation of the Hungarian Legal Philosophical Tradition' *Archiv für Rechts- und Sozialphilosophie* 89 (2003), pp. 159–170 at 159, as well as 'Portrait-Sketches...' [note 37], p. 246.

[65] Gunther Teubner *Globale Bukowina* Zur Emergenz eines transnationalen Rechtspluralismus (Basel: Europainstitut Basel 1996) 37 pp.

[66] See, e.g., *Comparative Legal Cultures* ed. Csaba Varga (Aldershot, Hong Kong, Singapore, Sydney: Dartmouth & New York: New York University Press 1992) xxiv + 614 pp.; *European Legal Cultures* ed. Volkmar Gessner, Armin Höland & Csaba Varga (Aldershot, Brookfield, Singapore, Sydney: Dartmouth 1994) 567 pp.; *On Different Legal Cultures*... [note 64].

On the Origins of Peoples and of Laws

H. Patrick Glenn

The Biblical view of the origins of humanity would have us as relatively youthful, the origins of the world being situate just under six millennia ago (calculated from the biblically identifiable generations). Palaeontologists have long disputed this, relying largely on radiocarbon dating of human bone remains (including skulls, relevant particularly for the size of brains) which would situate the origins of *homo sapiens* approximately 200,000 years ago, before the present (B.P.). This would not exclude prior, human-like creatures (*homo neanderthalensis*, *homo ergaster*, *homo habilis*) whose origins may be as distant as 2,000,000 (2M) years B.P.[1] The work of the palaeontologists is now being complemented by remarkable findings of geneticists, who construct trails of mitochondrial DNA from existing populations in the world, using estimates of how often mutations appear in the mitochondrial DNA (which reproduces only asexually). This would allow reconstruction of human movement over vast periods of time, since "the genetic distance between two populations generally increases in direct correlation with geographic distance separating them."[2] The result would be a fuller and more complete scientific view of the history of humanity, or proto-humanity, extending over millions of years. Written legal traditions appear only in the last three thousand years of this entire period. Is there significance in these findings, however, for lawyers and our understanding of the relations of legal traditions, both written and oral? It is a pleasure to dedicate these lines to Csaba Varga, whose own interests have extended to law and legal theory in all parts of the world and in all of their manifestations.

1 The Human, and Proto-human, Journey

There is now considerable scientific agreement, amongst both palaeontologists and geneticists, using entirely different means of measure and calculation, that the origin of the *homo sapiens* species lies in Africa some 150,000 to 200,000 years B.P. *Homo sapiens* did not appear suddenly but would be the result of evolution from earlier, proto-human

[1] For accessible and recent surveys, J. Shreeve 'The Greatest Journey' *National Geographic* 209 (2006) 3, p. 60; 'A Survey of Human Evolution' *The Economist* (December 24, 2005), with further references to the scientific literature at Survey, p. 12, and accessible at <www.economist.com/surveys>.

[2] L. L. Cavalli-Sforza *Genes, Peoples and Languages* trans. M. Seielstad (London: Penguin 2001), p. 23.

creatures which themselves originated in Africa as long as 2M years ago, if not more. Their emergence from four-legged, ape-like creatures would have resulted from the need to stand erect in forest-denuded, African savannahs, in order to avoid the effect of too much corporal exposure to direct sunlight.[3] These proto-human creatures would themselves have moved out of Africa, which explains the spectacular finding of their remains in different parts of the world (*homo neanderthalensis* in Germany, *homo georgicus* in Georgia (dating from 1.8M, B.P.) and *homo floresiensis* (measuring only a metre in height) near Java. The current agreement on the origins of *homo sapiens* in Africa, followed by a second, later movement out of Africa, is based largely on genetic work distinguishing *homo sapiens* from the proto-human species which preceded it. As a new species *homo sapiens* thus replaced and made extinct the earlier species on its arrival in both Africa and elsewhere, and a competing theory of multiregional development of *homo sapiens* would now be considered, by most, to be inaccurate.[4] *Homo sapiens*, according to the DNA, did not interbreed with its ancestors, when it discovered them.

The (relatively recent) diaspora of *homo sapiens* out of Africa would have occurred some 60–80,000 years B.P., well after the earlier diaspora of proto-humans. The people involved would have been hunter gatherers and their exploration would have been assisted by the development of human language, usually situated at approximately 100,000 B.P.[5] Talking about travel thus helped bring it about, an ongoing phenomenon. Travel also led to genetic distinctions between scattered human populations of the world as a result of the so-called "founders effect" by virtue of which the (chance) genetic characteristics of the founders of the population played an important part in the genetic composition of their successors, and initial genetic compositions were subject to local environmental conditions (skins becoming lighter in northern climates, etc.).[6] In terms of world history, the existence of physically distinct groups of people (the word 'race' is not used in the scientific discussion) is thus very recent. If we use the five-number calendar now being proposed by the 'Long Now' movement (the year 2007 represented as 02007),[7] then the movement out of Africa at, say, 60,000 B.P., is captured by the five numbers of the calendar, with another 40,000 years available before moving to six figures. In generational terms, 60,000 years represents some 2400 generations (at 25 years per generation). It has all happened rather quickly, and very recently.

Those moving slowly out of Africa, in small numbers and in different directions, would have quickly lost physical and genetic contact with one another. Within each group

[3] *The Economist* [note 1], at p. S-6, citing the work of Peter Wheeler, and for similar, earlier conclusions, W. H. McNeill *The Rise of the West* A History of the Human Community (Chicago & London: University of Chicago Press 1963), p. 4.

[4] For 'out of Africa', the articles cited in note 1; Cavalli-Sforza [note 2], pp. 10 and 58–59 (Neanderthals distinct and extinct); S. Oppenheimer *Out of Eden* The Peopling of the World (London: Constable 2003), pp. 45ff; though for ongoing debate, H. Engeln ' Migranten der Vorzeit' *Die Zeit* (April 4, 2002), p. 30; and for earlier versions of it, McNeill [note 3], p. 5 ("one of the unsolved puzzles of archeology and physical anthropology", debate between "parallel evolution of hominid stocks toward full human status in widely separated and effectively isolated regions" or "alternative hypothesis that *Homo sapiens* arose in some single center and underwent racial differentiation in the course of migration to diverse regions of the earth").

[5] Cavalli-Sforza [note 2], p. 93.

[6] Cavalli-Sforza, p. 43 (increasing homogenization of the local population over time).

[7] For the Long Now calendar, and proposal for 'slower/better' thinking, <http://www.longnow.org>.

the tendency would be to homogenisation, but across groups the phenomenon of 'genetic drift' would accentuate the initial differences. The first movement of the moderns would have been through southern Eurasia, following the coast through what we know as India and eventually to south-east Asia, Australia and China. There may have been overland as well as coastal routes, such that human contact with Asia did not originate with the Silk Road, whenever its origins may have been in the last three to four millennia, but has existed from the time of Asian human habitation. The discovery of images of red-haired people, Caucasian-type mummies, and European-style fabrics in western China, dating from some 3000 years ago, are confirmations of this long-standing contact.[8]

The arrival of humanity in Europe was later in time, perhaps blocked by hostile Neanderthals, or simply by the difficulty of travel overland. It is thought to have occurred some 40,000 B.P. (1600 generations ago)[9] and would have occurred from India and the Levant, though extending as far north as Ukraine and the Urals (hence the Uralic language in Finland and Hungary), though some refer to movement into south-western Europe from the Maghreb.[10] North and South America would have been the last continents inhabited by human beings (and are hence the least genetically different), and there is now great controversy over the time, identity and route of the first arrivals. The first arrivals have been generally seen as arriving from Asia, over a then-existing land bridge (Beringia) in the Bering Sea though "speculation about first settlement vastly exceeds the amount of archaeological data."[11] Alaskan remains have been dated to 11,000 B.P. and this date coincides with radiocarbon dating of the Clovis tradition, whose spearheads have been found in central North America.[12] Refined methods of archaeologists have now, however, pushed back the initial date to around 15,000 B.P.[13] and geneticists have arrived at still earlier dates, as far back as 43,000 B.P., using calculations of genetic distance.[14] The longer the possible period of settlement of the Americas has become, the greater has become the speculation as to possible points of origin. Sites in South America have suggested arrival by sea, over the Pacific, and the possibility of an ice bridge from Europe has given rise to suggestions of European origins (though this would have the "Europeans", or at least some of them, leaving Europe almost immediately on their arrival).[15] The countries listed

[8] H. Pringle *The Mummy Congress* (Toronto: Penguin 2001), pp. 141–160; Cavalli-Sforza [note 2], at pp. 100 and 101. The dating of the Silk Road is accordingly being adjusted backward in time and recent archeological work shows close cultural connections along it from the early second millennium BC. See J. Mei 'Cultural Interaction between China and Central Asia during the Bronze and Early Iron Ages' *Proceedings of the British Academy* 121 (2002), pp. 1ff, notably pp. 24–25 ('prehistoric' Silk Road "channel for east-west connections much earlier than previously thought").

[9] Shreeve [note 1], pp. 65 and 68.

[10] Shreeve, p. 68; Cavalli-Sforza [note 2], p. 132 (for Maghreb, Ukraine, through Urals).

[11] B. Fagan *Ancient North America* The Archaeology of a Continent (London: Thames & Hudson 1991), p. 77.

[12] Fagan [note 11], at pp. 77–78 and 80.

[13] Fagan, at p. 81; and for recent archaeological work, T. D. Dillehay *The Settlement of the Americas* A New Prehistory (New York: Basic Books 2001).

[14] Cavalli-Sforza [note 2], p. 63 (though 'more refined estimate' would fix date at 32,000 B.P.).

[15] For possible origins other than in Mongoloid Siberians, L. S. Gould 'Mixing Bodies and Beliefs: The Predicament of Tribes' *Coumbia Law Review* 101 (2001), pp. 702ff at p. 749; for footprints found preserved in volcanic ash near Puebla, Mexico, dated as approximately 40,000 B.P., *The Globe and Mail* (July 5, 2005), p. A-10 (suggesting spread of humanity much faster than previously thought, and ancestors adapting more quickly and easily to new environments than had been thought); for 'Ken-

as being interested in being seen as the "homeland" of North Americans now include Russia, Spain, France, Denmark, Japan, China and Korea.[16] Yet whether Europeans arrived in the last thousand years, or much earlier, this would have given rise simply to 'reunions of a close-knit family.'[17]

2 Migratory Laws

The story of peoples is necessarily the story of their laws, and movement of peoples necessarily implies movement of laws. The entire notion of common law in the history of western laws thus derived from the complex process of adjusting the law of new arrivals (said to be common to the entire territory of their place of arrival) with the law of those previously established in the same territory (the *iura propria* or particular, non-common, laws).[18] This was the process which occurred in Europe from the 10th century, following the migration of peoples within Europe, and which was replicated abroad as laws of European origin followed European trade and/or settlers throughout the world. In the *longue durée* which the palaeontologists and geneticists are now in the process of revealing, however, the movement of peoples did not give rise to any meeting of laws, as occurred much later in time, but to a much simpler legal process of migration of laws into, in each case, a true *terra nullius*. The process is not lacking in legal interest, however, since in each case the law of those first arriving may claim priority, once identified, over those arriving later, and even much later. There are also general questions relating to the development of human institutions and laws to which the story of human migration appears to make a significant contribution.

A first general conclusion which appears necessary to draw is that there has been no society in human history which has developed in complete isolation from other societies. Each society out of Africa began its history with an initial stock of information, in all cases apparently that of a hunter-gatherer society, and even the original birthplace of humanity, in Africa, cannot be seen as entirely isolated from return contributions of those who knew the path of return. In the language of human development, a minimal or threshold level of diffusion thus underlies all human societies and all laws, whether unwritten or written. If many societies or human groupings (though not all) have moved "in the general direction of greater complexity,"[19] it remains the case that "all modern societies are descended from Upper Palaeolithic hunter-gatherer bands"[20] and that these bands all had at least initial contact with a parent or geographically proximate band. Evolution, to the extent evolution occurred, took place from a common base of information. To the

newick man' possibly having European origins, *Die Zeit* (August 10, 2000), p. 27; and for the general thesis of European Solutrean settlement over an Atlantic ice bridge (the 'stone age Columbus' theory, <http://www.nmnh.si.edu. rtp/students/2007/schedule07_anthropology_lecture html> and <http://www.bbc.co.uk/science/horizon/2002/columbustrans/shtml>. For human development in North America being faster than European, given duration of settlement, Dillehay [note 13], at p. 275.

[16] Dillehay, at p. 280.

[17] Shreeve [note 1], at p. 69.

[18] H. P. Glenn *On Common Laws* (Oxford: Oxford University Press 1995).

[19] B. Trigger *Understanding Early Civilizations* A Comparative Study (Cambridge: Cambridge University Press 2003), p. 41.

[20] Ibidem.

extent to which one speaks of evolution, or co-evolution, it must be that of "substantially independent" and not entirely independent societies, those which have not been "directly subordinated" to or shaped by "substantial dependence" on other, more complex societies.[21] There remains much room for variation, and much commonality which could flow from common environmental conditions, or common (even universal) patterns of human thought, but in each case the result is a combination of circumstances that radical theories of diffusion or evolution are incapable of explaining in their entirety.[22]

A second conclusion relates to the western concept of "race" which developed from the 16th century persecution in Spain of 'conversos', those having converted to Catholicism from Judaism or whose parents had so converted, giving rise to the notion of a collective identity capable of being transmitted from one generation to the next at birth.[23] The notion of race is now in the process of being discredited, as an arbitrary distinction amongst people whose stock of genes is largely common and whose distinctive genetic characteristics (passed on from ancestors) cannot be categorized as falling within any coherent concept or category of race. We now have, with the work of the palaeontologists and geneticists, a much fuller and more complete record of a common, genetic base (excluding any notion of a "pure" genetic strain), as well as geographic or environmental explanations of the genetic differences which have developed.[24] Differences amongst peoples result from geography, nothing more sinister, and cannot be grouped into any larger and more abstract concept of race. New Yorkers may be different because they are from New York, but this type of distinction is the only one which can usefully be drawn between peoples.

A third question raised by the research relates to the transmission, not of genes but of memes, or units of information transmitted over time.[25] There is controversy over the scientific character of this notion of memes, but less controversial is the notion of tradition, the content of which is the object of ongoing transmission over very long periods of time. To what extent can one discern the operation of traditions, and even legal traditions, over this long history of humanity? There is certainly an enduring tradition, and even multiple traditions,[26] of hunter-gatherers as chthonic peoples, and this normative tradition appears to have no obvious point of origin in time. We now thus have some

[21] Ibid., pp. 28–29.

[22] For this conclusion, after detailed study of seven "early civilizations" (though none older than 4700 B.P.), ibid., at pp. 684–688.

[23] See E. Hannaford *Race* The History of an Idea in the West (Washington, DC/Baltimore: The Woodrow Wilson Center Press & The Johns Hopkins University Press 1996), notably pp. 22, 58 and 59 (for the notion of permanent "racial" characteristics emerging from catholic refusal in Spain to recognize conversions from judaism); G. M. Fredrickson *Racism* (Princeton: Princeton University Press 2002), notably p. 31 (Spanish treatment of "conversos" as "first real anticipation" of modern racism); R. Bartlett *The Making of Europe* (London: Penguin 1993), pp. 236ff ("The Growth of Racism in the Later Middle Ages"); H. F. Augstein *Race* The Origins of an Idea, 1760–1850 (Bristol: Thoemmes Press 1996); yet for "proto-racism" (group characteristics said to be stable, unalterable) in antiquity, however B. Isaac *The Invention of Racism in Classical Antiquity* (Princeton: Princeton University Press 2004), notably at pp. 175–177 (for Aristotle's notion of natural slaves).

[24] Cavalli-Sforza [note 2], at pp. 10 and 13 (for influence of environment), and 76 (European genetic stock "about two-thirds Asian and one-third African").

[25] As to which see H. P. Glenn *Legal Traditions of the World* 2nd ed. (Oxford: Oxford University Press 2004), at pp. 14–15 and 358.

[26] For the multiple traditions of North America, Fagan [note 11], at pp. 289 and 291.

sense of the potential duration of chthonic, oral, legal tradition, which would be of something less than 200, 000 years of age (from the date of origin of *homo sapiens*), or perhaps of something less than 100, 000 years of age (if language is taken as an essential means of transmission or, perhaps more importantly, of justification, of practice). More specific traditions would then have developed locally, notably those of particular languages. An important, more specifically legal tradition which developed would be that which accompanied the development of agriculture, since 'some kind of law appeared' with the use of land (even collectively, which implies nevertheless some form of boundary) and the apportionment of harvest.[27] The development of agriculture also meant a sharper division amongst peoples, since hunter gatherers must have fewer children in order to ensure mobility and since farming is an inherently more aggressive activity (clearing of land, expansion of farm land to accommodate growing population, etc.).[28] Field agriculture may have had multiple, distant origins (Middle East, Americas)[29] but there is clear evidence of its movement over large land masses given a particular point of origin. European agriculture would thus have arrived from the Middle East, at a rate of about one kilometre per year, starting approximately 11,000 B.P. and arriving in England some 5500 years later.[30] It is not clear whether it was the technique of field farming which moved, or actual farmers, but it appears that languages moved with the farming,[31] and that the entire farming enterprise was based on more developed notions of collaboration and sharing than those which previously existed. Tracing oral traditions over long periods of time is perilous and arduous work, necessarily based on speculation from artefacts, but it is going on, and there have been recent attempts to show that normative attitudes towards the family and authority have been influenced by the "founder effect."[32] The normative origin of legal traditions would be not unrelated to the genetic origins of peoples.

A final major question raised by this contemporary research relates to the nature and claims of chthonic or aboriginal peoples. There would appear to be hostility towards much of the research on the part of such people, manifesting itself in some cases on insistence on burial of human remains and prohibition of research upon them, and more generally on the incompatibility of such research with notions of chthonic or aboriginal identity or entitlement ("We already know where we came from" or "I just hope these guys aren't gonna tell us we're all Swedish").[33] Yet chthonic populations appear to be collaborating with the major Genographic Project now being sponsored by the National Geographic

[27] T. Janson *Speak* A Short History of Languages (Oxford: Oxford University Press 2002), p. 41.

[28] Cavalli-Sforza [note 2], at p. 127; and more emphatically on the aggressive nature of farmers, "numerous, immensely rich, well armed and domineering", H. Brody *The Other Side of Eden* Hunters, Farmers and the Shaping of the World (Vancouver & Toronto: Douglas & McIntyre 2000) p. 7.

[29] McNeill [note 3], p. 7 (distinguishing field agriculture based on seeds from garden agriculture based on transplanting).

[30] *Die Zeit* [July 20, 2006], p. 25; cf. the figures of Cavalli-Sforza [note 2], p. 99 (beginning in Middle East 10,000 B.P., arriving England 6000 B.P.).

[31] Janson [note 27], p. 43; *Le Monde* [November 28, 2003], p.28; but for 80% of modern Europeans descended from the hunter-gatherer gene type, Oppenheimer [note 4], p. xxi.

[32] Cavalli-Sforza [note 2, pp. 185–195 on French sociological research showing different attitudes towards contemporary family in parts of France identifiable by Frank, Basque or Celtic origins; suggesting at p. 201 "founders' effect" on religiosity of U.S. ("American religiosity must be a case of cultural drift").

[33] Shreeve [note 1], p. 73.

Society and IBM,[34] so it is possible there is no underlying incompatibility. This would be the case if it became recognized that neither identity nor claims to entitlement are dependent on a notion of 'aboriginality' (from the beginning), but are satisfied by simpler notions of distinctiveness of belief (fundamental for group identity) and priority in time (for claims of entitlement). Claims to enjoyment of land would thus ensure to descendants of those first entitled to such enjoyment and such first entitlement may be capable of relatively precise dating. It need not extend to an imprecise "beginning", however this is defined. There will be ongoing questions of identity, involving some mixture of descent, acceptance and self-identification, but these are capable of judicial resolution. In Australia it is thus argued that the possible existence of the Kimberly people (now extinct), who would have preceded contemporary Australian "aborigines", does not affect the property claims of these contemporary, chthonic, aborigines.[35]

3 Conclusion

In a time of increasing concern over inter-generational equity,[36] it appears salutary that we be reminded not only of those who follows us, but of those many generations which appear to have preceded us, and from whose stewardship we have benefited, as "moderns." Contemporary paleontological and genetic research provides a fuller and more precise view of the human story, and of the many human journeys. The research appears to be more illuminating than threatening, and it is difficult to see how it is incompatible either with the claims of chthonic peoples or with the substance of most religious teaching. The research does not deal with creation, but with time lines, and the longer the time lines, the more miraculous the process may appear.

FACULTY OF LAW & INSTITUTE OF COMPARATIVE LAW
MCGILL UNIVERSITY, MONTREAL, CANADA
PATRICK.GLENN@MCGILL.CA

[34] Ibid., p. 71; *Le Monde hebdomadiare* [May 14, 2005], p. 10 (100,000 DNA samples drawn from indigenous populations of ten major regions).

[35] R. Hanbury-Tenison 'An earlier start' *Times Literary Supplement* [July 28, 2006], p. 13 ("the fact that they are not the direct descendants of the [Kimberly] should in no way prejudice their ownership; no one denies that they occupied the land for millennia before the arrival of the Europeans").

[36] B. Weiss 'Our Rights and Obligations to Future Generations for the Environment' *American Journal of International Law* 84 (1990), pp. 198ff.

The Meaning of the Law: Limits and Possibilities

Yasemin Işıktaç

Law can be actualised in various ways. However, here we found convenient to limit the subject within the frame of enactment, which is particularly the most common way. One of the reasons of this, as well as being the most common way, is that it has been accepted as an ideal form for today.

When mentioned to law, the first legal form coming to mind is enactment and it has taken a primary assurance form of human rights since the French revolution. The ascension of the enactment is a reaction arisen against the arbitrariness of sole governments. The assurance of the freedoms, governing of the public by the public and for its main mean, a written, limited law principal standard has been formed.[1] However, these laws should also be limited. Assuring "Unassignable, indispensable basic rights and freedoms" forms this limit. This elevated point reached by the law, being bound by law of the governors and the governed, being responsible only to law, equal implementation of law to everybody and many more principles are also the principal basis of political independency and legitimacy.

With the Article 5 of the Declaration of Independence of 1789, it has been determined that "everything unforbidden by the laws is free". Thus law has been crowned as the necessary and sufficient condition of all other independencies. As a statement of the c o m m o n w i l l nine articles out of seventeen of the Declaration of 1789 directly refer to the law. Rousseau has elevated the common will which is an important representative of the community agreement and the national sovereignty notions that found the statement in the law to almost a transcendental principle level by recognising reflection of common benefit, inapprehensive and indivisible characteristics too.[2]

It is a fact that this elevated law comprehension could not always stay in this level during application.[3] Due to being law a sole regulation does not have any magic and mir-

[1] Csaba Varga [Theory and practice in law: on the magical role of legal technique, in Turkish] trans. Huseyin Öntaş in *Hukuk Felsefesi ve Sosyolojisi Arkivi* 15 (2006), p. 5.

[2] Ayferi Göze [Political thoughts and administrations, in Turkish] (Istanbul: Beta 1986), pp. 206–208.

[3] How much the belief of "Law does not give any harm" seems attractive, the facts of concrete life have pursued quite a different path. The balance of enormous countries has adequately betrayed that the claim of "law cannot be overwhelming" remained in the political mythology, it did not go further than a political legend and it is one of the deceptions used to violate human rights and many injustices and inequities could play the role of l a w . In order to accept that the law could be a threating source in terms of human rights, it would be

acle and it could not have. If law is equal, democratic and liberal, it reflects a positive meaning.[4]

As a multi-dimensional normative structure law will show its true function in the concrete life practiced to eliminate the oppositions to law. The function and the meaning of a law gained during the application are its principle evaluative criteria. On the one hand, these evaluations indicate us the normative dimension of the law and on the other hand, they indicate us the function of law confronting the needs in the social life. Besides, it will be necessary to esteem the value of justice, which is the transporter of these both functions.

In this discussion, the issues related to the question of validity from among the other main questions of law (i.e. effectiveness and justice) are excluded; in other words this research is limited to the problem of legal norm, the validity of which has not been discussed, being the cause of opposition to law.[5]

The point has been based on where the current norm as a value carrier creates opposition to law. Actually, this entails questioning what the standard is; in other words the value that is required to be realized by law. The relation of law as a value with justice requires a deeper examination of the relation between law and morality. Hart has attracted our attention on talking about not only one question but many connected questions—he used the phrase "the questions" consciously because he means that there can be many questions related to the relation between law and morality.[6] With a narrowing evaluation, these headlines can be specified concerning the relation between the law and the morality especially in terms of our subject:

(1) Mutual interaction between law and morality. Historically, the evolution of law has been affected by the morality; however, here, it is necessary to pay attention to legal order created to fulfil justice which has formed the basis to fulfil morality.

(2) Analytically, is it necessary to refer to the morality while giving a correct and complete definition of law or law system?

(3) Legal norm's being the cause of opposition to law is a state of injustice. Because of

adequate only to examine the phenomenons of supervision of convenience to constitution. See Bülent Tanör [Human rights issues of Turkey, in Turkish] (Istanbul: BDS 1994), p. 179.

[4] Idem., p. 180.

[5] These three principal questions carry a vital importance for the law: Is what we describe as law valid? (the ontological problem); Is what we describe as law effective? (the phenomenological problem); and Does what we describe as law fulfill a value? (the axiological problem). The first question is directly related to the order function of law and it is its formal side. The answer is in the frame of principal codes which have been brought up connected to the related legal order. The second question is a question whether an application which is out of the discussion subject in terms of validity is actually be of use as an application. This is a scope that can be more closely associated with the public benefit function of law and the answer can be given related to the scope more effective or in a manner why it is not effective, in other words it can be given by technics of Sociology of Law. The third question is an evaluation in terms of whether law is actually a g o o d implementation concerning the realisation of a specific value or the realisation of a programme. This can be called the problem of justice. The issue of a norm being just is the issue whether this norm responses to the final values or purposes inspired of a particular legal order. Discussion of a norm in terms of legal value means to question the difference between 'what actually is' and 'what should be'. The question of justice is in fact the question of evaluation of the law from the view of legal philosophy, that is in terms of the o u g h t problem. Cf. Yasemin Işıktaç [Logical analysis and implementation of legal norm, in Turkish] (Istanbul: Filiz 1999), p. 25.

[6] H. L. A. Hart *The Concept of Law* (Oxford: Oxford University Press 1961).

this, it is related with the possibilities and the forms of the moral critique. If this possibility is accepted, which moral criterion will be taken as a principle?

(4) How will be the issues passed over regarding the content of the notion of justice? In a different expression, how will be the phenomenon of application of law that gives way to opposition to law or resolution of this realized?

The relation with the subject of responding to all these questions is obvious.

1 Question One: The Relation between Law and Morality, its Scopes and Limits

Morality can be defined as the will of realization of g o o d . In comparison to this, law that has made a much narrower formal request expects the realization of j u s t i c e . The good and the j u s t i c e values that we can evaluate as »what should be« on the basis of law and morality are the objectification criteria in the ideal meaning. It is obvious that the actual connection between law and justice can be established from this point. Since the law that we can define as "giving someone his due" takes place in the notion of good also by being something good. Behaving appropriate to justice is a moral behaviour. However, in comparison to other moral values, we can define justice as "minimal ethic". Because it, as an idea of equality, expects us to settle for what relieves. The reason of this is that one field to realize the order function is adequate for law; however, morality demands a wider field that will comprise all our life from the things that happen to us to the things that happen to others. In the field of moral values (such as love, mercy, etc.) there are such values that they even expect from us to abandon what we have taken as our rights and to sacrifice ourselves.

It is obvious that the distinction between law and morality cannot be made as a matter of formal criteria like being reliant or not being reliant to coerciveness, normativeness and sanction.

Just like in law, also in morality, every norm orders to behave in a particular manner in a particular situation. When a particular situation arises, it is a duty for humans to act in the direction revealed by both norms.

It is not adequate to make a distinction between law and morality by conducting from coerciveness. There is no difference between them as a matter of applying sanctions; however there is a difference in terms of the quality of the sanction. While the sanction of law is external and apparent, morality has a sanction in a compunction way. In the event of opposition to law, moral maturity is perfect in every respect as far as it can deal with consciousness.

In addition to the similarities raised for law and morality in the field of formal criteria such as coerciveness or normativeness, contextually, one similarity between law and morality can be discussed. Because of this, it is difficult to separate their fields from each other. Murder prohibition, accomplishing attempted charges, not lying, etc. concern both law and morality. However, as a field peculiar to morality can be discussed such as keeping inside clean, responsibilities to us, purifying from spiritual contradictions, there is a field of law completely independent from morality related solely to organization, such as the flow direction of the traffic, court order, putting pursuit of rights on time.

It is obvious that in the common field of law and morality the requests of the morality are always wider than the law. Contrary to the command of the morality as in a manner of "being helpful", law limits the duty in terms of responsibility with close relatives and partners. In case of their request and if it is definite that they are in a difficult situation, it brings up in a manner of helping.

When set out from the formal points with the above statements, the impossibility of establishing the distinction between law and morality can be seen. When considering the unity in the field of the subject and the closeness of the values, will it be possible to make successful field decomposition? We see that the difficulty of separating formally appeared law from morality is also subject to the fields related to the content. On the one hand, making this differentiation is a requisite to provide moral freedom—otherwise there will be an imposed morality; this is mainly contradictory to the essence of morality and it is something that kills human personality—on the other hand, in order to see law as a science, it is necessary to specify its subject and scope, differentiate it from similar events and concepts and limit them mutually.[7]

2 Question Two: What Functions should a Perfect Definition of Law Comprise?

While Kant speaks of the fact that lawyers are still trying to find a definition of law, he also says that he believes that one day a joint definition of law will be found. However, a definition could not be accepted without any discussion at the present time. This can lead to some positive outcomes, such as replacing a static comprehension of law with a dynamic comprehension of law or recognizing the possibility to new expansions of new law definitions. However, there is no possibility of establishing dialogue without establishing an average agreement base in the subject of what should be understood of law as a normative notion in terms of universal issues.

The main issue of any law theory is to focus on what the essence of law is. This could be answered in two ways: the priority is the law notion. Here, the question is "What is law?". Attention can be directed to the nature of law in the social reality. Here, the question will be "Why law?". While Habermas attracts our attention to this binary question, he remarks that "as long as a socialization principle which does not require an establishment of norms is developed, it will always stay as an issue of legitimation and establishment".[8] Because of this, there will always be studies related to ethics or orientation law.

We see that the relation between law and ethics is in the centre of the discussions. Even though this relation has showed differences throughout the history, we can typify it in two main tendencies. While natural law foresees comprehension of law in terms of justice value, the positivist school holds that law has taken shape with the will of law protector and apart from this pursuit that it will be the ideological evaluation of law. Despite of these discussions, law should comprise a solution, moreover an appropriate solution—while natural law comprehends realization of law in a meaning of exceeding

[7] Vecdi Aral [About law and legal science, in Turkish] (Istanbul: Filiz 1986), p. 71 & note 88.

[8] Jürgen Habermas [About the Logic of Social Sciences, in Turkish] (Istanbul: Kabalcı 1998), pp. 155 and 164.

from this appropriateness, positivism comprehends what has been found appropriate by the law protector—for the issues raised in normative expression as well as in public life. This gives the sign of three principal functions that cannot be neglected: the dimension of norm, the dimension of public benefit and axiological dimension. The negligence of these three functions of law norm by any theoretic law approach will reveal a deficiency towards law.

3 Question Three: The Possibility and the Methods of Criticism on Value-based Approach to the Law

The relation between law and ethics

(i) Can be established as empirical; it is an evaluation in terms of efficiency of proposing that legal systems that do not fulfil certain minimum moral conditions cannot survive. In other words, non-realization of equity or remaining requests directed to law unsolved will mean that law does not accomplish its functions as law.

(ii) Can be established analytically; if compulsory conceptual moral facts, even before entering into descriptive determinations, are in a connection, a relation is being discussed in terms of validity. In this case, law will take its validity from being directed to value.

(iii) Can be established normatively; in the definition of law notion, if the obligation of including moral facts is being put forward, a normative relation can be discussed.[9] In case the complete and perfect definition of law comprises the above-mentioned three functions, normativeness will typify under the function of order. The order as the field that the value realizes and the organization which is its instrument interestingly turn into an indicator about normativeness.

The first two have been examined in the parts related to the definition problem and transitions between law and morality. Here let's stop for a moment on normativeness and then as a proposal let's try to solve one of the typical questions of legal philosophy. This issue has been tangled around the antinomy between i s and o u g h t and the obligation of making a choice.

The connection between the legal system—when considered as valid and current law—and the social system and also between the legal system and the perspective of its participants should be considered fundamentally as a positive relation. Because, law as a dialogue relation is concerned with how parties find a solution for a successful social life and how this solution will be applied. Rejection of this connection causes pernormative contradictions. Because normativity evokes directly is/ought antinomy. If the normativity of law is not being discussed, it will also not be discussed that it reflects a value. Actually, there is a possibility to overcome this antimony in here by the approach of Welzel. In the duality of positive law and natural law, while natural law means the law that ought to be, positive law means both the law that is to be in the perspective of currency and validity and at the same time law that ought to be because it reflects the legal idea. We

[9] *Rechtspositivismus und Wertbezug des Rechts* Vorträge der Tagung der Deutschen Sektion der Internationalen Vereinigung für Rechts- und Sozialphilosophie (IVR) in der Bundesrepublik Deutschland, Göttingen, 12.–14. Oktober 1988, ed. Ralf Dreier (Stuttgart: Steiner 1990), pp. 9–23 [Archiv für Rechts- und Sozialphilosophie Beiheft 37].

can formulate this as is/ought conception of law, i.e., the law can be examined by neither i s nor o u g h t expressions but with 'is-ought' expressions. It is obvious that positive law carries an o u g h t character. However, since this o u g h t is embedded in human consciousness as a sovereign power and comes across as a social order that can be perceived from their behaviours, it is still o u g h t . Dependent on time and space it is a changeable is/ought expression. Not being dependent on time and space, natural law expresses an exact and constant o u g h t which has been identity as a duty that is realized by men as a legal and moral ideal.[10] Law that expresses exact and constant o u g h t by this characteristic, can only be designed not only by means of intelligence but also with consciousness.[11]

Positivism being an important legal tradition, it formulates its main thesis in a way that law and morality does not have a compulsory connection.[12] However, positivism should reconsider its thesis while interpreting the legal norm. Because, in interpreting the law the a i m of law will be taken as essential point. This, as a reached point, has been passed forward the researches on subjective will. Today, the importance and the indispensability of teleological interpretation signify this. Teleological interpretation can be done only by someone who takes reason as essential; in other words it is compulsorily rational. So, researches on this topic will have to be carried to the context of concepts and values.

4 Question Four: How can the Issues Related to the Determination of the Content of Justice as a Value Establishing the Relation between Law and Morality be Overcome?

Before answering this question, the issues which do not have to be discussed in making just decisions can be determined:

(a) for making just decisions the linguistic expressions of legal rules should have appropriate possibilities,

(b) the conditions related to the actual case should be enlightened sufficiently,

(c) the adjudicators should be impartial and unbiased.

The applying of law making techniques successfully, being clear and comprehensible of the norm, using appropriate techniques and technology while determining conditions related to the actual case, problems of qualified judges (as a principle condition for the just enforcement of laws) are crucial conditions. However, when moved out merely from these conditions, it is obvious that it will not be enough for these principles with limited postulates to enlighten the field of making law concrete.

As a starting point we can take the law as a hierarchy of values, in other words we can look to the hierarchy of enacted laws. First of all, the criteria of taking out in an

[10] Hans Welzel *Naturrecht und Materiale Gerechtigkeit* (Göttingen 1962), p. 238. In providing ethical and logical accuracy of law, natural law can give accurate directives to the law maker. There is no pre-definite and ready system to be given to the law maker concerning the ethical accuracy. Natural law could not find a universal system of norms. In addition, by reminding that the duty of the law maker is an ethical duty and that it is compulsory to do what is appropriate for justice, it prevents it from being stuck in theories.

[11] Ibidem.

[12] Varga [note 1], p. 13.

appropriate way by competent organs can be discussed. Here, we see that the problem walks back and forth and relies on the constitution as a reference text. Today constitutions as social agreement documents are being undertaken not only with a legal impact but also with a sociological duty. There is no problem with the stages ranked under the stage of constitution within the hierarchy of enacted laws which is typified and brought up in a perfect way by Kelsen. Statutes and statutory decrees, regulations in conformity with statutes and statutory, by-laws in conformity with regulations, etc. are consistent with each other. However, along with taking place in the constitutional order, we see that a point discussed in terms of hierarchy of enacted laws is the international law documents.[13] We are especially interested in multi-participant agreements on human rights in treaty qualification.[14] Some extreme positivist comments by moving from the point that these documents are been accepted as statutes by the constitutions claim that these documents take place under constitutions just like other statutes. Its result in practice is to accept the possibility of making constitutional arrangements contrary to these documents or the worthlessness of the international agreements in respect of constitution. The verdict of "It cannot be applied to the Court of Constitution with the claim of disagreement to Constitution about these" that takes place in Article 90 of the 1982 Constitution complicates this issue even more. However, in these kinds of agreements, the country that signs the agreement undertakes the responsibility of adjusting arrangements contrary to the agreement in the national legal system. Except this, even if there were no written statutes, the principle of *pacta sund servanda* would proceed as a rule of law and the government would commit itself with this principle. If there is no principle like this it cannot be talked about the possibility of dialogue between humans; one of the reasons that lying is regarded as the first and the worst sins was that the w o r d , a way to carry the dignity, committed both communicant and interlocutor. Even if the government political would have gained a completely different characteristic, the agreement will continue to commit the government.[15]

This means that the principles brought by the international law have raised the standards of national legal system in terms of the human rights. The government as a member of the international society is responsible for accomplishing the basic rights and the freedoms recognized in this scope and making coherent the national legal system. The government by also recognizing to the citizens the authority to apply to the international jurisdiction assures in front of the international society that it will accomplish the necessities of international documents. International law forms a standard for oppositions to

[13] Four theoretical studies can be typified related to the position of international law in terms of hierarchy of enacted laws: the first is that the international law is in the same alignment with the statutes, the second is that it is between the constitution and the statutes, the third is that it is in the same alignment with the constitution and the fourth is that it is by taking place above the constitution and is a criteria for the constitution as well.

[14] Universal Declaration of Human Rights (December 10 1948) and European Convention on Human Rights (November 4, 1950) can be typified here.

[15] Vienna Convention on the Law of Treaties signed on May 23, 1969 has been put in force in 1980. The admission of Vienna Convention on the Law of Treaties (1969) has brought up in a positive sense that international agreements are included in the hierarchy of national legal system. However, 8 countries have voted negatively to the Article 50 organising this subject of the agreement. Turkey takes place among these countries. For agreement document see A. Gündüz [International law and principal documents related to international organisations, in Turkish] (Istanbul: Beta 1987), pp. 115–144.

law that will arise in national legal order.[16] Because of this, it is necessary to underline the importance of international law that gives possibility to fair application in the normative system.

After examining the issue in terms of the hierarchy of enacted laws and from the formal point of view we can also handle it as the content in several ways.

5 Law/Time Relation

The fact that law can always get a little older in societies—especially like our country where the change process of social life is lived fast—has attracted attention. Conservative character of law and intensity of change in social life influence on this obsolescence as well. For instance, when we think about change in traffic and traffic law, progress in environment or woman's location in the family and in business life today, parallel to the development in world technology, it can be discussed that written law which was valid and adequate in the past cannot answer to the needs of today. New life forms may require new rules. It should be discussed whether law will provide all these changes in time or the new structuring of law will be overcome whether by making new legal rules or with case laws. With the improvement of current law, seeking for solutions to the problems has been much more preferred when difficulties related to adjustments of acts, especially in code characteristic, are taken into account. This has gradually increased the importance of court decisions and qualified jurists. In terms of Turkish legal practice, case laws of upper courts aimed to accomplish this duty can be shown as example.

Law needs time; because even if it does not enact laws to be valid forever, it does not enact them for a single day. Lawmaker makes laws for a predictable future. Since the judge cannot completely estimate the negative results that can be come across from the first look, he has to behave in a careful and prudence manner. Since thoughts are separate from each other and the deficiency of a norm cannot be understood immediately, legal orders can always include inadequate norms. The continuity of provision of a statute is only dependent on the period of statute that remained in force. Because of this, it should be stated on the notions of entering into force and ceasing to have force in the relation of time and law. Realization of order is possible with recognizing and giving meaning to social fact in the field of law. This explanation process will also shape the coerciveness in the core of law. At the same time the social change constantly opens the distance between the legal system and social reality. A valid legal norm should have minimum effectiveness

[16] It can be put forward that the principal of "respect to human rights" considered as the qualities of Republic in the Article 2 of the 1982 Constitution includes respect to not only national legal rules that protect human rights but also international agreements on human rights that Turkey is party. İbrahim Kaboğlu [Constitutional judgement, in Turkish] (Ankara: Imge 1994), pp. 79–80. It cannot be thought that the government can be saved from a signed agreement by enacting a statute later. Because of this, Constitutional Court can control the conformity of laws enacted after the agreement to the agreement. Thus, the agreement enters into the block of constitutionality. Süheyl Batum [European Convention on Human Rights and its impacts on Turkish constitutional system, in Turkish] (Istanbul 1990) [Thesis of associate professorship, ms], pp. 32–33. The conclusion derived from the comment of the Articles 2 and 15 of 1982 Constitution is that the international agreements related to human rights as a rule of supra-national law takes in the upper place. Necmi Yüzbaşıoğlu [Constitutional block in Turkish constitution judgement, in Turkish] (Istanbul: Universitesi 1993), p. 49.

in order not to lose its validity.[17] A norm that is always ineffective will become disputable. This is called disused or deserted legal norm problem and indicates a situation that can be accepted as a negative customary law.[18] This approach concerning behaving inappropriately to the norms in force is extremely disadvantageous for the legal system and should be left out of the system through legal politics. Abeyance of a norm that is valid and in force is equal to behaving against the norm that is in the same situation; moreover this can cause even more serious results in terms of legal security.

For our country in need of modernization the law that ought to be [*de lege ferenda*] has also a major importance as a matter of time/law relation. Previsions in this subject have a major importance for legal politics. The importance given to these studies related to the futuristic comprehension of the law and this system even by the developed countries is obvious. This century which is an era of momentum and communication crowns whoever covers early distance. This attitude is important to accomplish deficiency of time and shape the future in a manner of high political strategies.[19]

The ascension of legal standards as a matter of content and the success of legal practice can be argued out as well. A great part of these may require structural evaluations. Enacting just laws is also a prerequisite for realization of the label of government which is written in the 2nd article of the Constitution. A series of acts appropriate to the requirements of being a democratic, secular and social state and respectful to the rule of law will be the principal criteria to deal with these structural issues. But unfortunately, difficulties in the conditions related to being a democratic and secular government have pulled ahead the social state practice that requires more technical studies and which means participation of logic to the system; we cannot contend that these conditions have been completely realized yet.

The positive legal system is in contradiction with universally accepted principles and rules of a democratic regime and composes a narrow frame to the expectations of society and thus acute problems that gradually get difficult to resolve are being created either in the process of government devices or in the individual and social life platform.

Reorganizing the politico-juridical system in force as having an essence outstanding to supremacy of law and human rights, either grows out from a concrete necessity or comes out as a one and only rational method to come to a solution. Qualification of being problem solving found in the essence of the politico-juridical system in force should be regained. The system has come to a position that creates problems in its own. However, this criticism directed to the system should not turn into a deception in form of "look at the acrobat". It should not be left out of account that both quality management and law

[17] Hans Kelsen *Reine Rechtslehre* (Wien: Deuticke 1960), pp. 14 and 276.

[18] Ibid., p. 277.

[19] In a futuristic study dated 1995 although the subject has been limited with the sources of law, these general views can be a prevision even for today. For the tendencies of rationalisation of law (transition from a charismatic concept of law to a experimental concept of law, taking the law as a holistic system that does not contain a gap, expansion of material functioning field of law in terms of law of statute and law of agreement), tendencies of socialization of law (the growth of the function of the government in forensic protection, the relation between the tendencies of socialization of law and the minimisation of the government), tendencies of the development of subject of law (tendencies of specialization and bureaucratication of legal organisations and tendencies of scientification in law), see Yasemin Işıktaç [The impacts of contemporary evolution tendencies on the concept of the sources of law, in Turkish] in *Hukuk Felsefesi ve Sosyolojisi Arkivi* 2 (1995), pp. 81–95.

depend on "human quality" as well. Through education, democracy as a level of c o n s c i o u s n e s s should be explicated to individuals, moral behaviour should be elevated again, and by all means the legal system should be put in effect. It should not be forgotten that positive legal system, even if in the worst way, is an indicator of existing rights and freedoms. However, it should not be left out of account that this system is applicable for everybody without exception. Because, even as a minimal ethical standard, if there is no justice the possibility of realization of other moral principles will be placed in difficult circumstances. It should not be forgotten that opposition to law is always a matter of justice and conformity to the law is the rule and opposing to the law is the exception and this designates the value aspect of law.

FACULTY OF LAW
ISTANBUL UNIVERSITY, TURKEY
ISIKTAC@YAHOO.COM

The Problem of Legal Indeterminacy in Contemporary Legal Philosophy and Lawrence Solum's Approach to the Problem

Sercan Gürler

At first sight, the law seems to be a system of rules and the judges only adjudicators who work within the mechanism of that system. That is, they make a decision about disputes only by using some basic logical equipment in order to apply some written laws. This means that there is a determinacy in the law and that rules determine the outcomes in every case. This view of law can be called l e g a l f o r m a l i s m . Even though this approach to the law seems to be intuitively acceptable, it has been under attack, at least from the early critiques of legal realists, since the beginning of the twentieth century. However, more rigid and more exact critiques of legal formalism and especially of the notion of l e g a l d e t e r m i n a c y have come from another approach. This contemporary approach to the law is called the c r i t i c a l l e g a l s t u d i e s movement. Its advocates have been criticizing not only legal determinacy but all aspects of modern western legal thought. They first view all of these modern legal approaches as a whole without distinguishing the differences between them (i.e. the two main traditions in modern legal theory: the natural law theories and legal positivism) and brand these approaches under the name l e g a l l i b e r a l i s m . They then try to show the inner contradictions of this whole. Thus there has been a long and complicated debate between advocates of the critical law studies movement and advocates of so-called legal liberalism. Since the 1970s, legal philosophy, at least in Anglo-American countries, has been pervaded by this debate.

In this article I attempt to examine the problem of legal indeterminacy and try to show Lawrence Solum's approach to the problem. He is one of the American scholars who have taken part in this debate and he has made some considerable critiques of the legal indeterminacy thesis. It would be interesting to take into account his overall thoughts on the topic because his approach might also be useful in grasping more accurately the problem itself. However this would need a more detailed examination; here I examine the problem concisely and rather focus on Solum's arguments or counter arguments. Therefore my references are mostly taken from his writings.

1 The Indeterminacy Thesis

The roots of the problem of legal indeterminacy can be traced back to a distinction which can be found in GADAMER's writings. According to this distinction there is an indeterminacy of legal text on the one hand and there is an indeterminacy of a rule when applied to a case on the other hand. So legal indeterminacy is related as much to the legal interpretation as to the legitimacy and notion of rule of law. Besides this, at the core of the problem there is a question of whether the law is wholly indeterminant and whether there are some constraints on a judge's ability to make discretions.[1]

Before considering the indeterminacy thesis, it may be needed to define what the term indeterminacy means.

There can be five definitions of indeterminacy:

(1) P is indeterminate if P does not come to an end.

(2) P is indeterminate if P is not fixed, is vague or indefinite or has no fixed value.

(3) P is indeterminate if P cannot be decided or settled especially of a dispute, in which case P is uncertain.

(4) P is indeterminate if P is not particularly designated.

(5) P is indeterminate if it is impossible to determine P in advance.[2]

Except (1), the other definitions can be brought together to make a single definition which is most relevant to the problem. This single definition of indeterminacy can be stated:

> P is indeterminate if P is not particularly designated hence it is impossible to determine P in advance, in which case P is undecided, unsettled, uncertain, is vague or has no fixed value.[3]

When we turn to the problem, we can observe that if a legal system determines that in every case presented for adjudication there will be only one correct outcome, it is said that there is a determinate legal system. On the other hand, if a legal system in any case does not determine any outcome, it is said that there is an indeterminate system.[4]

The indeterminacy thesis is defined by TUSHNET, one of the important advocates of the thesis, as follows:

> [A] proposition of law [...] is indeterminate if the materials of legal analysis-the accepted sources of law and the accepted methods of working with those sources such

[1] Gülriz Özkök 'Hukuki Belirsizlik Problemi Üzerine' [On the problem of legal indeterminacy] *Ankara Üniversitesi Hukuk Fakültesi Dergisi* 51 (2002) 2, pp. 1–18 at p. 1. See also Michael J. Perry 'Normative Indeterminacy and The Problem of Judicial Role' Harvard Journal of Law & Public Policy 19 (1995–1996), pp. 375–390 at p. 380.

[2] These definitions are all taken from N. Otakpor 'On Indeterminacy in Law' *Journal of African Law* 32 (1998), pp. 112–121 at 112–113.

[3] *Ibid.*, p. 113.

[4] Stuart Fowler 'Indeterminacy in Law and Legal Reasoning' *Stellenbosch Law Review* 6 (1995), pp. 324–347 at p. 325.

> as deduction and analogy-are insufficient to resolve the question, »Is this proposition or its denial a correct statement of the law?«[5]

Briefly it can be said that the indeterminacy thesis means that the legal propositions are indeterminate. It is important to notice that the indeterminacy thesis does not assert that it is a claim about rightness of outcome or difficulties in determining outcome. Rather, it asserts that "no matter how hard one tries, or how skilled one is as a lawyer, legal propositions in the relevant range are indeterminate."[6]

In other words, the legal indeterminacy argument is that "legal questions do not have correct answers, or at least not unique correct answers."[7] The defenders of the thesis doubt "whether the *legal materials* are collectively sufficient to determine a (single right) answer to the legal question" and according to them "certain legal issues might have unique right answers when extra-legal materials (including moral principles or the background, training, or biases of the judges) are considered" but this does not mean that the law itself is determinate.[8]

Amongst the claims upon which the indeterminacy thesis is grounded are

> the general nature of rules, the nature of language (e.g. pervasive vagueness, or deconstruction); gaps or contradictions within the law; the availability of exceptions to legal rules; inconsistent rules and principles that overlap in particular cases; the indeterminacy of precedent; and the indeterminacy in applying general principles to particular cases.[9]

There are mainly three debates in Anglo-American legal theory focused on the determinacy–indeterminacy problem: (1) the attacks of American legal realist commentators on formalist legal and judicial reasoning; (2) the revival and modification of the realist critique by some members of the critical legal studies (CLS) movement, with some CLS theorists claiming that law was 'radically indeterminate'; and (3) Ronald Dworkin's view that all, or nearly all legal questions have a unique right answer (this is 'the right answer thesis').[10]

So, the legal indeterminacy thesis as associated with legal realism and the critical law studies movement especially in Anglo-Saxon legal tradition means shortly that "laws (broadly defined to include cases, regulations, statutes, constitutional provisions, and other legal materials) do not determine legal outcomes."[11] In other words, the indeterminacy claim involves the idea that "the law does not constrain judicial decisions […] [A]ll cases are hard cases and […] there are no easy cases."[12]

[5] Mark Tushnet 'Defending the Indeterminacy Thesis' *Quinnipiac Law Review* 16 (1996–1997), pp. 339–356 at p. 341.

[6] Ibidem.

[7] Brian Bix *A Dictionary of Legal Theory* (Oxford: Oxford University Press 2004) vii + 227 pp. and especially on p. 97.

[8] *Ibidem* (emphasis original).

[9] *Ibidem.*

[10] *Ibid.*, pp. 97–98.

[11] Lawrence B. Solum 'Indeterminacy' in *A Companion to Philosophy of Law and Legal Theory* ed. Dennis Patterson (Oxford: Blackwell Publishing Ltd. 1999), pp. 488–502 at p. 489.

[12] *Ibid.*, p. 488.

If it is put in another way, the legal indeterminacy thesis can be described from at least four distinct aspects:

(a) Law is a historical continuum (that is, "it has no social existence of its own without the context making it interpretable [...] and setting it in function [...]").

(b) Law is an open system (that is, "[i]t can only be treated as closed for the sake of its historical reconstruction").

(c) Law is a complex phenomenon with alternative strategy (that is, "[l]aw as a bipartite phenomenon organized together from two distinct sources raises the question of the character and composite nature of its instrumentality").

(d)Law is an irreversible process (that is, "law cannot be manipulated in all its components to the same depth").[13]

Thus, it can be concluded that "law is something more than a set of rules and it is even more than a set of enactment."[14]

2 The Significance of the Legal Indeterminacy Thesis

If we ask the question "Why does *legal indeterminacy* matter?" we can answer in several ways, but the most important ones are related with liberalism and its main ideals. Because, liberalism, as a normative political theory, is committed to determinacy as a political ideal and at the core of this argument there is a notion called the r u l e o f l a w. There are at least two considerations connecting the concept of determinacy with the rule of law. First, for individuals to know which duties they have under the law and to have opportunities to conduct themselves according to law, the law must be determinate. Second, since legal outcomes are enforced by coercion, if this coercive application cannot be justified by legal reasons, then some legitimacy problems will arise. Beside these two considerations about the rule of law, there may be another one which is concerned with democracy. In democratic theory it is presupposed that only elected legislature "can form a judgement, enact it through legislation, and have its will followed by the courts" but the indeterminacy thesis is not compatible with this presupposition.[15]

If the indeterminacy thesis is true, the ideal of the rule of law and the main components of this ideal, that is, the notion of l e g a l j u s t i c e, will not be fully realized, because

> (1) judges will rule by arbitrary decision, because radically indeterminate law cannot constrain judicial decision; (2) the laws will not be public, in the sense that the indeterminate law that is publicized could not be the real basis for judicial decision; and (3) there will be no basis for concluding that like cases are treated alike, because the very idea of legal regularity is empty if law is radically indeterminate.[16]

[13] Csaba Varga 'Is Law a System of Enactments?' in *Theory of Legal Science* ed. Aleksander Peczenik, Lars Lindhal & Bert Van Roermund (Lund: D. Reidel Publishing Company 1984), pp. 175–182 on pp. 180–181.

[14] *Ibid.*, p. 181.

[15] Jules L. Coleman & Brian Leiter 'Determinacy, Objectivity, and Authority' *University of Pennsylvania Law Review* 142 (1993–1994), pp. 549–637 at p. 580.

[16] Solum 'Indeterminacy' [note 11], p. 488.

As understood from the above considerations, there are some relations between indeterminacy and legitimacy.[17] It is claimed that to make legitimate decisions judges constrain themselves only by "applying the rules and not creating their own." By contrast, however, the indeterminacy thesis asserts that "law does not constrain judges sufficiently, raising the spectre that judicial decision making is often or always illegitimate."[18]

The importance of legitimacy can be put more clearly with this quotation:

> If a judicial decision is legitimate, it provides a prima facie moral obligation for citizens to obey the decision.[19]

In other words, it can be said that society can only be justified when it requires that "what appears to it as the state be not only restricted by law but be predictable in its actions and be controlled." Thus "it is a natural requirement that the legislation be predictable and understandable."[20]

Although members of the Critical Legal Studies Movement are not the first defenders of the indeterminacy thesis, the most important and clear explication of the thesis belongs to them. They take the arguments of the thesis as one of the basic issues of contemporary legal theory and take these arguments to their logical results.[21]

The members of the Critical Legal Studies Movement use indeterminacy thesis as part of their criticism of liberalism. However, in modern liberal legal theory there are some other liberal theorists like H. L. A. Hart who also accept the thesis, at least to the extent that it can explain the fact that there are always gaps in the law. But it is important to notice that the way that liberals use the notion of indeterminacy is a little bit different from the way that the critics of liberalism use it.[22] However, this is not the main task of this article.

3 The Arguments for Legal Indeterminacy

In order to overcome the claim that their thesis is implausible, advocates of radical indeterminacy have made several arguments. These arguments of the indeterminacy thesis have some important considerations. Therefore, before explicating Solum's critiques of the indeterminacy thesis, we can take a look at several of these indeterminacy arguments briefly.

a) Patchwork Quilt Argument. Critical legal scholars argue that legal materials are only contingent agreements between competing social groups and these materials reflect the ideological struggles within the society. They further pose that since this agreement is not

[17] Kasım Akbaş *Hukukun Büyübozumu* [Disenchantment of the law] (İstanbul: Legal Yayıncılık 2006), p. 102.
[18] Ken Kress 'Legal Indeterminacy' *California Law Review* 77 (1999), pp. 283–337 on p. 285.
[19] *Ibidem.*
[20] Csaba Varga 'Transformation to Rule of Law from No-law: Societal Contexture of the Democratic Transition in Central and Eastern Europe' *Connecticut Journal of International Law* 8 (1992–1993), pp. 487–505 on p. 493.
[21] Akbaş [note 17], p. 99; Fowler 'Indeterminacy…' [note 4], p. 324.
[22] Akbaş [note 17], *id.*

inherently rational and coherent then the legal materials themselves cannot embody this rationality and coherence either.[23] The clearest statement for this argument is Unger's:

> It would be strange if the results of a coherent, richly developed normative theory were to coincide with a major portion of any extended branch of law. The many conflicts of interest and vision that lawmaking involves, fought out by countless minds and wills working at cross-purposes, would have to be the vehicle of an immanent moral rationality whose message could be articulated by a single cohesive theory.[24]

b) Deconstructionist Argument. Critical legal scholars invoke the deconstructionist techniques of famous philosopher, Jacques Derrida for defending the indeterminacy thesis. According to the deconstructionist argument which is also called the f u n d a m e n t a l c o n t r a d i c t i o n argument, liberalism suffers a fundamental contradiction that in our contemporary societies there is a tension between needing others, that is, solidarity and fearing them, that is, individuality. Similar to this, there is also another contradiction between needing centralized powers to protect our autonomy, that is, being socially constructed, and fearing that these powers will try to destroy our autonomy, that is, the desire to be separate. This contradiction or tension consists in p s y c h o l o g i c a l a m b i v a l e n c e and this ambivalence is deeper than any "abstract theoretical political commitment." Because of this it can be called a fundamental contradiction, contradiction between s e l f and o t h e r or between soindividualism and a l t r u i s m .[25]

> [W]e are divided, among ourselves and also within ourselves, between irreconcilable visions of humanity and society, and between radically different aspirations for our common future.[26]

In this context, the term d e c o n s t r u c t i o n is used by critical scholars to increase the justification for the proposition that application of legal rules and legal doctrine result in conflict, contradiction and indeterminacy.[27]

c) Epiphenomenalist Argument. This argument accepts the idea that outcomes are predictable. But suggests that the predictability arises from e x t r a - l e g a l factors. All legal materials, namely legal doctrines, statutes, case law etc. are only e p i p h e n o m - e n a , i.e. "entities without any real causal role in determining the results of legal proceedings." Not the legal materials then, we can say, but ideology, politics or class bias determine outcomes. In other words "easy cases are not easy because the law determines

[23] Kress 'Legal Indeterminacy' [note 18], p. 303. See also Sururi Aktaş *Eleştirel Hukuk Çalışmaları* [Critical legal studies] (İstanbul: Kazancı Yayınları 2006), pp. 163–168.

[24] Roberto M. Unger 'The Critical Legal Studies Movement' *Harvard Law Review* 96 (1983), pp. 561–675 on p. 571, quoted by Kress, *id.*

[25] Kress [note 18], *id.*; Coleman & Leiter [note 15], p. 573; Solum 'Indeterminacy' [note 11], p. 495.

[26] Duncan Kennedy 'Form and Subsance in Private Law Adjudication' *Harvard Law Review* 89 (1976), pp. 1685–1778 at p. 1685.

[27] For a more detailed consideration and wide discussion of deconstruction and its impact on legal interpretation, see Michael Rosenfeld 'Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptations of the New Legal Formalism' *Cardozo Law Review* 11 (1989–1990), pp. 1211–1267.

the outcome"; rather, because the outcomes are determined by the ideologies, politics and class bias, we can predict them.[28]

There is a similar argument that can widen the scope of the epiphenomenalist argument. It states that both the nature of the application of the law and the nature of the legal reasoning are s o c i a l l y d e t e r m i n e d .[29] As to the application of the law, the argument claims that

> [T]he social factors which permeating through the filter of legal consciousness turn up in the law-applying process, operate not only as *ad hoc* factors effective exclusively in the given case, but also as sets of elements defining the social nature of the application of law and bearing also the marks of generality, however, in the guise of the principles of the policy of law-applying activity, may manifest themselves as postulates for the subsequent application of the law, too.[30]

Concerning the legal reasoning the argument advances that

> in the process of reasoning logic acts as factor of control and not as one of determination [...] Also the social conditioning of legal reasoning, i.e. the social contents of law-applying, will perform the function of determining not only in the direction of the components of the process of reasoning, not controlled or controllable by logic, but in the last resort even in the direction of the practical potentialities, depth and effectiveness of logical control itself.[31]

d) Rule Sceptic Argument. This argument is based on Wittgenstein's rule-following considerations. More specifically, critical scholars use Kripke's interpretation of Wittgenstein.[32] Wittgenstein (or we can say Kripke) argues that there is no fact to prove that I mean same thing by using a current sentence as I did before for another past usage. Again, there is no fact to prove that I am using the words in the correct way or applying the rules that govern the usage of words correctly:[33]

> [T]here is [n]o fact about our past use, intention, or attitude towards a word [...] that controls or restricts or limits our future uses of that word.[34]

So at the core of the rule skeptic argument there is a claim that "there are no facts that constitute or determine a sentence's meaning." This shows that language is basically

[28] Solum 'Indeterminacy' [note 11], p. 496.

[29] See Csaba Varga *Law and Philosophy* Selected Papers in Legal Theory (Budapest: Publications of the Project on Comparative Legal Cultures of the Faculty of Law of Loránd Eötvös University 1994), pp. 317–374.

[30] *Ibid.*, p. 336 (original emphasis).

[31] *Ibid.*, p. 362.

[32] "A spate of work on Wittgenstein and law has followed the recent debate in philosophy of language between Saul Kripke, who interpreted Wittgenstein's remarks on following rules as posing a sceptical paradox, and various antisceptical objectors", Timothy A. O. Endicott 'Linguistic Indeterminacy' *Oxford Journal of Legal Studies* 16 (1996), pp. 667–697 on p. 689.

[33] Brian Bix *Law, Language, and Legal Determinacy* (Oxford:
Oxford Clarendon Press 1993) x + 221 pp. on p. 37.

[34] C. Yablon 'Law and Metaphysics' [book review] *Yale Law Review* 96 (1987), p. 628, quoted by Bix *Law, Language...*, *id.*

indeterminate.[35] Because there can be no objective facts that determine that any sentence and its words mean one thing rather than another,[36] we can say that language is "undefinedness." So, this argument can also be called as linguistic undefinedness.[37]

This claim fits well to the legal indeterminacy thesis. Critical scholars take Kripke's interpretation of Wittgenstein[38] to conclude that in following a rule or using a word, the correctness or incorrectness of a judgment, that is, the concept of meaning, can only be based on social or cultural consensus. The use of a word is correct when it agrees with the use of the vast majority of the others with whom we live together in a community. This shows that the language we use can change due to the social changes. Because of the fact that language is an instrument that can evolve by itself continuously from time to time, while making decisions about any particular case judges apply and interpret this instrument again and again.[39] Although critical scholars may accept the easy cases, they attribute this easiness not to the language used in legal materials but to the consensus of the society. Because this consensus consists in political and ideological elements, and it is asserted that this consensus has been imposed by the powerful upon the rest of the society, "[i]f and when the society's ideology changes, which cases are considered easy will [...] also change."[40]

4 Arguments of Solum

After examining the main arguments for indeterminacy, we can now turn to the arguments of Solum for criticizing the indeterminacy thesis.

Solum defines the indeterminacy thesis as

> the existing body of legal doctrines—statutes, administrative regulations, and court decisions—permits a judge to justify any result she desires in any particular case [...] a competent adjudicator can square a decision in favor of either side in any given lawsuit with the existing body of legal rules.[41]

According to Solum there are two assumptions related to the indeterminacy thesis. The first is that "the indeterminacy thesis always accurately describes the legal phenomena" and the second is that it "plays an important role in support of a related thesis, the

[35] Because of this, sometimes the term "linguistic indeterminacy" is used. Cf. Endicott [note 32], p. 669 ("I will use »linguistic indeterminacy« to refer to unclarity in the meaning of linguistic expressions that could lead to legal indeterminacy").

[36] Coleman & Leiter [note 15], p. 568.

[37] Varga *Law and Philosophy* [note 29], p. 304.

[38] For a critique of Kripke's interpretation of Wittgenstein's rule-following considerations and its misapplication to legal theory, see Bix Law, *Language...* [note 33], pp. 36–62.

[39] Csaba Varga 'Hukukta Kuram ve Uygulama: Hukuk Tekniğinin Sihirli İşlevi' [Theory and practice in law: On the magical role of legal technique] çev. Hüseyin Öntaş *Hukuk Felsefesi ve Sosyolojisi Arkivi* 15 (2006), pp. 5–17 on p. 10.

[40] Bix *Law, Language...* [note 33], pp. 37–38.

[41] Lawrence B. Solum 'On the Indeterminacy Crisis: Critiquing Critical Dogma' *The University of Chicago Law Review* 54 (1987), pp. 462–503 at p. 462.

mystification thesis—the claim that legal discourse conceals and reinforces relations of domination."[42]

Solum argues that both these two assumptions are problematic and that defenders of the indeterminacy thesis (that is, the critical scholars) "have a long way to go in formulating indeterminacy as a workable proposition with real critical bite" and the strong version of the thesis "is actually counterproductive to the program of critical scholarship."[43]

He chooses as the motto of the thesis this quotation:

> The starting point of critical theory is that legal reasoning does not provide concrete, real answers to particular legal or social problems. Legal reasoning is not a method or process that leads reasonable, competent, and fair-minded people to particular results in particular cases [...]. The ultimate basis for a decision is a social and political judgment incorporating a variety of factors, including the context of the case, the parties, and the substance of the issues. The decision is not based on, or determined by, legal reasoning.[44]

Solum first distinguishes between two versions of indeterminacy: One is s t r o n g indeterminacy and the other is w e a k indeterminacy.[45] He defines strong indeterminacy as follows:

> In any set of facts about actions and events that could be processed as a legal case, any possible outcome-consisting of a decision, order, and opinion-will be legally correct.[46]

In other words, the strong indeterminacy thesis claims that all cases are hard cases.[47]

From the point of legal practice, strong (or radical) indeterminacy means that "competent speakers of a language can never know whether an expression applies, and that competent lawyers can never know what to tell a client."[48]

But Solum, like some other scholars, easily defeats this version of indeterminacy with the e a s y c a s e argument.[49] According to him, to defend the strong indeterminacy thesis is not simple. Because, he says, if we find even a single case (which in fact we can)[50] "whose results are determined by the body of legal doctrines taken as a whole", it shows that the strong indeterminacy thesis may be wrong.[51] If we look at ordinary cases, claims this argument, we can see the pervasiveness of easy cases and this fact undercuts

[42] *Ibid.*, pp. 462–463.

[43] *Ibid.*, p. 463.

[44] David Kairys 'Law and Politics' *George Washington Law Review* 52 (1984), pp. 243–262 on pp. 243, 244 and 247, quoted by Solum 'On the Indeterminacy Crisis' [note 41], pp. 463–464.

[45] Solum, p. 470. Sometimes r a d i c a l i n d e t e r m i n a c y is used for strong indeterminacy and m o d e r a t e i n d e t e r m i n a c y for weak indeterminacy, see Kress 'Legal Indeterminacy' [note 18], pp. 296 and 297.

[46] Solum 'Indeterminacy' [note 11], p. 491.

[47] Solum 'On the Indeterminacy Crisis' [note 41], p. 470.

[48] Endicott 'Linguistic Indeterminacy' [note 32], p. 669.

[49] Cf. Solum 'On the Indeterminacy Crisis' [note 41], 471–472.

[50] Lawrence gives an example to prove that there can be even a single easy case—"This first paragraph of this essay does not slander Gore Vidal. Thus, I prove that one legal rule has at least one determinate application"—*ibid.*, p. 471.

[51] *Ibidem.*

the strong indeterminacy thesis. Because, these cases have determinate and correct outcomes. Determinate and correct outcomes create some degree of certainty. This amount of certainty shows that indeterminacy may exist but not radically, only moderately. So the burden is "on advocates of radical indeterminacy to overcome the implausibility of their thesis."[52]

Although the strong indeterminacy thesis can be rejected in this way, there is still a problem about the word 'easy'. For example, eating ice cream in the privacy of one's own home[53] can hardly violate a legal rule. But it is not impossible. There can be some cases that this activity leads to a violation of a rule. Due to this uncertainty of the word 'easy', proponents of strong indeterminacy have made three arguments which were previously discussed in this article. It is not necessary to examine again these arguments in detail. Instead we may proceed to the counter arguments Solum has made to the strong indeterminacy thesis.

a) Counter Arguments to the Internal Skepticism Argument. Internal skepticism tries to demonstrate that so-called easy cases are in fact hard cases. This criticism is internal, because it is grounded on the acceptance of legal practitioners like lawyers and judges. It is asserted that the legal practitioners see the results in easy cases as indeterminate.[54]

In order to defeat this argument of internal skepticism, Solum makes a very elaborate claim that distinguishes between concepts of d e t e r m i n a c y, u n d e r d e t e r m i n a c y and i n d e t e r m i n a c y.

First he takes two sets of possible results of a given legal dispute and shows the relation between these two sets. The first set consists of all imaginable results, no matter how ridiculous or improbable. The second set consists of results that are compatible with the law or can be seen as legally reasonable outcomes. He uses the word the law as "legal materials taken as a whole, including constitutions, statutes, and case law."[55]

He then offers some definitions:

(i) The law is *determinate* with respect to a given case if and only if the set of legally acceptable outcomes contains one and only one member.

(ii) The law is *underdeterminate* with respect to a given case if and only if the set of legally acceptable outcomes is a non-identical subset of the set of all possible results.

(iii) The law is *indeterminate* with respect to a given case if the set of legally acceptable outcomes is identical with the set of all possible results.[56]

Now, in order to make more clear what he means by the concept 'undeterminacy', he says that "a case is underdetermined by the law if the outcome (including the formal

[52] Kress 'Legal Indeterminacy' [note 18], pp. 296 and 297.

[53] The example is taken from Solum 'On the Indeterminacy Crisis' [note 41], p. 472.

[54] *Ibid.*, pp. 472–473.

[55] *Ibid.*, p. 473.

[56] emphIbidem (original emphasis). He makes this distinction also in other places. Cf. Solum 'Indeterminacy' [note 11], p. 490 and Lawrence B. Solum 'The Virtues and Vices of a Judge: An Aristotelian Guide To Judicial Selection' Southern California Law Review 61 (1987–1988), pp. 1735–1756 on p. 1748 (including note 39). See also Sercan Gürler 'Çağdaş Ahlâk Kuramlarının Hukuk Felsefesine Yansımasına Örnek Olarak Lawrence Solum'un »Erdem Ahlâkına Dayalı Hukuk Kuramı«' [As an example of application of contemporary moral theories to legal philosophy: Lawrence Solum's virtue-centered jurisprudence] *Hukuk Felsefesi ve Sosyolojisi Arkivi* 16 (2007), pp. 141–168 on p. 156–157.

mandate and the content of the opinion) can vary within limits that are defined by the legal materials."[57]

He uses also three more concepts interchangeable with determinacy, indeterminacy and underindeterminacy: for determinacy he uses r u l e - b o u n d , for indeterminacy u n b o u n d and for underdeterminacy r u l e - g u i d e d .[58]

He then considers why some cases have taken the name ' h a r d '. In order to explain this, he offers two formulations of the concept of a hard case:

(i) "Cases are 'hard' when they are underdeterminate in a way such that the judge must choose among legally acceptable results that include outcomes that constitute victory (or loss) for each litigant, or various combinations of victory (or loss) for all parties to the litigation.

(ii) Hard cases are those in which the judge's choice among the set of legally acceptable results will substantially affect a significant practical interest of the litigants."[59]

So he concludes that in order to be hard a case does not need to be indeterminate. The underdeterminate cases can also be hard or we can say that it is not the fact that because a case is hard, it is indeterminate; but that it can be underdeterminate.[60] In this way, by elaborating on the concept of the hard case, he believes that he will defeat the internal skeptic arguments.

b) Counter Arguments to the External Skepticism Argument.[61] After examining the internal skeptic arguments, Solum attempts to defeat two external skeptic arguments. One of these external skeptic arguments is the rule-skeptic defense of indeteminacy and the other is the deconstructionist defense of indeterminacy.

α) Critique of the Rule-skeptic Defense of Indeterminacy. As Solum understands it, a rule-skeptic argues that "one can always come up with a perfectly plausible interpretation of any rule, including legal rules, such that any particular behavior can be seen as either following or not following the rule." So the argument can easily conclude that, concerning the rules, "anything goes!"[62]

In order to show the failure of rule skepticism, Solum makes a distinction between logical and practical possibility. He takes this idea from epistemology and tries to show that the reason for the lack of effectiveness in rule skepticism is the same as that in epistemological skepticism. It can logically be possible to doubt the certainty of knowing, but it does not affect what we do in fact. For example it is possible to say that we can never know anything. But it makes no change to the fact that we are lying on the bed and lis-

[57] Solum 'Indeterminacy' [note 11], p. 489.

[58] Solum 'On the Indeterminacy Crisis' [note 41], p. 473.

[59] *Ibid.*, p. 474.

[60] *Ibid.*, p. 474 and 475.

[60] He takes the distinction of internal skepticism and external skepticism from Ronald Dworkin's *Law's Empire* (Cambridge, Massachusetts: Harvard University Press 1986), pp. 78–86, using this distinction for legal interpretation and explaining it (on p. 78) as a distinction "between skepticism *within* the enterprise of interpretation of some practice or work of art, and skepticism *outside* and *about* that enterprise" (withoriginal emphasis). Solum 'On the Indeterminacy Crisis' [note 41], p. 473, "[e]xternal skepticism proceeds from a perspective outside the practice of law".

[62] Solum, p. 477.

tening to music. It is same for the rule skepicism: "worrying about rule-skepticism will not have any effect on the way cases are decided." So, he concludes, "[t]he skeptical possibilities invoked by both rule-skepticism and epistemological skepticism are not practical possibilities, and only practical possibilities affect the way one acts."[63]

β) Critique of the Deconstructionist Defense of Indeterminacy. The deconstructionist defense of indeterminacy, as Solum writes, claims that "the indeterminacy of legal rules is a function of deep contradictions within liberal society, or of the failure of liberal society to reconcile or mediate a deep contradiction within the collective and individual human self."[64]

In order to show that there are some serious problems with the deconstructionist argument, Solum first has recourse to Dworkin. In his criticism of critical scholars Dworkin argues that the critical scholars "seem wholly to ignore [...] the distinction [...] between competition and contradiction in principles."[65] So, according to Solum, it is not appropriate to talk about a contradiction within the existing legal doctrine, but it can be said that there is a "compromise between competing principles."[66]

In addition to this problem, Solum draws our attention to another problem. The deconstructionist argument can not provide an answer to the argument of easy cases. Even if the claim "some legal doctrines embody a tension between community and autonomy resulting in indeterminacy" is acceptable, it does not prove that all of the law is indeterminate. The defender of the deconstructionist argument "would have to take all cases, including the easiest ones [...] and demonstrate both that they are indeterminate and that this indeterminacy is a function of some deep conflict between self and other." But Solum thinks that neither demonstration has been made. He concludes that the deconstructionist argument can only show that "some legal rules are underdetermined over the set of all cases."[67]

c) Counter Arguments to the Epiphenomenalism Argument. According to the epiphenomenalist argument, as Solum writes,

> although legal doctrine is chronologically prior to the result in a particular case, and although variation in doctrine may appear to explain variation in result (at least within the limited domain of easy cases), the doctrine does not *determine* the result because in fact both doctrine and result are determined by something else.[68]

Solum says that the epiphenomenalist argument has to prove that the relation between real causal factors and results in particular cases has not been determined by legal doctrine. In other words, if the link between real causal factors and the results can be completed by intentional actions of judges who decide the cases using doctrinal instruments, the epiphenomenalist argument is false:

[63] *Ibid.*, pp. 478–479.
[64] *Ibid.*, p. 481.
[65] Dworkin *Law's Empire* [note 61], pp. 274–275.
[66] Solum 'On the Indeterminacy Crisis' [note 41], p. 482.
[67] *Ibid.*, pp. 482–483.
[68] *Ibid.*, p. 484 (original emphasis).

> [D]octrines *would* determine results, although the doctrines would in turn be determined by something else.[69]

So he supports the view that "doctrines do play a causal role, even though that role is usually underdeterminative." He thinks that this view can supply an explanation "for how doctrines influence outcomes." If the judges took into account the limits of legal doctrine regarding any possible results, they would "act intentionally in choosing results within the legal doctrine they perceive." Because there can be a possible account of the mechanism by which doctrine determines outcomes, the burden is on the defenders of the epiphenomenalist argument. Solum concludes by asking "[c]an the epiphenomenalist defenders of strong indeterminacy offer a similarly adequate causal explanation?"[70]

Thus, Solum has shown the inadequacies of the strong intederminacy thesis from different aspects and instead of indeterminacy he has offered the concept of underdeterminacy. However, there is another argument from indeterminacy he has to cope with: weak versions of the indeterminacy thesis.

d) Weak Versions of the Indeterminacy Thesis and Solum's Critiques.

α) Counter Arguments to the Important-case Indeterminacy Thesis. The first weak version of indeterminacy that Solum attempts to examine is the important-case indeterminacy thesis. In this version, indeterminacy is accepted not for all cases, but only some subset of cases. Solum expresses that some critical scholars admitted that "all interesting or important cases are indeterminate." At the core of this argument is the word ' i m p o r t a n t . According to this argument, the argument from easy cases may be true but insignificant. Because, if it were true, one single easy case which can be thought to be the proof for the inadequacy of the indeterminacy thesis is uninteresting or unimportant.[71]

So, the criteria that define the word 'important' is the key for the viability of the important-case indeterminacy thesis. As Solum points out clearly, "[u]nless importance is defined by criteria other than practical indeterminacy itself, the thesis will be trivial: indeterminate cases are indeterminate". The conclusion, which means only tautology, can not damage the argument of easy cases. Further he says that there is no such adequate criterion that has yet been provided by critical scholars.[72]

Without telling us if and when indeterminacy is really important, critical scholars cannot show that even this restricted form of the thesis has bite.[73]

β) Counter Arguments to the Modally Weakened Indeterminacy Thesis. It would be useful to take a look to the quotation below to understand what the modally weakened indeterminacy thesis means and the counter argument Solum has made to it:

[69] *Ibid.*, p. 485 (original emphasis). For a similar statement, cf. Solum 'Indeterminacy' [note 11], p. 496.
[70] Solum 'On the Indeterminacy Crisis' [note 41], p. 486.
[71] *Ibid.*, pp. 487–489.
[72] *Ibid.*, p. 489. Solum here examines the arguments of David Kairys and Mark Tushnet, two defenders of important-case indeterminacy and finds that they can not achive to show the relevance of the word i m p o r t a n t to the indeterminacy thesis. But it does not need to stay long on this now.
[73] *Ibid.*, p. 491.

> They [the Critics] don't mean—although sometimes they sound as if they do—that there are never any predictable causal relations between legal forms and anything else [...]. The Critical claim of indeterminacy is simply that none of these regularities are *necessary* consequences of the adoption of a given regime of rules. The rule-system could also have generated a different set of stabilizing conventions leading to exactly the opposite results and may, upon a shift in the direction of political winds, switch to those opposing conventions at any time.[74]

In short we can say that the modally weakened indeterminacy thesis admits that there can be easy cases, but claims that legal rules do not n e c e s s a r i l y determine the outcomes in particular cases. Thus, it weakens the modal status of the indeterminacy thesis.[75]

The importance of the thesis depends on the meaning of the word 'necessity' and the meaning of the word 'necessity' depends, in turn, on the possibility of demonstrating that in any particular case the outcome does not need to follow from legal rules. But, according to Solum, the critical scholars did not notice this dependency.[76]

To make clear his counter argument he chooses a philosophical apparatus with the term 'p o s s i b l e w o r l d s' and distinguishes between four possible worlds. These are

> (1) logically possible worlds—those that are not internally inconsistent; (2) physically possible worlds—those that are not inconsistent with the laws of science; (3) socially possible worlds—those that do not violate our understanding of the limitations on the behavior of humans and their communities; and (4) practically possible worlds—those that are within the realm of sufficient likelihood to be of practical consequences.[77]

He contends that there are two possible interpretations of the word 'necessity'. According to first interpretation, n e c e s s i t y means a requirement that "the application of particular legal rules in particular cases produce identical results in all logically, physically, or socially possible worlds." This version of modally weakened indeterminacy thesis, he says, may be true but does not have any critical bite. Maybe it is true that, when a legal rule is applied to a case, it can be imagined that there would be different possible worlds in which the outcomes would be totally different. But this makes the indeterminacy thesis trivial. Because, "we could imagine a world so different that this essay violates the securities laws, but this possibility is trivial; it has no claim on our attention."[78]

Although the first interpretation of necessity makes the indeterminacy thesis useless, Solum accepts that the second one can be valuable and may save the modally weakened indeterminacy thesis. In this second version of the thesis, the necessity of the relationship between legal rules and particular cases can be formulated so as to keep the critical bite. It would be reasonable to suggest that any change in the political world can affect the result

[74] Robert W. Gordon 'Critical Legal Histories' *Stanford Law Review* 36 (1984), p. 125, quoted by Solum 'On the Indeterminacy Crisis' [note 41], p. 491 (original emphasis).
[75] Solum 'On the Indeterminacy Crisis', p. 492.
[76] *Ibidem.*
[77] *Ibidem.*
[78] *Ibid.*, p. 493.

of the application of a legal rule to any particular case. Because of the fact that political pressure is a kind of cause of underdeterminacy or indeterminacy in particular cases, he admits the critical bite of the modally weakened indeterminacy thesis. But he adds that to what extent the thesis can be critical depends on the number of the cases affected by this pressure. He states that "[i]t is not difficult to imagine easy cases that would be unaffected by any change in our world fairly described as »a shift in the political winds«." So he shows that this is an empirical question that whether "the modally weakened indeterminacy thesis can demonstrate that most law is indeterminate in all practically possible worlds."[79]

As a conclusion Solum makes some considerations from his evaluation of the indeterminacy thesis. First, he contends that "legal doctrine underdetermines the results in many, but not all, actual cases." In other words, with the exception of the easy cases, the outcomes "are rule-guided, but not rule-bound." Second, although he admits that in some cases outcomes are underdeterminate, that is, "any party could 'win' under some valid interpretation of legal doctrine", it does not mean that "the doctrine itself is indeterminate over all cases". Third, even with respect to hard cases it can not be said that the legal doctrine is completely indeterminate. Even in these cases, judges are constrained within the limits of legal doctrine.[80]

As his last resort Solum declares his position with these words:

> My point is that whatever counts as a case, whatever counts as practical determinacy, and whatever empirical study reveals, the truth about indeterminacy is different from that implied by most, if not all, formulations of the indeterminacy thesis in critical legal scholarship. These versions of indeterminacy will seldom, if ever, make a practical difference to the parties to a dispute. It is for this reason that I conclude that these current critical versions of the indeterminacy thesis are dogma.[81]

5 Conclusion

Although the debate around legal indeterminacy seems to have lost its popularity compared to previous decades, there are still some points left unresolved in this debate. During the heyday of the debate in the 1990s, the legal theory, at least in the Anglo–American countries, witnessed many interesting and useful attempts to argue for and against the legal indeterminacy thesis. Thus, the boundaries of this theoretical discipline were widened and new research areas for legal theory were opened.

The critical scholars, the main proponents of indeterminacy thesis, by referring to genius thinkers or philosophers outside of the legal theory like Wittgenstein, Gadamer and Derrida, have shown us that there might be a close relation, more than we might expect, between legal theory and the other main branches of contemporary philosophy.

As mentioned before, the problem of legal indeterminacy is related directly with legitimacy on the one hand, and with legal reasoning on the other. But, maybe it is more important to see that the critical scholars, by drawing attention to the nature of liberal legal theory, lead us to think about the problem of legitimacy in the liberal condition. In

[79] *Ibid.*, p. 494.
[80] *Ibid.*, pp. 494–495.
[81] *Ibid.*, p. 495.

fact, it seems that critical scholars are more convincing when they speak from the point of view of political theory. They can successfully show the inner contradictions and incoherency of liberal theory and practice. The mystification argument is so strong that no liberal counter argument can easily resist. Because of this, the mystification argument deserves more attention. However, when the case is for legal reasoning, it has to be said that the indeterminacy thesis, although it might be somewhat interesting and worth thinking upon, can hardly justify its basic arguments. The liberal rejoinder (whether we can still call this counter argument for indeterminacy thesis liberal), at least some versions of it, would be more coherent and structured. As a matter of fact, the indeterminacy thesis has been opposed by many liberal scholars and the basic arguments of the thesis related to legal reasoning have been proved false, or at least incoherent.

As to Lawrence Solum, one of the distinguished scholars who has taken the liberal side in the debate, it can be said that by using some interesting and original conceptual arguments like underdeterminacy, he has led us to notice the importance of the terms used in the debate. Besides this, by taking examples from actual cases, he has shown that arguments made in every part of legal theory, without taking note of the real conditions of life, would lack consistency. However, to appreciate his arguments (or counter arguments), they have to be seen in context, considering his whole attempt to make a more fully elaborated theory. He is known for his virtue-centered jurisprudence. His approach to the indeterminacy problem can be seen as a part of his judicial theory based on Aristotelian virtue ethics. So, his arguments have meaning only if they are understood in this context. However, this would be another task which is out of the scope of the current article.

The last point worth noting is that all these discussions about the problem of legal indeterminacy are rooted in the history of Anglo–American legal tradition. However its main discussions can also be traced in Continental legal tradition; they are directly related to some basic characteristics of the case-law system. Keeping in mind this condition, the debate around the indeterminacy problem can still help us to understand the very nature of the law and how it works.

faculty of law
istanbul university, turkey
gurler@yahoo.com

Some Preliminary Observations on Truth and Argumentation in the Jewish Legal Tradition

Bernard S. Jackson

1 Methodological Preliminaries

A legal philosophy colloquium in which I recently participated (at the University of Turin, in June 2004) was devoted to "Truth and Argumentation", and was concerned, in particular, to explore the possibilities (despite the prevailing postmodernist climate) of combating "relativist" theories of argumentation by stressing the relationship of argumentation to truth. Given the interest and contributions of our honouree in both the philosophy of law and comparative legal cultures, I hope that this paper may interest both him and other readers.

In addressing this issue from the perspective of the Jewish religious tradition, I was expected in Turin to avoid at least some of the supposed perils of a relativist approach. But clearly, claims which the Jewish tradition may regard as objective, true, and non-relativist, can only be so w i t h i n the framework of Jewish philosophy and theology. Why, then, should someone not committed to this Jewish framework privilege the epistemological claims which emerge from that particular tradition? Should we not, rather, have recourse to philosophy for a universal analytical framework, one within which we may achieve a non-relativist account of argumentation, based on a non-relativist account of truth?

One only has to put the matter in this way to problematise it. The Western analytical tradition is itself a cultural tradition, no doubt making universal claims, but making them, necessarily, within the framework of its own epistemological assumptions. It stands on no different level to that of any other particular cultural tradition, and we may therefore happily engage in comparison between it and any other particular cultural tradition, such as that of Judaism.

It is not, however, entirely clear what point—beyond that of description—may be served by such a comparative enterprise. For if the object is evaluation or critique, in order to arrive at a b e t t e r account of the relationship between truth and argumentation, we have to have an objective criterion of evaluation or critique, and it is not clear where such a criterion may come from, if not from the universalist claims made within one particular tradition or the other.

In this context, we must distinguish between internal and external questions. Inter-

nal questions are those which arise w i t h i n each of these worlds of discourse (using, necessarily, the language and concepts of that tradition: thus, strictly speaking, one can do this for the Jewish legal tradition only through the medium of the Hebrew language). External questions are those which arise in, and are posed from, and by the use of, the language of the other. What is the point of such external comparison? In much of my historical work, I have taken the view that the proper function of comparison is the generation of hypotheses which may then be applied to the other tradition, in order to determine whether they are meaningful at all in the foreign context, and if they are what answers may be discovered using the i n t e r n a l resources of the other tradition. Such an approach may also pose questions as to why issues prominent in one tradition (and even claimed there to be universal) are not sufficiently central to another tradition to have been manifest in the latter from internal analysis alone. I stress that this exercise is purely descriptive, not evaluative (unless some evaluative privilege has already been applied to one or other of the traditions being compared).

In what follows, I attempt primarily to describe some claims made from within the Jewish legal tradition. They may or may not prove helpful in posing questions to, or suggesting hypotheses for, Western jurisprudence. Conversely, we may usefully summarise those external questions from Western jurisprudence which both may provide hypotheses for the description of the Jewish legal tradition and at the same time enhance the communication of that tradition to an external audience.

For this purpose, reference may be made to the excellent monograph by Anna Pintore, *Il diritto senza verità* (1996), later published in English translation as *Law without Truth* (2000). After summarising the philosophical debate regarding the nature of truth in general, Pintore poses the question whether the concept of truth can be applied at all to norms. Contrary to those who would radically distinguish the concepts of truth and validity, viewing only the latter as relevant to norms, she argues that "predicating the truth or falsehood of norms" (in a fashion derived from Tarski) "is necessary for constructing a logic of norms". So far, so good—or so bad, if one does not accept the need for, or particular meaning of, the notion of "a logic of norms". Suffice it to say, for present purposes, that Pintore's claim does provide a useful comparative question to pose to Jewish law, as I shall presently argue. But if "predicating the truth or falsehood of norms is necessary for constructing a logic of norms", we then have to come clean on the particular conception of truth we are adopting in making that claim. Pintore examines in turn the rival candidates: truth as correspondence, truth as coherence, truth as consensus and procedural truth. While it is not Pintore's object in this book to draw conclusions for theories of argumentation, it is not difficult to see how adoption of these different conceptions of the truth of norms might generate different approaches to theories of argumentation. I here offer a few observations on this issue in the context of Jewish law.

2 Truth and Argumentation in the Jewish Legal Tradition

a) Truth in Judaism. If we propose to discuss Truth and Argumentation in the Jewish Legal tradition, we cannot avoid Jewish theology. Here, truth (or the nearest we can get to it in Hebrew: normally regarded as the concept *emet*) is not some autonomous concept:

it is one of the 13 attributes of God.[1] The Talmud states "The seal of God is truth".[2] Thus God's revelation is by definition true. Does it follow that this is the e x c l u s i v e source of truth, and if so what, and to whom, is the accepted range of divine revelation?[3] Judaism has traditionally been hostile to natural law and natural theology, at least insofar as they claim that there are sources of value independent of divine will and divine creation.[4]

b) Truth and Norms. Kelsen, following Hume, may have thought that failure to recognize the distinction between "is" and "ought", and the modalities appropriate to each (causality and imputation), was characteristic of pre-modern thought.[5] Genesis thus commences with an elementary conceptual mistake: creation of the world by divine command. Many have followed in the view that only propositions can be true; norms can "merely" be valid. Judaism's rejection of this distinction is expressed in a number of ways. If, as already noted, truth is an attribute of God, and if the norms of divine law are the means laid down to achieve *imitatio dei*, then they are of their very nature designed to achieve truth. A philosopher, however, might retort that this is merely their end, not their nature. If so, we may have to resort to a simpler form of argumentation: if "The seal of God is truth", then it follows that norms revealed by God are true, since they have been "sealed" (a metaphor for the conclusion of a covenant).

Steven Schwarzschild writes: "In Judaism truth is primarily an ethical notion: it describes not what is but what ought to be."[6] He cites the association of truth with ethical notions in the Bible[7] and rabbinic literature.[8] Here, too, an analytical philosopher might resist the implication that such associations entail the conclusion that truth itself is an ethical notion. They may not entail it logically (nor do the Jewish sources claim such entailment). Nevertheless, the association is supported by its coherence with a whole raft of beliefs (some already mentioned). And it has survived the Humean attack. As Schwarzschild points out, Hermann Cohen designates the normative unity of cognition and ethics as "the fundamental law of truth".[9] Some have gone further. Martin Buber seeks to identify faith [*emunah*] with truth [*emet*], here conceived as interpersonal trust. Does this sell out any "hard" conception of truth? In the theological context, the believer may very reasonably say: "My belief that X is true is based on my faith in the truthfulness of my source of information (God), which is far more reliable than any attempt I might make at independent confirmation." And even a very moderate secular sceptic of the le-

[1] Steven S. Schwarzschild 'Truth' in *Encyclopedia Judaica* XV (Jerusalem: Kete, 1973), p. 1414.

[2] *Shabbat* 55a; Jerusalem Talmud, *Sanhedrin* 1:5.

[3] An issue which recently got Chief Rabbi Sir Jonathan Sacks into hot water, when he suggested that divine revelation through the Torah was not the exclusive source of truth, and led to his being accused, illogically, of denying the "absolute" nature of Torah truth. See further <http://www.mucjs.org/rrs03intro.htm>.

[4] By B. S. Jackson, 'Natural Law Questions and the Jewish Tradition' *Vera Lex* VI (1986) 2, pp. 1–2, 6 and 10 as well as 'The Jewish View of Natural Law' [reviewing Novak's *Natural Law in Judaism*] *Journal of Jewish Studies* LII (2001) 1, pp. 136–145.

[5] H. Kelsen *Pure Theory of Law* trans. M. Knight (Berkeley: University of California Press 1967), pp. 76–85 (§§18–20), citing also his *Society and Nature* (Chicago: The University of Chicago Press 1943), pp. 249ff.

[6] Schwarzschield [note 1].

[7] Peace (*Zechariah* 8:16), righteousness (*Malachi* 2:6ff), grace (*Genesis* 24:27, 49), justice (*Zecheriah* 7:9), and even salvation (*Psalms* 25:4ff).

[8] *Mishnah Avot* 1:18, "The world rests on three things—truth, justice, and peace."

[9] Hermann Cohen *Ethik des reinen Willens* (Berlin: Cassirer 1904), ch. 1.

gal process will readily accept that truth is frequently constructed in the courtroom by w h o m we believe, not w h a t we believe.

c) Truth and Language. Access to the truth of norms in the Jewish tradition is mediated through the language of Torah. But what kind of language is this? The tradition itself endorses two seemingly opposite conceptions: on the one hand, the Hebrew of the Torah (if not of the man on the Tel-Aviv omnibus) is *lashon hakodesh*, the holy language, the language of the divinity, which predates human culture[10] and has depths, levels,[11] and forms of signification (such as its numerical connotations, generating exegesis by *gematria*[12]) which go well beyond human language. Moreover, the drafting of Torah—even without imputing to it any mystical levels of meaning—is held out to be perfect: there are no contradictions and nothing superfluous. Any apparent redundancy is the vehicle of added value meaning, and the coherence of the text is such that analogies may be drawn by linking together the most disparate sources. Its style is never arbitrary, nor is any aspect of its discourse structure: material found in collocation is put there for a purpose, however disparate its subject-matter. The use of analogy to interpret the Torah makes full use of purely literary, and not only substantive, connections.[13]

Yet against this, there is an opposed hermeneutic principle: "The Torah is written in the language of man".[14] This does not mean that it was written by human hands, but rather that it was written in a manner intelligible to human beings, using the conventions of human language. I shall not seek here to resolve the tension between these two opposed conceptions of the nature of the language of Torah. Suffice it to say that each is deployed, on occasion, in support of particular exegetical outcomes: outcomes requiring sophisticated literary exegesis on the one hand, outcomes validated by the "plain sense" [*peshat*] on the other. This may not be the place to discuss further the significance of the co-existence of such opposed approaches. For the moment, suffice it to note the recognition that particular forms of argumentation are premised upon particular conceptions of the nature of the language of the primary text.

[10] On the role of *Torah* in the creation of the world, see *Mishnah Avot* 1:4; cf. Philo, *de opif. mundi* 20, 25, 36 (divine *logos*, identified with Torah in *de migrat.* 130); see further W. Z. Harvey 'Torah' in *Encyclopedia Judaica* XV (Jerusalem: Keter 1973), p. 1236.

[11] On the distinction between *peshat* and *derash*, see R. Loewe 'The Plain Meaning of Scripture in Early Jewish Exegesis' *Papers of the Institute of Jewish Studies* 1 (1965), pp. 140–185; by L. I. Rabinowitz, 'Peshat' and 'Derash' in *Encyclopedia Judaica* (Jerusalem: Keter 1973) and older literature there cited; S. Kamin *Rashi's Exegetical Categorization in Respect to the Distinction between Peshat and Derash* (Jerusalem: Magnes Press 1986) (in Hebrew, with summary in English); D. W. Halivni *Peshat and Derash* (New York & Oxford: Oxford University Press 1991), pp. 52–88.

[12] Though not generally used for halakhic purposes.

[13] See, by B. S. Jackson, 'A Semiotic Perspective on the Comparison of Analogical Reasoning in Secular and Religious Legal Systems' in *Pluralism in Law* ed. A. Soeteman (Dordrecht: Kluwer Academic Publishers 2001), pp. 295–325 and, earlier, 'Analogy in Legal Science: Some Comparative Observations' in *Legal Knowledge and Analogy* ed. P. Nerhot (Dordrecht, etc., Kluwer Academic Publishers 1991), pp. 145–165.

[14] For the approach of R. Ishmael (as against that of R. Akiba), cf. Babylonian Talmud, *Sanhedrin* 64b and elsewhere. See M. Elon *Jewish Law* History, Sources, Principles, I (Jerusalem & Philadelphia: Jewish Publication Society 1994), pp. 371–374.

d) Truth and Logic. The claim that the language of Torah is divine and therefore significantly different from human language is paralleled in the Talmud by a remarkable passage, which appears to make a similar claim in respect of logic. We read in *Erubin* 13b:

> R. Abba stated in the name of Samuel: For three years there was a dispute between Beth Shammai and Beth Hillel, the former asserting, 'The *halachah* is in agreement with our views' and the latter contending, 'The *halachah* is in agreement with our views'. Then a *bath kol* issued announcing, '[The utterances of] both are the words of the living God, but the *halachah* is in agreement with the rulings of Beth Hillel'. Since, however, 'both are the words of the living God' what was it that entitled Beth Hillel to have the *halachah* fixed in agreement with their rulings? – Because they were kindly and modest, they studied their own rulings and those of Beth Shammai, and were even so [humble] as to mention the action of Beth Shammai before theirs.

The immediate result of this story is a hierarchical rule: in cases of conflict between the views of the Schools of Hillel and Shammai, the former (normally[15]) take precedence. Moreover, a very human (if non-legal) justification is given for this outcome: not only did Beth Hillel take account of the views of their opponents; they also referred to them respectfully. Yet, at the same time, revelation is strongly stressed in the passage. First, it is a "heavenly voice" which reveals this hierarchical rule, despite the fact that such a *bat kol* is excluded as a source of authority for the resolution of (substantive) halakhic disputes in another famous Talmudic passage.[16] Secondly, even the rejected opinion, that of Beth Shammai, is accorded the status of revelation: "both are the words of the living God" [*divre elohim hayyim*]. The precise meaning of this has been a matter of considerable scholarly discussion. I myself incline to the view that the *halakhah* as a whole, according to this passage, belongs to the sphere of divine epistemology, in which the law of contradiction may be transcended; a more pragmatic approach, however, is required in practice.[17]

[15] On the historical development of this rule, and residual exceptions to it, see S. Safrai 'Bet Hillel and Bet Shammai' in *Encyclopedia Judaica* IV (Jerusalem: Keter, 1973), pp. 737–741.

[16] For the famous talmudic story of the "oven of Akhnai"cf. Babylonian Talmud, *Baba Mezia* 59b. See E. N. Dorff & A. Rosett *A Living Tree* (Albany: State University of New York Press 1988), pp. 189f.; Elon [note 14], pp. 261–263. I have suggested elsewhere that the rejection may be a reaction against the use of the "heavenly voice" [*phone ek tou ouranou*] in the New Testament. J. B. Jackson 'The Prophet and the Law in Early Judaism and the New Testament' in *The Paris Conference Volume* ed. S. M. Passamaneck & M. Finley (Atlanta: Scholars Press 1994), pp. 67–112 [Jewish Law Association Studies VII] at p. 84. For further discussion, see E. Berkovits *Not in Heaven* The Nature and Function of Halakha (New York: Ktav Publishing House 1983), pp. 47–50; M. Koppel *Meta-Halakhah* Logic, Intuition and the Unfolding of Jewish Law (Northvale, New Jersey & London: Jason Aronson 1997), pp. 79–86 (including the wider controversy regarding the status of disputes between R. Eliezer and R. Joshua); B. S. Jackson 'Literal Meaning and Rabbinic Hermeneutics: A Response to Claudio Luzzati and Jan Broekman' *International Journal for the Semiotics of Law / Revue Internationale de Sémiotique Juridique* XIV (2001) 2, pp. 129–141 at 134f.

[17] B. S. Jackson 'Secular Jurisprudence and the Philosophy of Jewish Law: A Commentary on Some Recent Literature' *The Jewish Law Annual* 6 (1987), pp. 33f; *aliter*, Hanina Ben Menahem 'Is there Always One Uniquely Correct Answer to a Legal Question in the Talmud?' *The Jewish Law Annual* 6 (1987), pp. 167ff. See further, with reference to other rabbinic sources (notably: Babylonian Talmud, *Hagigah* 3b; the R. Yannai tradition in the Jerusalem Talmud, *Sanhedrin* 22a and elsewhere), Berkovits [note 16], pp. 50–53; Halivni [note 11], pp. 101–125, who develops (on p. 111)—on the basis of such sources—a "double-verity theory which dichotomizes between practice and intellect".

In short, the passage appears to claim that logically contradictory norms may both be true, since both are "the words of the living God", and such words are by definition true. Human beings are not expected to be able to understand how both may simultaneously be true—how, in other words, the law of contradiction may be transcended—but another "true word", that of the divine voice, the *bat kol*, has assured us that this must be the case, and so it must be. It follows that human logic is not a criterion for the evaluation of divine truth. PINTORE may still be correct in claiming that "predicating the truth or falsehood of norms is necessary for constructing a logic of norms"; it does not however follow from this (for the Jewish tradition) that "predicating the truth or falsehood of norms is *sufficient* for constructing a logic of norms".

e) Truth and Argumentation. The above remarks about the relations between truth, language and logic in the Jewish legal tradition indicate at the very least forms of pluralism which may make it difficult to conceive of claims to the truth of argumentation in particular cases. Yet in practice, as *Erubin* 13b itself indicates, strategies are adopted in order to mitigate what otherwise might appear to lead to a system devoid of criteria for determining the very truth in which it so passionately believes, and which indeed provide the system with a certain dynamic capacity for change through new argumentation.[18] In seeking to identify these strategies,[19] we may usefully adopt PINTORE's classification of different conceptions of truth, and ask to what extent each is applicable within the Jewish legal tradition.

SCHWARZSCHILD observes that Jewish philosophers generally accepted the Greek notion of truth as "correspondence with reality",[20] even though "such intellectualism, however, is ultimately superseded by biblical ethicism".[21] Such philosophical acceptance, however, relates to the general concept of truth, not the form of truth attributed to the divine word. The conception of *lashon hakodesh*, observed above, implies a conception of truth internal to a particular form of discourse (comparable, I may note, to the SAUSSUREan conception of linguistic meaning). Moreover, it would be problematic to claim that the language of the norms of Torah-law "corresponds with reality" in any conventional sense. In fact, the traditional Jewish approach has more in common with PLATO: the ideal world of the norms of Torah, SOLOVEITCHIK argues, is no less than

[18] As in the capacity of later authorities to adopt an earlier minority view, using the principle of *hilkheta kebatra'i*. See further Elon [note 14], pp. 267–272. See also I. Ta-Shma 'The Law is in Accord with the Later Authority – *Hilkhata Kebatrai*: Historical Observations on a Legal Rule' in *Authority, Process and Method* Studies in Jewish Law, ed. H. Ben- Menahem & N.S. Hecht (Amsterdam: Harwood Academic Publishers 1998), pp. 101–128.

[19] I am not referring here to the various formulations of "hermeneutic rules" [*middot*] adopted by the Rabbis for the exegesis of the biblical text, notwithstanding the fact that they include a number comparable to modern rules of statutory interpretation (such as the relationship between general and specific terms, and a version of *eiusdem generis*; see Dorff & Rosett [note 16], pp. 198–204; B. S. Jackson 'On the Nature of Analogical Argument in Early Jewish Law' in *The Jewish Law Annual* XI (1994), pp. 137–168 and especially at 154–160). Given the many "discretionary" elements within most of these rules, they generally generate possible, rather than necessary interpretations, leaving open a choice between different possibilities which still has to be made on other grounds.

[20] Citing Saadiah Gaon *Book of Beliefs and Opinions*, preface and 3:5; Abraham ibn Daud *Emunah Ramah*, 2:3.

[21] Citing Maimonides *Guide of the Perplexed*, 3:53, end.

a description of the reality of divine creation, and a programme through which that reality may be recreated from the corruptions and distortions which have crept into human, mundane existence.[22] There may, indeed, be an aspiration to create a new correspondence with that ideal reality. But the truth or meaning of that reality is not accessible through some test of correspondence with empirical reality as perceived by human senses.

The conception of truth as c o h e r e n c e might appear to have a much stronger claim, in the context of Jewish law. As already noted, the coherence of the biblical text is considered so strong that analogies may be drawn by linking together the most disparate sources. Elsewhere I have compared Ronald Dworkin's account of the methodology of Hercules, who must strive to take account of the political values of the *whole* legal system, in the course of deciding a hard case in any particular area of that legal system. It is hardly surprising that Dworkin attributes the capacity so to do to a judge of "superhuman" abilities.[23] And even then, Dworkin does not claim that the result of the argumentation will be "demonstrable", brooking no counter-argument, but only that it will be the best possible argument. How do we know that it is the best possible argument? Because it comes from Hercules. How do we know who is Hercules? Because his is the best possible argument! To escape from this vicious circle, it appears that we need some external criterion to determine who Hercules is— i.e. who is the "superhuman" judge to whom the divinity has entrusted such charismatic (delegated) authority.

I put the matter in this provocative manner in order to indicate the necessity to incorporate a version of the conception of truth as c o n s e n s u s . That notion has two applications in the context of the Jewish legal tradition.[24] First, it indicates the need, in general, to adopt a pragmatic criterion of truth (not what is said but who says it): truth is here defined as emanating from a recognised source of authority, just as we saw in *Erubin* 13b, where, for practical purposes, we follow the views of Bet Hillel rather than Bet Shammai, notwithstanding the fact that, *sub specie aeternitatis*, each one may have a hold on the divine truth. Jewish law has a whole series of such pragmatic rules for determining controversies.[25] That brings us to the second sense in which, it may be argued, "consensus" has been adopted in Jewish law as a criterion of truth. Although the *halakhah*

[22] See my discussion of J. B. Soloveitchik *Halakhic Man* trans. Lawrence Kaplan (Philadelphia: The Jewish Publication Society of America 1983) in 'Comparazioni interne ed esterne di ordinamenti giuridici religiosi: la prospettiva del diritto ebraico' *Daimon* Annuario di diritto comparato della religioni 2 (2002), pp. 257–283 at 275–278. Cf. A. Pintore *Law without Truth* (Liverpool: Deborah Charles Publications 2000), p. 126, quoting M. Detienne *Les maîtres de vérité dans la Grèce archaïque* (Paris: Maspero 1967), pp. 42f: "in a system of religious thought where the efficacious word triumphs, there is no distinction between »truth« and justice; this type of word is always in conformity with the cosmic order because it creates the cosmic order and is its necessary instrument."

[23] A "lawyer of superhuman skill, learning, patience and acumen". Rondald Dworkin *Taking Rights Seriously* (London: Duckworths 1968), p. 105.

[24] It is even more central within Islamic jurisprudence. See A. Hassan *The Doctrine of Ijma in Islam* (Islamabad: Islamic Research Institute 1976); J. R. Wegner 'Islamic and Talmudic Jurisprudence: The Four Roots of Islamic Law and Their Talmudic Counterparts' *American Journal of Legal History* XXVI (1982), pp. 25–71 and in particular at 39–44 and 55–58; and for the possibility of Islamic influence on Jewish law in this context, S. W. Baron *A Social and Religious History of the Jews* VI, 2nd ed. (Philadelphia: Jewish Publication Society of America & New York: Columbia University Press 1958), p. 100.

[25] See *Controversy and Dialogue in Halakhic Sources* I–II, ed. H. Ben-Menahem, N. Hecht & S. Wosner (Boston & Jerusalem: Boston University Law School Institute of Jewish Law & Israel Diaspora Institute 1991–1993) in Hebrew with synopses in English.

traditionally endorsed a majoritarian criterion of decision-making,[26] in recent centuries that has given way to a demand for a "consensus" of halakhic scholars. The demise of the ancient Sanhedrin, within which a majority vote could be ascertained, certainly contributed to this development. But that is hardly a sufficient explanation: consensus appears to have entered Jewish law as a criterion for the acceptance of new argumentation around the 14th century.[27] And the early sources which apply it seem to deploy it not so much as a guarantee of truth but rather as a protection against taking responsibility for the consequences of error in the course of argumentation.[28]

We have still failed to identify a conception of truth, or even a combination of conceptions, capable of generating demonstrable argumentation. Perhaps PINTORE's final candidate, p r o c e d u r a l t r u t h , will prove of greater assistance? A case may, indeed, be made for procedural truth, but only at the cost of severing the link between the truth of a decision and the truth of the argumentation used to justify that decision. For decision-making and argumentation are more radically distinct within the Jewish legal tradition than can be the case in secular systems based on the ideology of the rule of law.[29] How can this be, if truth is identified with the rules of law divinely-revealed in the Torah? The answer is that these divinely-revealed rules were not always conceived as the *e x c l u s i v e* form of revelation of divine truth. In fact, the original conception of judicial activity was not through argumentation (or consultation of a written text) at all, but rather through the divine guidance of the intuition of the judge as to the right decision in the case before him. As Jehoshaphat charged the judges he appointed: God will be with you in the act of giving judgment: *ve'imahem bidvar mishpat* (*2 Chron.* 19:6). Though this notion of the charismatic judge gave way in time to a more rationalist conception, traces of it remain to this day within the Jewish legal system.[30] Indeed, we may apply to it a KELSENian theory of "normative alternatives" (the judge is authorised to decide either in accordance with the law or not in accordance with the law) with a far clearer theoretical basis than that which Kelsen provides in the context of secular legal systems.[31] The conclusion, then, is that the truth of the legal decision (*psak*) is a function of the procedure of the appointment of the judge and his proper conduct of the proceedings, rather than of the argumentation he has used. There is a story in relatively recent times of an halakhic authority being

[26] Babylonian Talmud, *Baba Mezia* 59b; see also note 16.

[27] B. S. Jackson '*Agunah* and the Problem of Authority: Directions for Future Research *Melilah* (2004) 1, pp. 1–78 [Publications of the Agunah Research Unit 1] and at <http://www.mucjs.org/MELILAH/2004/1.pdf> in §§ 4.3.4 and 5.1.

[28] See further B. S. Jackson '*Mishpat Ivri, Halakhah* and Legal Philosophy: *Agunah* and the Theory of »Legal Sources«' *Jewish Studies, an Internet Journal* [JSIJ] 1 (2002), §4.3.3 and at <http://www.biu.ac.il/JS/JSIJ/1-2002/Jackson.pdf >.

[29] B. S. Jackson 'Significato letterale. Semantica e narrativa nel diritto biblico e nella teoria contemporanea del diritto' *Ragion Pratica* 12 (1999), pp. 153–177 or 'Literal Meaning: Semantics and Narrative in Biblical Law and Modern Jurisprudence' *International Journal for the Semiotics of Law / Revue Internationale de Sémiotique Juridique* 13 (2000) 4, pp. 433–457.

[30] See further B. S. Jackson 'L'ebraismo come ordinamento giuridico religioso' *Daimon* 1 (2001), pp. 165–183 or 'Judaism as a Religious Legal System in *Religion, Laws and Tradition* Comparative Studies in Religious Law, ed. A. Huxley (London: RoutledgeCurzon 2002), pp. 34–48.

[31] Kelsen *Pure Theory of Law* [note 5], pp. 269, 273 and 354; Hans Kelsen *General Theory of Norms* (Oxford: Clarendon Press 1991), p. 248 and ch. 58 §xxi in general; B. S. Jackson *Making Sense in Jurisprudence* (Liverpool: Deborah Charles Publications 1996), pp. 115f.

asked his opinion of the decision of an illustrious colleague. Just tell me the decision, he insisted, not the argumentation; I might disagree with the argumentation, but I would always endorse his decision.[32]

To conclude this brief review of the relationship between truth and argumentation in the Jewish legal tradition. We are not impelled by the foregoing to take a postmodernist approach to Jewish law (though some have been tempted to invoke Jewish law in the postmodernist cause[33]), such that anything goes, any interpretation is as good as any other. For models of good argumentation have been internalised by various communities of *halakhah* (with some internal differences). Within any such community there will be a fair measure of agreement as to what constitutes a good argument and what does not. Of course, this does not exclude controversies on which there will be no demonstrable outcome. Here, pragmatic rules have to be adopted, in the knowledge that "these and these are the words of the living God" (emphErubin 13b).

3 By Way of Conclusion

What, then, is the outcome of these comparative reflections? I have used an external framework in order to pose questions to the Jewish legal tradition, and I have identified internal resources which may provide partial answers to these questions. But are these partial answers so peculiar, theological, and culturally contingent as to lack any value in terms of a potential contribution to these same issues as posed within Western jurisprudence?

An adherent of secularisation theory might answer this question in historical terms: the sovereignty of the law and the majesty of its argumentation derives from the West's adoption or construction of the divine right of kings on the one hand and of holistic theories of interpretation on the other, from the Bible and later Jewish tradition, mediated and fortified through a Christianised Rome.[34] But such historical theories are beyond our present concerns.

CENTRE FOR JEWISH STUDIES
UNIVERSITY OF MANCHESTER, UK
BSJACKSON@MANCHESTER.AC.UK

[32] See M. Elon 'More about Research into Jewish Law' in *Modern Research in Jewish Law* ed. B. S. Jackson (Leiden: E. J. Brill 1980), pp. 89f note 52: "R. Hayyim of Brisk had a query regarding a practical matter. He decided to turn to the leading authority of these times, R. Isaac Elhanan of Kovno. He wrote: »These are the facts and this is the question; I beg you to reply in a single line – 'fit' or 'unfit', 'Guilty' or 'not Guilty', without giving your reasons.« When R. Hayyim was asked why he had done so, he replied »The decisions of R. Isaac Elhanan are binding because he is the *Posek* of our generation, and he will let me know his decision. But in scholarship and analysis my ways are different from his and if he gave his reasons I might see a flaw in it and have doubts about his decision. So, it is better if I do not know his reasons.«"

[33] See Suzanne Last Stone 'The Emergence of Jewish Law in Postmodernist Legal Theory' at <http://www.juedisches-recht.org/miller/harvard/Postmodernist-Legal-Theory.htm>, and literature there cited.

[34] E.g. P. Goodrich *Reading the Law* (Oxford: Basil Blackwell 1986), pp. 4–8. A more radical instance of secularisation is suggested by P. Goodrich in his *Languages of Law* (London: Weidenfeld and Nicolson 1990), »The Eucharist and English Law: A Genealogy of Legal Presence in the Common Law Tradition«, pp. 53–110.

Formalism and Anti-Formalism in Judicial Reasoning

Zdeněk Kühn

Although judges are rarely legal philosophers or theoreticians, and are seldom interested in legal theory, their work is theory-laden. Judges operate in a world full of concepts, doctrines, theories, and other abstract standards. Their work is dependent on generally accepted narratives about the nature of their activity. The content of these narratives is filled by judicial ideology,[1] a quasi-description of judicial activity which is constructed through a complex set of interactions between academic teachings, political rhetoric of the separation of powers, judicial self-perceptions, the views and expectations of the legal community, and the prevailing opinions of society as a whole on the proper role of the judiciary. Judicial ideology determines and prescribes the proper method of the judicial interpretation of the law; as well as the ideal role a judge should have in society.[2] Throughout this work, I employ the term "ideology" in a value-neutral manner without any negative or positive connotations.[3]

Following Wróblewski's analysis, I distinguish three main basic approaches to the judicial application of law.[4] The first possibility is the ideology of bound judicial decision-making. It espouses concepts of limited law and limited sources of law, which I am going to develop and illustrate further throughout this and the following chapters. This ideology maintains that, in their work, judges are fully bound by general rules, which in turn

[1] For the term and my intellectual inspiration see Jerzy Wróblewski *The Judicial Application of Law* (Kluwer 1992).

[2] The analysis that follows reflects my agreement with Mark Osiel, that "the judge resembles the resolutely anti-intellectual politician whose policies reveal him in fact to be, in Keynes' words, »enslaved to some defunct economist.« However disdainful of theory, the judge is sure to imbibe some notions concerning what adjudication is about and what makes some argumentation more persuasive to him than others. It is legal theory that provides him with those notions, however unaware he may be of their controversial status among jurisprudents." Mark J. Osiel 'Dialogue with Dictators: Judicial Resistance in Argentina and Brazil' *Law & Social Inquiry* 20 (1995), pp. 481ff at 488.

[3] In the meaning of the 'ideology' I follow Karl Mannheim's "the total conception of ideology", as elaborated in his *Ideology and Utopia* (original German in 1929), first translation in 1936, see Karl Mannheim, *Ideology and Utopia* An Introduction to the Sociology of Knowledge, trans. Louis Wirth & Edward Shils (New York: Harcourt, Brace & World 1968), pp. 55ff, 64ff & 265ff. The very term 'ideology' in this meaning is value neutral, without attributing any positive or negative connotations to it. In contrast with value neutrality of this use of ideology, "[t]he particular conception of ideology is implied when the term denotes that we are sceptical of the ideas and representations advanced by our opponent." (p. 49).

[4] See Wróblewski [note 1].

fully control their adjudication. General rules should be followed more or less mechanically, using arguments derived from the literal meaning of these rules. What matters according to this ideology is the correct outcome, in this context 'correct' meaning logical consistency with general rules pre-established within the system.[5] Weber's "formally logical rationality" captures and explains this approach. It is of no consequence whether the decision is made in accordance with some ideals of justice, whether it is effective, etc.[6]

On the opposite side of that spectrum we find the ideology of free judicial decision-making.[7] The basic tenet of this ideology is emphasis on outcomes consistent with some values prevalent in the system (political ideology, religion, the idea of justice, effectiveness etc.), while adherence to general rules is of secondary importance. What matters is the correct outcome, in this context "correct" meaning consistency with the applicable value system, not any sort of consistency with general rules.[8]

Finally, the ideology of legal and rational judicial decision-making is an effort to find a balance between the impossible ideals of the former ideology and too unrestrained conceptions of the latter. The ideology of legal and rational judicial decision-making takes from the latter its realism, acknowledging that any legal system is necessarily open and gives judges a wide arena for creative adjudication. That is why the ideology of legal and rational judicial decision-making is closer to free judicial decision-making, while at the same time it emphasizes values of legal certainty which would be undermined if some basic tenets of legalism and formalism embedded within the ideology of bound judicial decision-making would be completely ignored.[9]

The last several decades in Europe have witnessed the gradual decline of the ideology of bound judicial decision-making and a shift to less formal and more substantive approaches to law.[10] I will not describe the discussions trying to analyse a desirable ideology of judicial decision-making,[11] as it is not, after all, within the aim or scope of this work. I will attempt to show shifts of Western and Central European judicial and legal discourse between both poles of the spectrum of justification of judicial activity.

1 The Ideologies of Bound and Free Judicial Decision-Making in Comparison

The ideology of bound judicial decision-making[12] is a simplistic account of the judicial process which explains the nature of judicial activity as the application of enumerated pre-existing standards, typically the rules contained in the codes and other legislation. This ideology rests on the theory of the separation of powers. It does so to the extent that,

[5] Idem, pp. 250ff.

[6] This basically corresponds to Damaška's hierarchical ideal of officialdom, see Mirjam Damaška *The Faces of Justice and State Authority* A Comparative Approach to the Legal Process (New Haven 1986), pp. 18–23.

[7] Despite a similarity in terms, it is not identical with the school of free law, that is, *Freirechtslehre*.

[8] Cf. Wróblewski [note 1], pp. 250ff.

[9] Cf. idem, pp. 229ff.

[10] Idem, pp. 26ff, 271ff. & 305ff.

[11] Most importantly, in European circles an attempt to describe such an ideology (though not using this terminology) was made by Robert Alexy *A Theory of Legal Argumentation* The Theory of Rational Discourse as Theory of Legal Justification (Oxford: Clarendon Press 1989).

[12] See Wróblewski [note 1], pp. 273ff.

from today's vantage point, it is fair to say that this theory "overdramatizes"[13] the distinction between the judiciary and the legislature. Textual positivism [*Gesetzespositivismus*] is the principal methodology of legal interpretation upon which the ideology of bound judicial decision-making is based.[14] In its most extreme version, textual positivism consists in nothing more than the textual exegesis of law. Legal theory based on the ideology of bound judicial decision-making carefully demarcates the line between the making of law, which is reserved exclusively to the legislature, and its application, a process in which courts are supposed to match up that law mechanically to facts.[15] The typical paradigm of statutory construction based on this ideology is the syllogism.[16]

In contrast, the ideology of free judicial decision-making is pragmatic. It does not adore any particular method of the interpretation of the law; all are of equal value. What matters is the result achieved, while the method used to bring it about is of secondary and mostly rhetorical importance.[17] As law is, in any case, open to a plethora of divergent readings, this ideology goes on; there is no qualitative difference between the tasks performed by the judiciary and those of the legislature.

The original idea behind bound decision-making is to limit judicial discretion, thereby limiting judicial power. For a judge to be bound to obey the formal sources of law is supposed to be the ordinary state of affairs, assuring the predictable application of law.[18] Under the ideology of bound judicial decision-making, the legal system is conceived of as static. Legal actors attribute to the system a quasi-material existence.[19] Law is composed of nothing but the binding sources of law. The concept of law is inseparably connected with formal validity;[20] as formal validity sets the criteria which determine whether or not something is the law, the law is easily recognizable.[21] Anything that does not qualify facing the criteria of validity test is "non-law" and therefore is of no relevance in legal argumentation. Most extra-legal standards, policies, efficiency etc. are excluded from the

[13] H. L. A. Hart *The Concept of Law* 2nd ed. (Oxford 1994), p. 274.

[14] Tony Weir translates '*Gesetzespositivismus*' as 'textual positivism'. The original German term actually means the positivism of statutes, i.e., legal reasoning adhering only to statutory texts (the literal translation 'legal positivism', however, does not mean the same in English as in German and many other continental languages, including Slavic languages). Cf., by Franz Wieacker, *A History of Private Law in Europe* with particular reference to Germany, trans. Tony Weir (Oxford 1995), pp. 442ff or *Privatrechtsgeschichte der Neuzeit* unter besonderer Berücksichtigung der deutschen Entwicklung 2. Aufl. (Göttingen 1967), pp. 558ff. See also Franz Bydlinski *Juristische Methodenlehre und Rechtsbegriff* (Wien & New York 1982), pp. 186ff.

[15] Damaška [note 6], p. 37.

[16] Wróblewski [note 1], 273 ff.

[17] Cf. recently the critique of such legal instrumentalism by Brian Tamanaha *Law as a Means to an End* Threat to the Rule of Law (Cambridge 2006).

[18] Of course, "once it is perceived that each decision by a legal official involves a personal choice and can never be purely mechanical in character, adherence to binding law may itself be perceived as highly arbitrary, in the absence of any element of persuasion." Patrick H. Glenn 'Persuasive Authority' *McGill Law Journal* 32 (1987), pp. 261ff at 264.

[19] Csaba Varga *Law and Philosophy* Selected Papers in Legal Theory (Budapest 1994), pp. 240ff & 297ff.

[20] For a wonderful introduction to the concept of formal validity, its historical emergence, its socio-economic prerequisites and its historical antecedents see Varga [note 19], pp. 209ff.

[21] This might also be referred to as "hard positivism". Conceptually, such "hard positivism" is advanced in the original edition of Hart *The Concept of Law* (1960), while the postscript by Penelope A. Bulloch & Joseph Raz reflects a shift to soft positivism in its 2nd ed. (Oxford: Clarendon Press 1994), pp. 250–254).

reasoning when law is applied[22] because they are not "the law proper". Though they are pertinent in the process of legislation, they are of no consequence in adjudication. The notion of, say, persuasive authority, is without any significance whatsoever. That is why I call this conception of law the conception of "limited law."[23]

Within the ideology of bound judicial decision-making limited law is confined to a few formal "sources of law", so that the very concept of sources of law is highly restrictive. In the Continental version of this ideology, law is completely identified with the enacted law of the nation state,[24] i.e., national codes and statutes.[25] The application of international legal norms within the sphere of municipal law is at best very unlikely, if not conceptually excluded.[26]

According to the ideology of free judicial decision-making, the effort to make a rigid separation of law from non-law is considered unworkable. Since judges are viewed, at one and the same time, as both a law-applying and law-making body, the judge must necessarily take into account factors other than strictly legal ones. If a judge adhering to the ideology of free judicial decision-making serves in a state which embraces a liberal laissez-faire philosophy, she is likely to find these non-legal factors in the value framework of the community.[27] However, if the judge serves in a type of state which actively intervenes into social affairs, the ideology presupposes the enforcement of some official state policy and doctrines which had a previous and separate existence from to the text of the statute and with which any statute must be consistent.[28]

The overall conception of the ideology of bound judicial decision-making and the concepts related thereto rests on clear and rigid dichotomies: binding/non-binding, applicable/non-applicable or valid/invalid,[29] where any third alternative (e.g. an argument not formally binding but still having some force in legal argumentation) is conceptually ruled out (i.e., *tertium non datur*). A related concept is that of 'hard' law, with which the ideology of bound judicial decision-making is permeated; for instance, it posits that the only characteristic of law which matters is its binding force, and anything else (for example, the persuasiveness or societal acceptability of some selected legal solution) is to be disregarded.

[22] Wieacker [note 14], p. 341.

[23] I borrowed the term from, and was inspired by David Lyons 'Justification and Judicial Responsibility' *California Law Review* 72 (1984), p. 178.

[24] Konrad Zweigert & Hein Kötz *An Introduction to Comparative Law* trans. Tony Weir (Oxford 1998), p. 15 ("At a time of growing nationalism, this legal narcissism led to pride in the national system").

[25] As Common Law spread throughout the world from its English source, it came to earn the title, 'common', and nationalist conceptions of law became quite foreign to Common Law systems. It seems to be much more 'transnational' than one could expect from the position of a positivistic perspective on a domestic legal order. It has a unique "consciousness that common law is a whole." Esin Örücü 'Comparative Law in British Courts' in *The Use of Comparative Law by Courts* ed. Ulrich Drobnig & S. van Erp (The Hague, London & Boston: Kluwer Law International 1997), p. 257. As Örücü points out, this temptation is really unique and is comparable, perhaps, only to the Islamic legal family.

[26] In fact, the dualist approach to the relationship of international to municipal law seems to be characteristic for the 19th century.

[27] In view of the American obsession with efficiency, an American judge might be likely to find a basic comparator of his legal reasoning in the concept of efficiency.

[28] Cf. Damaška [note 6], pp. 71ff.

[29] Cf. Michel van de Kerchove & Francois Ost *Legal System Between Order and Disorder* (Oxford & New York: Oxford University Press 1994), pp. 97–98.

It is worth mentioning the historical interests that lay behind the evolution of both rival ideologies of judicial decision-making. The modern ideology of bound judicial decision-making, as reflected in formalization of law and the precise and clear separation of it from 'non-law', was in the immanent interest of the emerging bourgeoisie, which needed law to be comprehensible and predictable, run by state bureaucrats and judges that resembled rather self-operating machines, as opposed to the feudal legal chaos and the misuse of law by omnipotent absolutist governments.[30] Though today these early modern notions of judges as perfect machines seem naïve and ridiculous, if not offensive, such was not the case when the early modern idea of bound judicial decision-making was becoming prominent. This process has been, perhaps, best explained by Max Weber:

> Juridical formalism enables the legal system to operate like a technically rational machine. Thus it guarantees to individuals and groups within the system a relative maximum of freedom, and greatly increases for them the possibility of predicting the legal consequences of their actions. Procedure becomes a specific type of pacified contest, bound to fixed and inviolable "rules of games".[31]

The idea that it is conceptually possible to regulate all future legally relevant behaviour by general rules is closely connected to the liberal *laissez-faire* idea of the limited state and the early liberal idea of law. As most social problems would be settled by means other than resort to the state and its repressive machinery, the extent of the corpus of laws would also be quite small. That is why the early modern lawyers and philosophers considered it conceptually possible for law to maintain the characteristics of generality, formality, positiveness and autonomy, which would promote legal security also through bound judicial decision-making.[32]

In contrast, the motives behind the development of the ideology of free judicial decision-making are more diverse. They cover rationales starting from anti-formalist revolt against conceptual possibility of general rules through various revolutionary programs to transform society by all possible means, including judicial power, which should also implement the policies and ideals of the new social order, disregarding constraints put in place by general rules and classical ideologies of decision-making.

The ideology of bound judicial decision-making intertwined most features of the 19th century Continental exegesis. Many of these ideological features, as I shall show presently, are also present in the explicit judicial style of opinion-writing in many European Continental countries, above all France. In contrast, the ideology of free decision-making in

[30] See *Max Weber on Law in Economy and Society* ed. Max Rheinstein and trans. Edward Shils & Max Rheinstein (Cambridge 1969), pp. 226ff.

[31] Idem, pp. 226–227. According to Weber, the guaranty of adherence to objective norms "was sought after by economic interest groups which the princes wished to favor and tie to themselves because they served their fiscal and political power interests. Most prominent among these were the bourgeois interests, which had to demand an unambiguous and clear legal system, that would be free of irrational administrative arbitrariness as well as of irrational disturbance by concrete privileges, that would also offer firm guaranties of the legally binding character of contracts, and that, in consequence of all these features, would function in a calculable way. The alliance of monarchical and bourgeois interests was, therefore, one of the major factors which led towards formal legal rationalization." Idem, p. 267. For a modified account of this, cf. Roberto M. Unger *Law in Modern Society* Towards a Criticism of Social Theory (New York & London 1976), pp. 66–76.

[32] Cf. Unger [note 31], pp. 52ff.

its radical form never ruled the self-perception of Continental judges, with the exception of revolutionary occasions, like first years after the 1917 October Revolution in Russia,[33] the ideology of decision-making in Nazi Germany,[34] or, as will be analysed below, the first years following the Communist takeovers in Central Europe.

In fact, both models are conceptually possible even in their extreme variants, though they are rarely realized. The pure model of free judicial decision-making would lead to a situation of utter legal chaos, as unrestrained judges would decide all legal issues according to their own wisdom of justice (or any other applicable value system).[35] Under the pure model of bound judicial decision-making, in contrast, in case there is any gap in the law or any other problem of interpretation, judges are required to refer the issue back to the law-maker, which is the only body competent to fill that gap by a new rule. A legal system based on this extreme notion does not need legal interpretation by law applying bodies, and the only suitable interpretation is the authentic interpretation by the law-giver or like body.[36] For this reason, although both ideologies are conceptually possible, they are impossible to realize practically over the long term.

2 Formalism and Anti-Formalism in Judicial Reasoning

The ideology of bound judicial decision-making is deeply intertwined with formalist reasoning, which has a counterpart and rival ideology in anti-formalist reasoning. Since I refer to certain types of judicial reasoning as formalist, I must clarify what is meant in this work by formalism and anti-formalism.[37] According to Unger, "[t]here is an issue that overpowers and encompasses all others in the history of the modern Western rule of law[,] […] the problem of formality in law."[38] As judicial decision-making is a highly formalized activity, labelling judicial activity as formalist in this sense shall be *prima facie* value neutral or often even positive, reflecting the governing conception of the judicial and legal discourse, which in the era of modernism has developed towards being primarily rule-based.[39] To quote Unger again, "law is never purely formal, nor can formality ever vanish."[40] One can easily find a plethora of meanings of formalism in legal writings.[41] That is why a brief overview of this problem is necessary.

The most general sense of the term, "formalism" is that outlined already with refer-

[33] John Hazard *Settling Disputes in Soviet Society* The Formative Years of Legal Institutions (New York: Columbia University Press 1960), p. 17 (the early Soviet regime, after annihilating the old Tsarist law, placed "the right to develop law in the hands of the court exercising its own concept of Socialist justice").

[34] See Ingo Müller *Hitler's Justice* The Courts of the Third Reich (Cambridge, Mass.: Harvard University Press 1991).

[35] This was basically what happened in Russia after the 1917 October Revolution. Cf., for a more thorough elaboration, Hazard [note 33].

[36] Cf. Csaba Varga *Lectures on the Paradigms of Legal Thinking* (Budapest: Akadémiai Kiadó 1999), pp. 23ff.

[37] Cf., as a classic article translated into English, Hans Kelsen 'Legal Formalism and the Pure Theory of Law' in *Weimar* A Jurisprudence of Crisis, ed. Arthur J. Jacobson & Bernhard Schlink (Berkeley, Los Angeles & London: University of California Press 2000), pp. 76ff at 81.

[38] Unger [note 31], p. 203.

[39] Frederick Schauer 'Formalism' *Yale Law Journal* 97 (1988), pp. 509ff.

[40] Unger [note 31], p. 205.

[41] Martin Stone, for instance, found in legal scholarship at least seven varieties of formalism. See Martin Stone 'Formalism' in *The Oxford Handbook of Jurisprudence and Philosophy of Law* ed. Jules Coleman & Scott

ence to Weber. In this sense, formality relates to important qualities which characterize any modern legal system: "the striving for a law that is general, autonomous, public and positive."[42] However, this type of formalism, which posits the nature of law as closed, autonomous, positivist, etc., can be realized in a more or less pure form.

In this work, I consider various degrees of juridical formalism, and in so doing I will be taking into account both aspects of the style of judicial reasoning, on the one hand, and the surrounding environment, on the other. Whereas the former relates to judicial reasoning in the drafting of judicial opinions, the latter consists of all relevant participants of the legal system who evaluate judicial opinions and make judgments about the proper role of courts in society. The environment is made up, in part, of opinions of legal scholars and legislators, as well as the general approval of the judicial style by both the smaller professional community (lawyers) and the wider public (society as a whole or its wider segments), including other relevant actors in the system (politicians, etc.). Both components, the judicial style and the environment, form the judicial ideology of law application, as well as the degree of formalism in legal reasoning. What are, however, the components of formalism?

First, judicial formalism refers above all to methodological formalism, which reflects the philosophy of textual positivism. The high degree of formalism presupposes that judges employ in their reasoning arguments of the plain meaning of a statutory text and present their analysis as a sort of inevitable logical deduction from this text.[43] The judge-formalist treats legal concepts as if they yielded complete and crystal-clear content.[44] She denies that the connection between a legal text and the resolution of a hard case is remote—that the solution is indeterminate and that it requires moral, political, and economic considerations. She does not acknowledge that rules are vague, uncertain, and conflicting, and that there is often a choice from among several rules that might apply in the individual case.[45] Any judge is bound by rules,[46] but the judge-formalist overtly overstates this bindingness while, on the contrary, the judge-anti-formalist overtly downplays it.

Second, formalist reasoning is viewed as a purely mechanical mental operation. The formalist school has adopted the justification of easy cases as its paradigm of legal argumentation.[47] What the extreme versions of formalism and anti-formalism have in com-

Shapiro (Oxford University Press 2002), pp. 166–205 on 170ff. Cf., as a recently elaborated introduction to the problem by a Finnish scholar, Raimo Siltala *A Theory of Precedent* From Analytical Positivism to a Post-Analytical Philosophy of Law (Oxford: Hart Publishing 2000), pp. 50ff. Siltala distinguishes five basic modes of formalism: 1) constitutive formality (the formal relation of legal standard to its source, which gives the standard ideally a binary code valid/non-valid); 2) systemic formality, defined by internal coherence of the legal system and its standards; 3) mandatory formality, which relates to the formal binding force of the source of law (binary code binding/non-binding); 4) structural formality, which relates to the degree of closeness of operative facts of the rule (high degree of formalism relates to concrete clear rule); 5) methodological formality, which places emphasis on a literal reading of the law. My analysis primarily relates to the last sense of formalism.

[42] Unger [note 31], p. 204.

[43] Siltala calls this type of formalism 'methodological formality'. Siltala [note 41], pp. 50ff.

[44] Thus, the judge-formalist lives in von Jhering's heaven of legal concepts [*Begriffshimmel*].

[45] See generally on this Schauer [note 39].

[46] Idem.

[47] See, e.g., Joxerramon Bengoetxea *The Legal Reasoning of the European Court of Justice* (Oxford University Press 1993), p. 116. Cf. Lyons [note 23], p. 179 (claiming that we shall take the theory of limited law and its

mon is that neither of them distinguishes between hard and easy cases. However, while formalists present the judicial application of law as a mechanical activity in any case, however complex, for anti-formalists any case, however simple and straightforward, is at least potentially a hard one.[48]

The use of teleological and similar arguments, which place emphasis on the rationale of a legal rule, its purpose, the policies underlying it, its societal and economic functions, its constitutionality, might be designated as an essentially anti-formalistic decision-making (and an aspect of the ideology of free judicial decision-making). The judge—radical anti-formalist—would reject formalities as such, claiming that *all* cases must be decided considering the purpose of the rule, and the text itself never decides the case.

Furthermore, it is important to distinguish between the kind of formalism in which is employed formalistic argumentation actually leading to a formalistic result, and formalism in which formalistic argumentation is used as a veil to get the result which, however, could not be reached through formalistic reasoning. It is wise not to confuse both very different types and strategies of formalism. The latter might be criticized for a lack of openness necessary to appreciate what is really going on behind the veil of formalistic reasoning. The former, in contrast, is likely to produce an unreasonable application of law, disregarding societal conditions and the rational meaning of that law within the society.

If a judge who engages in a formalist discourse leading to formalistic results is not aware of the problems relating to formalism, he had internalized formalism and its values. Judges of this sort are real and authentic formalists. They do not reveal what is behind the formalist veil of their reasoning because they themselves are really not aware what is there.

If judges apply formalist reasoning in order to reach a result which cannot be reached in this way, they are aware that formalism does not work. They are also aware of the interpretational choices with which the application of law presents them, but in spite of this they use formalism in order to achieve another goal, e.g. to satisfy the generally prevailing formalist ideologies of judicial decision-making and thus through their seemingly formalist reasoning satisfy expectations of the professional or wider public.[49] In this case, formalism is not internalized as the real nature of judicial activity.[50]

Alternatively, a judge may not be able to act in a different way due to objective reasons, e.g., the very conditions of the totalitarian regime might force honest judges to rely on the letter of the law in order to create a safeguard against possible intrusions by state authority. Similarly, there are reasons of subjective nature, e.g., the inability to decide the

accompanying doctrine of legalistic justification as "a limited theory, applicable only to cases that can be decided on the basis of existing law and as ignoring the problem of justifying decisions in hard cases"; moreover, this theory "ignores hard cases, or cases that cannot be decided by applying established rules of law").

[48] Cf. Stone [note 41], pp. 172–173.

[49] Vivian Grosswald Curran claims that this seemingly formalist tactic must be seen as an aspect of positivism because "the judicial claim that it was applying enacted law signaled judicial approval of enacted law, even where the application may have been non-apparent, or even non-existent." Vivian Grosswald Curran 'Fear of Formalism: Indications from the Fascist Period in France and Germany of Judicial Methodology's Impact on Substantive Law' *Cornell International Law Journal* 35 (2002), pp. 101ff at 150.

[50] See, generally, by Mitchel de S.-O.-l'E. Lasser, 'Judicial (Self-)Portraits: Judicial Discourse in the French Legal System' Yale Law Journal 104 (1994–1995), pp. 1325ff and *Judicial Deliberations* A Comparative Analysis of Judicial Transparency and Legitimacy (Oxford University Press 2004).

real question in dispute might push judges to dispose of their case on formalist grounds which offer a much easier way of handling hard cases. In such a situation, formalism might be internalized in its own peculiar way because, in the opinion of this sort of judge, it is the only way in which judicial decision-making really "works".

3 The Decline of Formalism and Bound Judicial Decision-Making in Western Law

The ruling ideology of judicial decision-making in Continental Europe in the 19th century was constructed on the basis of the doctrines of early modern liberalism[51] and its theories of the separation of powers. As I have already shown, the development of new views on law were related to other historical trends, such as the end of the era of absolutist monarchy, the unhappy historical experience with activist judicial law-making in feudal France,[52] and the emergence of the liberal laissez-faire capitalist states and their new legal systems.[53] It is necessary to see the origins of this extreme version of positivism, close to the ideology of bound judicial decision-making, in the French and Austrian theories of legal exegesis of the early 19th century.[54] The German conceptual jurisprudence [*Begriffsjurisprudenz*] comes at a later stage in the development of these theories.[55]

Although it seems that the ideology of bound judicial decision-making in its most extreme form has never been fully internalized in judicial practice,[56] my purpose is not to give a detailed account of the 19th century theories of the judicial process. Rather, my more modest claim is that the 19th century Western European judges and above all legal scholars approached nearer to the formalist ideals and bound judicial decision-making than any of their successors.

The old ideology of bound judicial decision-making, intertwined with textual positivism, lost its prominence for many reasons. First, there was the recognition that, despite the expectations of some 18th century revolutionaries, law was not, nor could it ever have been, easily deducible from legal texts. The purest and most extreme model of the ideology of bound judicial decision-making had been overturned already in the early 1800's, with the abolition of the institution of mandatory judicial references to the legislature [*référé législatif*] in case of interpretational doubts, when the judiciary in France

[51] Cf. Damaška [note 6], p. 34.

[52] A classic on this is John P. Dawson *The Oracles of the Law* (Ann Arbor: The University of Michigan Law School 1968), especially on pp. 362–373. On the French feudal *parléments* and their role in the revolutionary conception of judicial activity, see, e.g., Bailey Stone *The French* parlements *and the Crisis of the Old Regime* (Chapel Hill: University of North Carolina Press 1986). On the German reaction to the pre-19th century courts, see Robert Alexy & Ralf Dreier 'Precedent in the Federal Republic of Germany' *Interpreting Precedents* A Comparative Study, ed. Neil Mac Cormick & Robert S. Summers (Aldershot: Dartmouth 1997), pp. 17ff at 40ff and Csaba Varga *Codification as a Socio-Historical Phenomenon* (Budapest: Akadémiai Kiadó 1991), pp. 76ff.

[53] Cf. Wróblewski [note 1], p. 273 ("The ideology of bound judicial decision-making is the product of liberal thought and legal positivism.").

[54] Dawson [note 52], pp. 392ff.

[55] Ulrich Falk *Ein Gelehrter wie Windscheid* Erkundungen auf den Feldern der sogenannten Begriffsjurisprudenz (Frankfurt am Main: Vittorio Klostermann 1989).

[56] My explanation presents a danger of inevitable simplification and even a caricature. For an attempt at the accurate picture of judicial formalism in the 19th century, see Regina Ogorek *Richterkönig oder Subsumtionsautomat?* Zur Justiztheorie im 19. Jahrhundert (Frankfurt am Main 1986).

was granted full competence to interpret the law.[57] Already at the end of the 19th century, in the face of demonstrations of the practical impossibility of its claims, the ideology of bound judicial decision-making came to be considered obviously naïve, and critical legal doctrine started to explore the flaws seen in this ideology.[58]

Moreover, the ideology of bound judicial decision-making seems to be intrinsically connected with the era of 'the long 19th century' and its ideal of the liberal limited state, political stability and the emphasis on keeping state intervention to a minimum. Therefore it could not survive untouched the collapse of the model for which it was constructed and which it served. For this reason Continental legal culture underwent a gradual transformation in the post-World War I era,[59] and particularly after World War II. "The legal positivistic approach to law relies in particular on confidence in the stability of the political situation within the state and on the guarantee that the 'right' solution will be found by the legislator."[60] The realities of the New Era which emerged from World War I found neither full confidence in the legislature[61] nor societal stability. To fill in this gap that arose in the New Era of the 20th century, a very different and creative approach to judicial lawmaking was called for.[62] Therefore, the ideology of bound judicial decision-making had to be repudiated for practical reasons. Textual positivism became an impractical obstacle to legal development and to the proper functioning of the law.

Even more importantly, the remodelling of the state, the growth in its powers, and the building of the welfare and regulatory state fundamentally transformed the accepted conceptions of state and law. The government ceased to be limited to the few issues for which the liberals opined the state is suitable, and the developing conception of law left behind the old liberal ideal of minimal, mostly private, law based on one all-encompassing code. While the number of laws, regulations and decrees in Western Europe inflated throughout the last five decades of the 20th century, the judicial power and the role of judicial interpretation also expanded. As the role of the administrative welfare state increased, the role of the judiciary tracked its development.[63]

In this way, the "infusion of broad political considerations, necessitated by expanding judicial review of the constitutionality of statutes" was "quite damaging to the 'closeness' of the logically legalist universe."[64] Efforts at the textual reading of abstract constitutional

[57] Obligatory reference to the legislature was abolished already in 1800, see Dawson [note 52], p. 379. On the institution of facultative reference in the 1830's, see Zweigert & Kötz [note 24], p. 120 (noting that reference was never used in practice).

[58] Wróblewski [note 1], pp. 273ff.

[59] Wieacker [note 14], p. 409 (indicating that this process started in Germany even before 1933).

[60] Walter Ott & Franziska Buob 'Did Legal Positivism Render German Jurists Defenceless during the Third Reich?' *Social & Legal Studies* 2 (1993), pp. 91–104 on 96.

[61] Most Central European judges in the new republics after World War I remained in their hearts monarchists and opposed weak governments based on systems of chaotic parliamentarism. For instance, according to Dawson, as the German executive and legislature were "[c]onfronted with turmoil and conflict on so vast a scale and with claims that might overtax the nation's resources, it is no wonder that [they] stood irresolute for a time. But for judges who had struggled to conserve the values of the society they had known, this was not the kind of government to which they must defer; indeed, this was the government, some would say, that had allowed the catastrophe to occur through weakness, callousness, or ineptitude." Dawson [note 52], p. 472.

[62] Cf. many examples provided by Wieacker [note 14], pp. 410–422.

[63] Mauro Cappelletti *The Judicial Process in Comparative Perspective* (Oxford 1989), pp. 4 & 24.

[64] Damaška [note 6], p. 38, note 40.

provisions demonstrated the absurdity of textual positivism, as there is seldom any sensible textual way in which such provisions might be read.[65] Textual positivism became not only undesirable, but above all entirely unfeasible. MADURO remarked that the crisis of formal reasoning has been caused by the extension of the "rule of law" to domains traditionally out of its range of action. The growth of administrative and constitutional law and the increase of social and economic regulation led to a change in the way in which law was conceived.[66]

This development gained significantly in strength for other reasons as well. Adherence to the letter of the law was discredited by the realization that the positive law might sometimes be grossly unjust, as happened during the Nazi era.[67] Some influential scholars, such as GUSTAV RADBRUCH, even associated positivism with the horrors of the Nazi machinery,[68] although these claims are now generally considered overstated if not wrong altogether. In light of these concerns about leaving law-making exclusively in the legislature's hands, the growth in the role of the judiciary, 'the least dangerous branch', was appreciated and viewed as an improvement in democracy, and as an illustration of the principle of the separation of powers and the system of checks and balances.[69] Textual positivism and the ideology of bound decision-making themselves came to be considered dangerous.

Last but not least, the growing power of comparative law in the course of European Integration 'disrupted' the national constructs and concepts, which until then had seemed to be natural and the only possible ones.[70] One small and good comparison might radically call into doubt the superiority of hitherto unquestioned national rules. Suddenly, instead of one unchallengeable legal methodology and style of legal rhetoric, a national observer might see a plethora of often strikingly different methodologies, which nonetheless often lead to quite similar results. All dogmatism needs a Holy Writ, the one Bible or

[65] Wieacker [note 14], p. 444. For an argument in this vein by a leading American constitutional scholar, see John H. Ely *Democracy and Distrust* (Harvard University Press 1980), in particular ch. 2 on »The Impossibility of a Clause-Bound Interpretivism«. It is for this reason that KELSEN explicitly refused to use abstract terms like democracy, rule of law, liberty or freedom in constitutional adjudication. The application of such abstract and open-ended terms was, in KELSEN's view, unacceptable because, were it otherwise, the constitutional courts would receive "absolute power" and the balance within the system of the separation of powers would be forever lost. Cf. the critique of a leading KELSENian expert Stanley L. Paulson 'On Hans Kelsen's Role in the Formation of the Austrian Constitution' in *The Reasonable as Rational?* On Legal Argumentation and Justification: Festschrift for Aulius Aarnio, ed. Werner Krawietz, Robert S. Summers, Ota Weinberger & Georg H. von Wright (Berlin 2000), pp. 385–395 on 394–395 ("If, however, one takes constitutionalism further, understanding it to represent not just the requirement of legality but also a »constitutionalization« of fundamental values, with an eye to constitutional protection of fundamental rights, then it is hard to avoid the conclusion that KELSEN takes back in the name of moral scepticism some of what he has given us under the rubric of constitutional review.").

[66] Miguel Poiares Maduro *We The Court* The European Court of Justice and the European Economic Constitution – A Critical Reading of Article 30 of the EC Treaty (Oxford: Hart Publishing 1998), p. 17.

[67] Wieacker [note 14], p. 421.

[68] Recently cf. Robert Alexy *The Argument from Injustice* A Reply to Legal Positivism, trans. Bonnie Litschewski Paulson & Stanley L. Paulson (Oxford: Clarendon Press 2002), pp. 40ff.

[69] Cappelletti [note 63], p. 4.

[70] Presented by many scholars as the 'disruptive power' of comparative law. Cf. Martijn W. Hesselink *The New European Legal Culture* (Kluwer-Deventer 2001), p. 38.

the one code, a contemporary European scholar has noted.[71] In consequence, a parochial textual positivism became conceived through this plethora of European legal cultures.

The legal cultures of Continental Europe, as they stand now, are in a sense the result of a clash between, on the one hand, the old textual positivism and the ideology of bound judicial decision-making and, on the other, the ideologies of free judicial decision-making portraying a judge relatively unconstrained in law-making which would fit the particular circumstances of the case before. The latter, European 'realism', did not entirely prevail in its conflict with classical positivism, but influenced Continental legal thought sufficiently enough.[72]

On the one hand, Continental scholarship retained basic doctrines of Continental classical positivism. In this sense, remnants of textual positivism and bound judicial decision-making still endure. In Western Europe the role of courts in law-making is "still far from clearly articulated."[73] Therefore, it can be said that modern law, and particularly civilian legal thinking, is deeply impregnated with legal-positivist philosophy, the validity of rules is assessed by reference to formal criteria—of competence, procedure, and sometimes basis—that are fixed by the legal order itself, generally by its higher norms on the constitutional level … Validity is then understood in an exclusively formal way, as a norm's membership of a given legal order. … The validation process is at once unilateral (taking into account only the rule's formal validity: that it has been enacted in conformity with intra-systemic criteria), absolute (leading to unambiguous results: a rule will be declared absolutely valid or totally void), and hierarchized (validity is always assessed in terms of basis, which necessarily supposes an ascent from a lower to a higher norm).[74]

On the other hand, the new concepts found in general clauses (abuse of rights, good faith, public policy, *gutte Sitten*, protection of public order etc.), expansive constitutionalism and constitutional adjudication all assisted in effecting an adaptation of the system to changing circumstances.[75] The code system was able to survive because of the shift between the ruler and the ruled: whereas a code ruled the judges in the past, in the present it is ruled by them.[76] However, the Continental code system is in any case no longer a classical code system: the death of the classical liberal code system of the 19th century was caused by an increasing number of particular laws and regulations, the growth of public law etc., which has accelerated in recent decades with the on-going integration of Europe and the never-ending stream of Brussels directives.[77]

Conceptually similar changes could also be observed in the Common Law world. While the 19th century produced the rigid doctrine of *stare decisis*, the less formal and more flexible system of equity lost much of its former significance, and the courts advo-

[71] Idem, p. 38.

[72] Cf. Lasser [note 50], pp. 27–61. According to Lasser, the breakthrough in French legal thinking was without doubt Gény's writings at the turn of the 20th century.

[73] Hesselink [note 70], p. 12.

[74] Van de Kerchove & Ost [note 29], pp. 97–98.

[75] Wieacker [note 14], pp. 411–412.

[76] Varga *Codification…* [note 52], p. 123.

[77] Cf. Hesselink [note 70].

cated in the advantage of clear-cut rules, the following century shifted the balance again.[78] Common Law courts now engage in a "realist approach to judging"; they are more "skeptical about rules and principles, less deferential to precedent, more concerned with a decision's social consequences."[79]

The new European legal culture rejects the concept of clear dichotomies, between binding/non-binding arguments, valid/invalid law, etc. where *tertium non datur*. This idea, as conceived by the ideology of bound judicial decision-making, is based on the presumption that any argument is either binding, that is relevant for the resolution of a legal dispute, or it is not binding, thus irrelevant for legal argumentation. The new approach to legal argumentation views the same phenomena as parts of a continuum, where, for instance, formal bindingness is but one of many concepts having various degrees of relevance in the legal discourse.[80] While the "hard" conceptions of law, deeply intertwined with textualist approaches, view formal arguments as the only appropriate form of legal rhetoric and judicial discourse, alternative "softer" approaches give legal discourse a twofold face, based on both formalist and substantive arguments.[81] An alternative approach to law emphasizes an obvious fact, though a fact not admitted by the ideology of judicial bound decision-making: "Reasoning in gaps of the authoritative material, can, by definition, not be determined solely by what is authoritative."[82] That is why the acceptance of the new approach does not signify the destruction of law as a rational system; rather it indicates the adoption of a broader conception of the legal system and its sources.

The prevailing approach in contemporary jurisprudence, unlike either the ideology of bound decision-making or free decision-making, distinguishes between hard and easy cases, although it is admitted that the dividing line between these two categories is vague and blurred. It seems now to be generally recognized that, while the formalistic view is necessary in order to secure legal certainty and the rule of law, the non-formalist approach (viewing law in its broader sense) is highly desirable in order for judges to have available satisfactory argumentation in hard cases and thus secure the rule of law, which is not exclusively a formal conception.[83] Easy cases, in this view, yield a solution that is non-controversial within the legal community and reached by methods formally recognized

[78] Cf. Patrick S. Atiyah 'From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law' *Iowa Law Review* 65 (1980), p. 1249; Julian Stone 'From Principles to Principles' *The Law Quarterly Review* 97 (1981), p. 224.

[79] Lawrence M. Friedman 'Courts Over Time: A Survey of Theories and Research' in *Empirical Theories about Courts* ed. Keith O. Boyum & Lynn M. Mather (New York 1983), p. 46.

[80] A wonderful illustration of this approach is given in *Interpreting Precedents* A Comparative Study, ed. D. Neil MacCormick & Robert S. Summers (Aldershot: Dartmouth 1997).

[81] The German theorist Robert Alexy compares formalist and non-formalist arguments in the following way: "[Legal argumentation] participates, on the one hand, deeply in the authoritative, institutional, or real character of law. This can be seen from the role of authoritative reasons in legal arguments and the institutional setting of legal reasoning which leads, in the last instance, not only to suggestions and proposals but to definitive decisions of courts, enforced, if necessary, by power. On the other hand, legal reasoning remains deeply connected with what can be called the free, discursive, or ideal side of law [...]. An adequate theory of legal argumentation must cover the authoritative, institutional, or real side of legal reasoning as well as its free, discursive, or ideal dimension." Robert Alexy 'The Special Case Thesis' *Ratio Juris* 12 (1999), pp. 374 & 375.

[82] Ibidem.

[83] This point is best explained by Ronald Dworkin, who wrote that "[t]he rule of law is a nobler ideal than the rule of legal texts." Ronald Dworkin *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press 1999), p. 338.

by the legal system (say by reference to the text, its "logic", the system, a non-controversial legislative purpose, or legislative history). In contrast, a hard case (i.e., a case presenting either a vague legal provision, conflicting rules, or a prima facie meaning that would result in an undesirable outcome) cannot be solved in this simple, non-controversial fashion but demands the application of substantive evaluations.[84]

The judge who espouses moderate anti-formalism (or say, rather, moderate formalism), while being aware of the existence of easy cases which can and should be settled on formalist grounds,[85] appreciates the high level of discretion enjoyed in hard cases. The judge would understand this discretion as opening the door and allowing him to find the best solution for the case from among a plethora of solutions offered by the legal system. Judicial anti-formalism is compatible with the idea of the one right thesis. However, if the one right thesis is adhered to, the judge at least implicitly admits that there is no objective reading of the law, and that which he is attempting to attain through judicial argumentation is a reading of the law best fitting the legal system in that individual's necessarily subjective judgment.[86]

4 The Ideologies of Judicial Decision-making in Judicial Practices

The ideology of bound judicial decision-making in its pure form has disappeared from the mainstream of Western European legal scholarship, even though it still rhetorically governs some very visible legal discourses, such as the style of writing judicial opinions or the pedagogical methods at some Continental law schools. The interaction of these discourses with less formal and more substance-oriented discourses seems to represent, in many respects, the contemporary European legal culture. This plurality of visible and less visible discourses within Western European legal culture hampers the ability of post communist lawyers rightly to perceive what is really going on in the European legal discourse.

The primary example of multiple legal discourses is to be found in France, as presented by Lasser.[87] The extremely short, deductive style of judicial argumentation used in France reflects the values of the ideology of bound judicial decision-making. However, according to Lasser, the most visible French judicial discourse, as it exemplified in the official self-portrait of extremely short written opinions of the French magistrates,

[84] My conception of the distinction between easy and hard cases more or less follows that of Aleksander Peczenik *On Law and Reason* (Dordrecht: Kluwer Academic Publishers 1989), pp. 19ff.

[85] We should be aware of distinction, outlined by Martin Stone, between 'overly rule-bound decision making' (ORBD) and 'easy case formalism' (ECF). The critique of ORBD is the critique of a particular legal practice: it recommends that judges "should not be overly rule-bound, but should decide in ways that are sensitive to the aims and needs the law is meant to serve." In contrast, ECF maintains the concept that judges sometimes can apply law following general interpretational guidelines (a 'core' meaning of the rule) finding the one right answer, while in other (hard) cases such a deductive step is not possible. That is why critics of ECF reject the very idea that judges can ever be bound by rules. If we reject ECF, we reject the very possibility that there can be an easy case. Stone [note 41], pp. 166–205 & 172–173.

[86] For instance, Dworkin's often misunderstood "one right thesis" asserts that law does not yield 'objectively' right answers to questions of law. That is why moral scepticism and law's indeterminacy are compatible with attempts by judges to find the one correct solution to a case. Cf. Ronald Dworkin *Law's Empire* (London: Fontana Press 1986), pp. viii–ix and 313–314. His one right thesis is, of course, essentially anti-formalist.

[87] Generally Lasser [note 50].

is only the tip of the iceberg. What are much less well known are the unofficial portraits of judicial activity as produced by mainstream French academic theory and the hidden discourse of the French civil judiciary. The French judicial system and legal thought, in fact, have been able to internalize and accommodate the anti-formalist critique, and at the same time to maintain its formalist façade, immediately accessible to outsiders. In contrast with the appearance of French judicial opinions, French legal scholarship, while not abandoning generally the formalistic position, openly acknowledges the goal-oriented role of the judge. And in contrast with judicial opinions, the unpublished judicial discourse of the advocates-general, who argue cases before the court on behalf of the public welfare, societal interest etc., clearly reveals the open and argumentative nature of law, as well as conflicting judicial policies.[88]

The result of this situation is a certain symbiosis of both portraits of the French judiciary and of legal argumentation:

> The bifurcation of French judicial discourse into distinct spheres thus represents the French judicial system's mediation between, on the one hand, France's historically and culturally determined distrust of the judiciary, and on the other, the post-Gény impulse towards socially responsible judicial hermeneutics. Both directives remain simultaneously operative [...] while the French civil judicial system maintains two distinct modes of reading, the two are completely interdependent, constantly leaking into each other and at no point pure.[89]

Another important input, which influences the structure of the invisible part of the French judicial system, is the highly developed and sophisticated documentation and research service at French high courts, which recently substantially improved its electronic data relating to judicial decision-making. As Hans Baade put it, the French Supreme Court

> appears to be able to preserve the high quality of its jurisprudence despite the tremendous growth of its case load through terse judgments based on largely unpublished detailed memoranda of the reporting judge, assisted by a highly developed judicial documentation and research service.[90]

Similarly, in Germany, the main ideological source of law and legal doctrines for Central Europeans, the inflexible, dogmatic and conceptual legal scholarship that had tradi-

[88] Idem, p. 60. "According to this official portrait, the French judge is nothing more than a passive agent of the legislature, mechanically generating required judicial decisions by plugging fact scenarios into the all-encompassing matrix of the Civil Code. [...] On the other hand, this official French judicial portrait hardly represents the totality of the French civil judicial system. There exists, hidden within the French judiciary, an entire other argumentative universe in which French *magistrats* argue not in terms of formalist application of codified law, but in terms of the social repercussions of their past, present, and future judicial decisions and of their concomitant normative rules of *jurisprudence*. In this hermeneutic discursive sphere, French *magistrats* argue in the incredibly open-ended and unstructured terms of 'equity' and 'justice]". (pp. 60–61)

[89] Lasser [note 50], pp. 1403 & 1407. As he explains, "In short, the French judicial system segregates its two discourses into distinct argumentative spheres. In the sphere of the official judicial decision operates the discourse of the formal, grammatical application of the codified law. In the unofficial sphere of the *conclusions* and *rapports* operates the discourse of the hermeneutic construction of socially meaningful judicial solutions".

[90] Hans W. Baade 'Stare Decisis in Civil Law Systems' in *Law and Justice in a Multistate World* ed. James A. R. Nafziger & Symeon C. Symeonides (New York: Transnational Publishers 2002), pp. 533–554 on 550.

tionally prevailed there was rejected several decades ago.[91] In contrast to France, however, the visible judicial discourse in Germany has become more open, substantively-oriented and clear, while still retaining important Continental formalist features. The German supreme courts now openly acknowledge their creative function and often make and change law overtly. This openly activist approach toward the law stands in sharp contrast to that of most of their predecessors, especially before World War I.[92] In its form, German judicial argumentation is heavily oriented toward legal scholarship, which, apart from precedents, is, at least formally, the main source of the German courts' perception of law.[93] Franz Wieacker evaluated the change in judicial style and reasoning in this way:

> The *Bundesgerichtshof* has been more acutely aware of its social role than any previous court, except those of revolutionary origin, and has been able to adjust its decisions to the new conception of the social state under a rule of law and fit them to the mandates of the Basic Law. Their stronger sense of their role made them less vulnerable than the positivist judges to manipulation by powerful interests, and their commitment to developing the law openly allowed them to abandon conceptual structures which had become out-dated or unconvincing.[94]

5 Post-Communist Europe: The Last Bastion of the Ideology of Bound Judicial Decision-Making?

It might be said that the last bastion of the ideology of bound judicial decision-making remains in what used to be Europe's Socialist East. Socialist legal theory, in contrast with the Western European development of the 20th century, continued to reject any role for precedent and creative judicial decision-making. Some socialist legal scholars even proudly acknowledged that their theory of legal sources went back to the early 19th century. For instance, a Hungarian scholar Szabó in this way discussed the allegation that socialist devotion to statutory law is inherited from Continental culture and that socialist methodology is similar to Continental style:

> If we can speak of any similarity in this field, we might say rather that Socialist legal systems have returned – although in different social conditions – to the views on the sources of law professed in Continental states at the outset of Bourgeois legal development.[95]

[91] Classical critique of the early post-war era might be found in Josef Esser *Vorverständnis und Methodenwahl in der Rechtsfindung* (Frankfurt am Main: Athenäum Verlag 1970).

[92] Wieacker [note 14], pp. 420–422.

[93] Cf. Hein Kötz 'Scholarship and the Courts: A Comparative Survey' in *Comparative and Private International Law* ed. David S. Clark (Berlin 1990), pp. 183ff.

[94] Wieacker [note 14], p. 421. Wieacker is talking also about the downside of this methodological shift. It presents dangers for legal certainty and the rational concept of law: "While the positivist judge could be blamed for adhering to his systematic and conceptual traditions and institutions at the expense of realistic solutions, the courts today are more open to the reproach that they are dispensing pure equity in an unprincipled and empirical manner." Ibid., p. 430.

[95] Imre Szabó 'The Socialist Conception of Law' in [International Encyclopedia of Comparative Law II: The Legal Systems of the World, their Comparison and Unification, ch. 1:] *The Different Conceptions of the Law* (The

Similarly, a Western expert dealing with socialist law already two decades before the fall of Berlin Wall observed that:

> The combination of a civil law system (with its emphasis on the general rule over the individual case and its formally deductive rather than inductive method) and Marxist ideology (with its belief in one right answer and intolerance for compromises and tentative definitions) occasionally produces a formality and scholasticism in legal thought reminiscent of nineteenth-century Begriffsjurisprudenz.[96]

After the end of Communism, the old 'Socialist Legal Family' which most comparative law treatises had posited, had seemingly been replaced by a legal black-hole.[97] Although as a result of the EU Enlargement, the 'other Europe' became part of the European Union, it would be too simplistic to assume that all features of the old legal culture disappeared with the fall of the Berlin Wall so that those countries' legal systems thereby automatically assimilated to the EU norm.

In fact, the analysis of Szabó written in the 1970's is fully applicable in the early 2000's. Much of post communist legal scholarship used to be, and still is, based on the position of simplistic textual positivism, in that it takes "an apologist's view in respect of the existing … legal systems." Academia and the old-fashioned parochial legal education is left "with hardly any other role but to provide explanations justifying positive law, while the study of the conditions for continued evolution, including a criticism of existing law, [is] relegated to the background."[98] This prominent feature, accompanied by insufficient funding of higher education throughout the region, has to a remarkable degree assisted the old ideology of the judicial application of law in being surprisingly resistant to the challenges of the post communist era.

However, the ideology of bound judicial decision-making is not likely to survive the challenge posed by the realities of a judiciary empowered after the collapse of Communism; a new ideological conception of the judicial function is urgently needed. Legal scholars, such as Csaba Varga, are developing new doctrines and a methodology which will be better able to account for judicial decision making, and will provide post communist lawyers with more practical ideologies of the judicial application of law. Increasing criticism of parochial approaches towards legal education, as well as the necessity to make legal studies more attractive for exchange students in the EU Socrates-Erasmus program, and similar factors put further pressure on the universities in the region to increase the

Hague: Mouton & Tübingen: J.C.B. Mohr 1975), p. 73 (in addition emphasizing that "even in appearance there is only outer similarity, because the social reasons for Socialist solutions are not identical with those reasons which once set legislative activity in opposition to the arbitrary practices of feudalism making it not merely the main, but the exclusive source of law.").

[96] Inga S. Markovit, 'Civil Law in East Germany: Its Development and Relation to Soviet Legal History and Ideology' *Yale Law Journal* 78 (1968–1969) 1, p. 2.

[97] Cf. Rafał Mańko 'The Culture of Private Law in Central Europe after Enlargement: A Polish Perspective' *European Law Journal* 11 (2005), pp. 527ff on 547–548, discussing the fact that the most recent edition of Zweigert and Kötz's treatise on comparative law simply discarded the Socialist Legal Family "without writing anything in their place" (p. 548).

[98] Szabó [note 95], p. 52.

overall comparative and transnational orientation of legal education. When this occurs, it will become virtually impossible to continue disseminating the old fashioned judicial methodologies which at present are still taught in many post communist law schools.

FACULTY OF LAW
CHARLES UNIVERSITY, PRAGUE, CZECH REPUBLIC
ZDENKU@SEZNAM.CZ

Ordo civitatis: *The Birth of the City and the Urbanization of the Philosophical Landscape*

Maurizio Manzin

1 Premise

If I were asked what has induced me since boyhood to study philosophy, after rapid reflection I would say that it has been indubitably been my love of the w o r d. Word in the sense of t h o u g h t a n d a c t i o n ("*legein kai poiein*"), o r i g i n o f a l l t h i n g s ("*en arche en ho logos*"), whose progress through mankind is also called h i s t o r y.[1]

This, of course, is not history in the sense of 'historiography', but history as a discipline which can be better defined as m e t a p h y s i c a l , because it seeks to discern, amid the material traces of civilisation, the passage of "some disturbed deity" (to quote a famous poem by Eugenio Montale): in other words, the *logos* itself.

Starting from this very general idea, I shall put forward some reflections—hopefully not too banal or nebulous—on the relationship between the city, freedom, and order during the period of transition from the feudal to the bourgeois ages.[2]

2 The City in the Ages of Transition

I begin by quoting a source well known to mediaeval scholars: St. Augustine's *De civitate Dei* (a wonderful example of the theology of history) in which the author, according to a current interpretation of *Gen*. 4,17, recalls that the first city to be inhabited by humans was founded by Cain,[3] whereas Abel the Just "as a stranger founded nothing".[4]

[1] See Francesco Cavalla *La verità dimenticata* Attualità dei presocratici dopo la secolarizzazione (Padua: Cedam 1996), pp. 67–70 (for the 'historiographical problem') and pp. 167–182 (for the word as 'origin').

[2] I have discussed these matters when introducing the Italian–French Seminar on *Les juristes et la ville en Italie* (Trento, November 22–23, 2002) organized by the University of Trento Dipartimento di Scienze Giuridiche jointly with the École Française de Rome, l'Institut Universitaire de France and l'Université Paul Valéry-Montpellier III.

[3] *De civ.* XV, 1:36–38.

[4] Aurelio Agostino *La città di Dio* ed. Luigi Alici (Milan: Rusconi 1990), p. 694. The city is the topic of the chapter entitled »La città politica« in my *Ordine politico e verità in Sant'Agostino* Riflessioni sulla crisi della scienza moderna (Padua: Cedam 1998), pp. 55–88.

To be observed first is that the theme of the city is closely connected with eschatology. In the biblical and then Christian tradition, the city's appearance (or disappearance) across the centuries has almost always marked a dramatic phase in the relationship between God and mankind. Opposed to the fallacious—and often presumptuous—human model of the city's foundation is a d i v i n e model: that of Jerusalem, the earthly and celestial city, the promised place of an everlasting alliance between the divine and the p o l i t i c a l.

If we consider the interruptions that have occurred in the many ages of Western mankind—and which, from the point of view of the theology of history, represent veritable categories of thinking and being—we note that the *polis* has always performed a crucial role. Thus it was at the time of the Roman Empire's "decline and fall" between 4th and 7th centuries, when large part of the population transferred to the country *villae*, easier to defend than cities and economically self-sufficient. So it was, once again, between the middle ages and modernity, with the proliferation of free cities (communes) between 11th and 14th century. And so it has been in the contemporary age of incomplete transition to post-modernity, when the prematurely announced fall of the 'walls' seemingly presaged a global extension of the metropolitan dimension to the 'global village', which implies, in seeming contradiction, an ecological nostalgia for the pre-industrial countryside (at bottom, every change of civilisation has been characterised by some sort of rural nostalgia, from Virgil to the contemporary so called new age movements of such delight to sociologists; while a nostalgia for lost innocence today represents the secular version of the far more powerful eschatologies of the past).

In sum, the aggregation and disaggregation of cities across the centuries have been part of a greater order which periodically loses and finds its centre, oscillating between unity and multiplicity, between the 'one' and the 'many' of classical and Platonic thought, as I have discussed elsewhere.[5]

3 Urbanisation as an Ordering of the Philosophical Landscape

I now propose a definition as the starting point for the further development of my reasoning, to wit:

> Urbanization is the topographical expression of an ordering attitude whose aim, in a knowledge context, is to obtain the methodological certainty of discourse.

This definition should be spelt out point by point.

a) By "attitude of order" I mean the prevailing idea that, in every genre of discourse, parts that differ from each other must be connected to form a whole, so that the connections among the parts are n e c e s s a r y and d e t e r m i n a b l e.

[5] See, by the author, *Alle origini del pensiero sistematico* Identità e differenza nella concezione neoplatonica dell'ordine (Trento: UniService 2003) x + 159 pp. as well as 'Ordine e procedura nella prospettiva classica e in quella moderna' in *Giustizia e procedure* Dinamiche di legittimazione tra Stato e societa internazionale, ed. Maurizio Basciu (Milan: Giuffrè 2002), pp. 239–246 and 'Logic, Order and the Law: Dionysian Hierarchich System in Medieval Legal Science and St. Isidorus' ambiguities' *Rivista internazionale di filosofia del diritto* 77 (2000) 1, pp.133–136.

b) By "methodological certainty" I mean the property of discourse whereby the order linking together its different parts (like the above-mentioned whole composed of parts connected necessarily and determinably) performs a r e a s s u r i n g function which consists in producing rational certainty and predictability (unlike other theories which are unable—or do not want—to order nature, society, politics, and so on).[6]

c) By "discourse" (or "speech") I mean either a linguistic form characterized by the intersubjective dialogue (where two or more individuals speak among themselves) typical of a city's foundational phase (the p o l i t i c a l level of discourse) or the final outcome of the shaping of a language (e.g. national) under the pressure of political, cultural, artistic or literary movements (a e s t h e t i c level of discourse).

Immediately before the communal age, at the apogee of medieval society (when large part of the territory had not yet been demoted to *locus amoenus*—i.e. 'outside the city walls'—and when *villanus* still meant 'from the countryside', and not necessarily loutish), the search for order was based on a polycentric model composed of many different *corpora* (bodies), especially political-military and ecclesiastical. The further development of free cities, dominated by the need to meld very diverse social entities together, shows the transition towards a monocentric political-institutional model (see for instance Dante's political theory in *De Monarchia*, a typical example of urban culture). In fact the city, narrowly circumscribed by its walls and organized very differently from the old *curtis* and *castellum*, could not survive chaotic coexistence among its various social components, so that it was extremely important, from the institutional as well as philosophical points of view, to reduce all of those parts to a whole according to a precise and knowable hierarchy (which was officially stated in the city statutes).

Significantly, the principal achievements in scholastic theology on issues such as 'order' and 'hierarchy' proceeded in parallel with the growth of the new free cities. And the schools in which theology was studied and refined flourished in close symbiosis with those cities. Hence, when the *civitas* (city) required an *ordo ordinatus* (ordered order), it was forged in the faculties of arts, which drew on the theoretical assumptions and schemes of neo-Platonic and Aristotelian philosophy.

This would have been impossible if the transition to the second millennium had not come about amid pervasive and sometimes dramatic uncertainty about a human condition prey to risks, violence and death (note that this condition was bewailed by Ausonius between antiquity and the early middle ages, as well as by Machiavelli and Hobbes at the very beginning of the modern epoch). Usually, in the absence of order, neighbours are perceived as possible menaces – as solitary unbounded atoms and thus potentially dangerous. All humankind becomes an unpredictable belt of asteroids from which ungoverned powers might strike and destroy at every moment. "I shall be a fugitive and a vagabond on the earth; and it shall come to pass, that every one that findeth me shall slay

[6] A good example is the process known in cultural anthropology as "shape-shifting", a term which denotes the capacity of living beings to change their form. This is a legacy from archaic cultures for which the universe was unstable and its apparent order did not correspond to a sequence of phenomena necessary by genesis and form. See, e.g., Thomas Cahill *How the Irish Saved Civilization* (New York: Nan A. Talese & Doubleday 1995) x + 246 pp.

me."—lamented Cain in the Bible.[7] Having slain his own brother, the "face of the Other",[8] Cain had breached the fragile peace of the post-Edenic state. Thereafter, as a tiller of the soil (permanent, not nomadic), he built a city in order to restore the lost peace, erecting walls against the barbaric lands of shepherds and nomads. That city was Cain's 'creature' (indeed, he named it after his son, Enoch) because it was a place created by banished and 'branded', but nevertheless hopeful, humanity.

In noetic terms, this hope is comprised in the idea that an o r d e r l y and p e r s u a s i v e (especially on the political and legal dimensions) discourse can confine conflicts within controllable limits: "*ne cives ad arma ruant*". Whence derives the need for a method (so that the discourse is orderly) and an efficacious language (so that it is persuasive). The birth of the city was tied to the affirmation of both.

4 Order Elevated to a System

One consequence of the raising of walls against the threatening chaos of Abel's followers was the onset of a dialectic between the o l d and the n e w (the same dialectic that would become archetypical of modernity). The city somehow imposed i t s time, at once orderly and articulated, on the timeless cyclicity of the outer lands. There was a n e w—and consequently an o l d—in a spatialized time horizon: that is, movement (and p r o g r e s s). This was particularly evident in the age of communes: the invention of the clock was, in this respect, a distinctive acquisition of the city world and in later centuries came to symbolize bourgeois status.

The countryside had represented the place of memory and conservation in the feudal age (with the advent of the great abbeys where amanuenses and scholars cherished and catalogued the past). Now, however, it was seen as a "dark forest" where the feudal virtue of 'courtesy' gave way to 'gentility', the virtue of the *gens nova* (new people). The countryside continued to be associated with the idea of immobility, of quietness, of cyclical repetition (its time was that of *distensio animi*, distension of the soul).[9] The city was instead the place of movement and change; but above all, in juxtaposition with the mystical silence of the abbeys, it was *agora*: the place of public discourse.

Thus established were the bases for the 'deforestation' of the memory consisting in the logical clearing of the inequalities and contradictions historically represented by the tangle of inherited languages and discourses, and in the subsequent construction of geometric cathedrals of reason (whose starting-point was, obviously, Abelard's *Sic et Non*). Gratian and Accursius were two eminent artificers of the 'deforestation' and clearance

[7] *Genesis* 4, 14. ["Et ero vagus et profugus in terra: omnis igitur qui invenerit me, occidet me"]

[8] With the "face of the Other" the reference is obviously to Emmanuel Levinas *Totalité et infini* Essai sur l'exteriorité (La Haye: Nijhoff 1961).

[9] On the philosophical significance of non-spatialized time, the essential reference is still Henri Bergson's discussion of Zeno's paradox in *La pensée et le mouvant* (Paris: Alcan 1934). On the theoretical-juridical importance of the concept see Enrico Opocher *Lezioni di filosofia del diritto* (Padua: Cedam 1983), pp. 207–211 and Francesco Cavalla *La prospettiva processuale del diritto* (Padua: Cedam 1991), pp. 5–16, where it is compared with the analogous conception of Giuseppe Capograssi set out in his article 'Giudizio processo scienza verità' now reprinted in his *Opere* 5 (Milan: Giuffrè 1959), pp. 58–76. The origin of the conception is, of course, Augustine, particularly in his *Confessions*, books X–XI.

of the field of legal science. From the scattered fragments of the stratified sources, they sought to construct a *corpus*: a 'whole' whose parts were in necessary and knowable connection, and from which nothing was excluded. They built, so to speak, a 'city of the law' dominated by the Twin Towers of the civil and canonic *corpora iuris*.

Once order had been erected into a system, sooner or later it succumbed to an uncontrollable urge to impose itself as absolute: it would tolerate no restraints. Hence jurists came to believe that 'all', but truly a l l , *in corpore iuris invenitur* (centuries later it would be the State or the codes). After all, it was only a matter of technique: the system can be modified when the regulatory laws are known.

This process of science and technique was not confined to the law, however, and by the fourteenth century it had pervaded all disciplines: the city was ready to conquer the territories outside its walls; to 'rationalize' the surrounding landscape and, after Galileo, even the heavens.

When the process reached maturation and furnished the instruments necessary for colonial expansion, the days of the 'wild forests' in West and East, with their 'uncivilized' natives, were numbered.

5 The City of the Law and its Inhabitants

I am of course aware of risks of ideologism deriving from over-insistence on the monocentric model as the purported expression of the *commune civitatis* (above all, the awful risk, of becoming, to use Francesco Calasso's apt expression, a "book-keeper of history").[10] I am also aware of the analogous (and, according to Calasso, greater) tendency towards centralization exhibited by the monarchical systems coeval with the communes.[11] And I acknowledge that it was the latter, and not the communes, which gave rise to the modern form of the state and the legal sources. Nevertheless, the slow development of mediaeval public law which led to the theories set out in Jean Bodin's *République* was always the work of jurists, the large majority of whom were trained and worked in the city and embodied its *forma mentis* to the maximum extent. And if this statement, with its implications, seems rash, one should reflect on the fact that the theory of public law, from Bartolus to Bodin, was never a doctrine of tyranny, not even when it theorized absolutism.[12]

Of course, the law of the city was not the law of the kingdom (in sources, provisions, validity of norms, etc.). Yet both derived from the 'city of the law', from that locus of thought in which rationality ordered the fleeting and chaotic forms of experience, creating the juridical figures and concepts of legal science. Of that 'city' the jurists were, so to speak, the builders and the inhabitants (the jurists, n o t the laws) concerned just as much as Cain of 'to banish' from its confines those responsible for political and social conflict.

[10] "Those who, on analysing human phenomena, feel the need to draw up balances, with columns for incomings and outgoings, but fashioned to suit their purposes". Francesco Calasso *Gli ordinamenti giuridici del rinascimento medievale* (Milan: Giuffrè 1965), p. 116.

[11] *Ibid.,* pp. 153–156.

[12] See Diego Quaglioni *I limiti della sovranità* Il pensiero di Jean Bodin nella cultura politica e giuridica dell'età moderna (Padua: Cedam 1992) x + 344 pp.

As said, this orderly citadel of the law represented the application, within its own domain, of a totalizing conception of order of neo-Platonic origin (although, from the thirteenth century onwards, it drew contingently on Aristotelian philosophies), and characterized by a theological structure derived from the doctrines of Dionysius the Areopagite.

I am convinced that none of the principal legal-politics theories of modernity can be fully understood without awareness of this twofold neo-Platonic and Dionysian inheritance.[13]

6 The Peace of Enoch

Over time, a gradual process that began with the flourishing of the communes and their conception of the hierarchical order laid the bases for modern "technical thought" (as defined by Heidegger). This was the conception whereby science, as rational objective and descriptive knowledge able to intervene efficaciously in the material world, must be regarded as independent from individual ethical options.

In order to protect itself against internecine wars, the city preferred to banish all forms of knowledge related to subjectivity and personal will: religion, ethics, aesthetics. To these the imitators of Cain preferred, from a certain moment onwards, the 'purity' of an impersonal and abstract will, with an orderly (logical and ontological) s t r u c t u r e whose (material) f u n c t i o n was not established by those dangerous forms of non-objective knowledge.

Thus, the jurists-builders of the 'city of the law' progressively became "surveyors of the laws" (to use Hobbes' famous expression) engaged in constant refinement of their science's procedures in an apparently unstoppable process which culminated with the Kelsenian heights of the *Reine Rechtslehre*. At that point they indeed seemed to have achieved definitive victory over every possible desire, by its nature always subversive, to "investigate the essences".

Now, it is indubitable that the logical arrangement of the universe wrought by objective science has had remarkable technical results for a certain part of humankind. The fact is that relinquishing discussion of its bases so as not to upset its non-evaluative purity has produced widespread scepticism: perhaps efficientist, but still scepticism. And when awareness is lost of the 'value of discourses on values' (because it is thought that, after all, no discourse is authentically better than any other), irrational persuasion and force triumph. Those who can, deploy one and the other to ensure access and permanence in the places that guard the secrets of technique, that is of power *tout court*.

Hence the peace of Enoch, although born from the intent to confer rules and certainty on the terrestrial life of men, constantly risks oppressing them with an excessively rigorous order of thought and being; an order, moreover, endowed with efficient techniques to ensure their obedience. In this eventuality, the walls erected against the disorder of the outer lands become difficult to distinguish from the stockade of a prison camp (it is not necessary to point out that history—above all recent—abounds with examples).

[13] This is the principal thesis argued in my *Alle origini del pensiero sistematico* [note 4].

What, then, can we say about this peace of Enoch? At minimum that, like the peace of order, it does not resemble the peace of Eden, which was the peace of freedom. The latter was lost because knowledge was sought as a source of power: "Ye shall be as gods" (which is very different from "Ye shall be gods"). For a simulacrum of power, Adam's offspring forswore freedom and yielded to an order. Which is still a good, as Augustine said, and the best of its species, because it expresses the value of s o c i a l i t y ;[14] but it carries the risk of forgetting its provisional and problematic character: that of an order which is the terrestrial simulacrum of the universal order of freedom, as such always perfectible ("intrinsically elastic" as Paolo Grossi has recently put it)[15]—and therefore not to be confused with the order of perfect freedom.

It is not the task of jurists to be the custodians of such an order (contrary to Bartolus' *canes curiales*) even less to be its arbiters or wielders. Instead, it is their task to perform the valuable role of c r i t i c s and tireless a d a p t e r s , artisans of tiny adjustments, stewards of that 'beauty of justice' which, like the polestar, orients sailors without ever being reachable.

faculty of law
university of trento, italy
manzin@jus.unitn.it

[14] Augustine wrote in regard to the goods of the earthly city, "non autem recte dicitur ea bona non esse, quae concupiscit haec ciuitas, quando est et ipsa in suo humano genere melior" (*De civ*. XV, 4). Cf. especially Sergio Cotta *La città politica di Sant'Agostino* (Milan: Edizioni Comunità 1960) 173 pp., together with 'Introduzione generale III, Politica' in Sant'Agostino *La città di Dio* (Rome: Città Nuova 1978), pp. CXXXI–CLII. On the sociality substantiated in the form of legal order, see Francesco D'Agostino *Lezioni di teoria del diritto* (Turin: Giappichelli 2006), pp. 3–17.

[15] "A law conceived as order is the warp and woof of society, almost a net that supports it and prevents it from unravelling, that springs from its own breast and follows it in perennial development in perfect coherence thanks to its intrinsic elasticity." Paolo Grossi *Prima lezione di diritto* (Rome & Bari: Laterza 2003), p. 18.

Poetry as Resilience: Engaging Silence and Indifference

Bjarne Melkevik

1 Introduction

Resistance against the persecution and destruction of human life has taken many forms and shapes throughout history. Among them, the construction of narratives has contributed to the production of rhetorical stances characterized by social and political demands which stress the urgent need for emancipation, justice and equality. In fact, narratives have provided new conceptual and operational frameworks, in which we have sought to organize and reinterpret the life we share as persons, human groups, and more recently as a global community.

In the process, we have been able to discover the extraordinary potential of language as a fundamental reference to encounter and denounce hate and systematic violence against specific groups. However, we have also been confronted by the profound human frailties and strengths that make us so amenable to be inspired, manipulated or transformed through the images and words that make up our diverse beliefs and aspirations. One of the overwhelming lessons we need to learn and learn again is that inspiration engenders responsibility, not only to ourselves and our beliefs, but to others, particularly those who are profoundly different.

In western cultures, the relationship between identity, literary discourse, and violence is old and complex. I am referring to narratives in which our individual and collective histories are brought into a common—and dynamic—point of view. It all begins with an implicit or explicit invitation; we are summoned or seduced so as to listen, consider or partake of an idea, a belief or a course of action that challenges our perception of who and how we are, and questions the usual commodities we derive from it.

Indeed, we know all too well that powerful narratives explore the deepest, and often describe the darkest scenarios in which humans interact. Such discourses may blend historical facts, with fictional accounts, and complex emotions with human actualities…and possibilities. Sometimes, they seem to create timeless images, in which vexing human passions are played out in scenarios in which we appear to be immediately and sometimes unconditionally implicated. Again, narratives can produce the kind of language that inspires our imagination about who we are and our perception of how we relate to others,

to the point of strengthening/transforming our character, and sometimes—only sometimes—our will to engage our surrounding and act.

In our world, nothing seems to be so relevant as the quality of our ability to live our lives fully aware of the fact that we all are—despite appearances—truly different. Nonetheless, it is equally pertinent to realize that we remain overwhelmingly dependent upon each other. Indeed, the cultural references available to imagine and reflect about how to balance such extremes in our daily live, remain as diverse as the cultural stimuli that make up our subjective and collective identities.

We are searching for new and believable values and norms to communicate and live out our beliefs in the midst of far reaching local, regional and global transformations. Of course, global networks and technological innovations are making some of us increasingly aware of the profound contrasts that make up our physical and cultural landscapes, and they are also contributing to the emergence of a global perspective, in which scenarios, actors and day to day experiences are brought into a reasonably common focus. But the mere access to images, languages and interpretations does not provide the necessary conditions for the kind of personal engagement that brings forth sustainable cultural practices, particularly when access to global imagery and discourses are considerably limited by geographical, ideological and local developmental conditions. Abstract and distant narratives may contribute significantly to our shared understanding of whom and how we are in our multifaceted settings, but we should never pass over in silence that profound cultural transformations—particularly those which sustain life—must become personal.

Indeed, we are becoming increasingly aware of the fact that the identity or identities we consciously or inadvertently choose to live, need common ground. Its content must concern each one of us personally. It acquires personal meaning when we experience the choice to live it out in our daily lives, in the workplace, in communal life, in the relationships we have with those we believe to be like us, and with those we perceive to be different from us. Beliefs and perceptions constitute a powerful dynamic through which personal and collective identities are construed.

From a cultural perspective, a common ground acknowledges differences, but supersedes them. It is made out of multiple ideas, concepts and values, with different contents, forms and shapes. In times of profound beliefs and cultural transformations, the ground must be flexible—the capacity to expand—without losing its commonality—the capacity to make sense and integrate new and particularly surprising experiences—so as to continue building upon both our profound differences and simultaneous dependence upon each other. It is precisely in this sense that the practice of tolerance emerges as a fundamental component in the process of achieving sustainable commonality despite our differences. Hence, actual participation in a common ground entails the capacity to acknowledge and address our differences, and the willingness to uncover the inadequacy of our beliefs and perceptions.

In this perspective, tolerance is a deeply personal/intimate value, but one whose practice is capable of stimulating profound social synergy as well. Optimally, its practice requires courageous men and women with the willingness to acknowledge and transcend their own prejudices and fears: a palpable commitment to assuming responsibility for

one's actions and omissions. I am referring to individual and collective standards we can practice; social interactions in which the meaning and experience of otherness is not taken as a ground for exclusion, let alone persecution.

This paper reflects upon a modern conception of tolerance, embedded in a poem which addresses one of the horrible cases of persecution, guilt and responsibility of the twentieth century. However, this is not a literary-normative exercise in psychological guilt, cultural fear, or human abandonment; though historical reference and analysis of these topics will definitely be part of our approximation to the source in question. Perhaps, what we need today is not only a renewed mosaic of multifaceted atonements of what we as humans are capable of doing to each other, when we chose to succumb to ideological fear and hatred. I think we are becoming increasingly aware of the violence humans can reproduce, and the pain we can generate and spread in our midst and far beyond, for whatever reasons. Hence, I hope to not only remember, but revitalize the contexts, symbols and choices that make this poem an engagement of silence and indifference, because today we need to be both emotionally inspired, and reasonably persuaded about our need of each other, and our need of common references we can learn, reflect and develop so as to remember, experience, build and enhanced our old/new/ and future common grounds.

2 The Poem: are "we" Capable?

Nothing seems to portray better the modern requirements for tolerance than the famous poem beginning by the following verses: "First they came for the communists" of Martin Niemöller (1892–1984), a German pastor and theologian.

> When the Nazis came for the communists,
> I remained silent;
> I was not a communist.
>
> When they locked up the social democrats,
> I remained silent;
> I was not a social democrat.
>
> When they came for the trade unionists,
> I did not speak out;
> I was not a trade unionist.
>
> When they came for the Catholics,
> I did not speak out;
> I was not a Catholic.
>
> When they came for the Jews,
> I did not speak out;
> I was not a Jew.
>
> When they came for me,
> There was no one left to speak out.

The narrative of this poem describes a painful dialectic. The movement appears to be driven by those who persecute others; all the groups, the persecutor and the persecuted, have something in common, which at the same time makes them different: they share an ideology or a cultural identity which allows us to distinguish one from the other. In each persecution there is a blurred subjective identity that is brought into the scene only to assert its lack of concern, because it has nothing to do with the persecuted.

The consequence of the non-spoken word is made all too evident: silence is transformed into the fatal loneliness it engenders. It is a dark logic which affects people directly, just like an arrow through the heart, because everybody can understand instinctively the issues and the fates at stake. We feel immediately related, due to its insistence that reinforces so directly its belief that tolerance cannot be considered only in passiveness, but as a profound concern, a fundamental matter that implicates everyone, without exception.

We have all experienced some degree of abandonment. But this narrative is not about maximizing or even transforming the potential of self-pity in our moral development… there are significant differences between guilt and responsibility. There is something deeply personal here, and it has to do with what would you and I do when we had the opportunity to act and chose not to, that is: whether or not abandoning others can be justified on moral grounds, and whether our claim not to be related nor concerned with the fate of the persecuted is really a modality of collaboration disguised in the kind of self-affirmation that engenders fatal loneliness. And of course, the most vexing question of all, how capable are we of persecuting others and on which grounds?

It is easy and equally dangerous to claim that we live in a society in which we are often put into a situation where, without any conscious or obvious choice, we have to play the role of a bystander or a witness, which enables us to imagine ourselves as being somehow beyond responsibility and guilt. Even if we have voiced on many occasions that many of our societies are slipping to the point of becoming a kind of "spectacle society",[1] by making way to an illusion in which the situations of the world we live in are seen as mere "objects" for observation. The poem of Niemöller is proving to be invaluable insofar as it exposes the ambiguity and inherent danger of the comfort of an alleged "neutral" and "not interested" spectator.

Niemöller engages this issue in his own way, by reminding us that, in the face of intolerance, the logic of observation can succumb to fear, cowardice, or fatal loneliness. If this is the case, shouldn't we also say that a modern conception of tolerance cannot (as shown by its etymology) be restricted to the necessity imposed by our consciousness to "suffer for and on behalf of others"?[2]

Of course, it must be understood that, if this position can only be strongly pedagogical, and is often a necessary prerequisite for tolerance, an understanding of tolerance still needs to be materialized as a "question" that needs our answer as human beings, and more importantly, our answer as members of a specifically "legal common ground" in which

[1] Guy Debord *La société du spectacle* (Paris: Gallimard 1996) [Folio 2788]. True »brûlots«, Debord's theses and analyses yet deserve our attention.

[2] R. Klibansky 'Préface' in (dir.), *Tolérance, pluralisme & histoire* ed. Paul Dumouchel and Bjarne Melkevik (Montréal & Paris: L'Harmattan 1998), p. 11. "In classical Latin, the verb 'tolerare' always indicates the fact of bearing suffering or resisting to adversity." Istvan Bejczy 'Tolerantia: A Medieval Concept' *Journal of the History of Ideas* 58 (1997), pp. 3ff.

our respective individualities and commonalities are brought into focus, and established democratically.

Insofar as we want to study Niemöller's poem, it is necessary to clarify its narrative, in the context of the author's life. This reference will be essential not only to understand the poem, but even more importantly to size up its tremendous effect, all around the world, since the end of World War II. Thereafter, it will be possible to relate the poem to the value of tolerance.

3 Niemöller and his Resistance to Nazism

Niemöller is known due to his resistance to the Nazification of the Protestant Church of Germany. He started out as an ordinary pastor in a suburb of Berlin, who began protesting when, in September of 1933, the Protestant Church became subjected to the Nazi regime and "non-Aryans" pastors were expelled.

He created, with others anti-Nazis clergy men, a new organisation called the *Pfarrernotbund*, which worked within the Church to foil the Nazification process. When the Protestant Church became the Reich Church[3] in 1934, Niemöller and other opponents left and found the Confessing Church.[4] From its beginning, this new Church directly fought against the Nazi dictatorship, by openly questioning its ideology, which they considered to be non-Christian, and immoral.[5]

Due to his positions against the regime, Niemöller was arrested in 1937 and interned in the Sachsenhausen concentration camp. In 1941, he was transferred to the Dachau concentration camp.

Released after the fall of the Nazi regime in 1945, he devoted the rest of his life to the reconstruction of the German Protestant Church, until his death in 1984. Most importantly, Niemöller was persuaded that Germany (and the Protestant Church) shared a collective liability for the atrocities committed by the Nazi regime. Accordingly, he was one of the originators of the Stuttgart Declaration of Guilt of October 1945, in which the Protestant Church admitted its "guilt" for the atrocities propagated by the Nazis, both by its actions and omissions.

[3] Bernard Reymond *Une Église à croix gammée* Le protestantisme allemand au début du régime nazi (1932–1935) (Genève: L'âge d'homme 1980).

[4] Paul Tillich in *Religion in Life* [A Christian Quarterly, Cincinnati & New York & Chicago] III (1934) 2, pp. 163–173.

[5] Tillich, p. 181: „Ce nouveau paganisme prend appui sur un sol différent—sur le caractère sacré du sang et du sol, du pouvoir, de la race et de la nation, autant de valeurs que l'éthique chrétienne minimise". And, as continued at p. 182, „À l'intérieur de l'Église, l'aile radicale du groupe dénommé »Mouvement croyant des chrétiens allemands« a ouvertement préconisé la paganisation du christianisme, s'efforçant d'abolir l'Ancien Testament et de purifier le Nouveau Testament. Plusieurs protestants se sont insurgés contre ce mouvement, qui a ainsi été défait; mais, ce faisant, on n'a pas mis fin aux tendances païennes à l'intérieur de l'Église. Au contraire, l'aile modérée du mouvement s'est maintenue et, dirigée par l'évêque du Reich et à présent libérée des radicaux de son propre parti, il lui est possible désormais de pénétrer peu à peu toute l'Église. Ce danger est d'autant plus menaçant que l'ancien type de prédication n'a pas réussi à atteindre les masses: il y avait là un véritable problème que l'Église n'a pas su résoudre, et de cette situation les chrétiens allemands cherchent maintenant à tirer profit. Dans tous ces mouvements, à divers degrés, on assiste à la résurgence des anciens démons que le Christ avait vaincus et à l'asservissement du christianisme ecclésiastique et de l'humanisme chrétien".

Niemöller reaffirmed this "recognition of guilt" and its theological and pastoral significance on numerous occasions, both in his papers and sermons. Indeed, the poem in question can also be reflected in the context of a recognition of guilt, as an expression of the turbulent issues and moral challenges of the times.

4 As If You Could Hear the Soldiers' Boots

There are a vast number of very different versions of this poem, and there is even some mystery about the exact original version. In fact, there is simply no original version. For some, Niemöller's words, said verbally, have been repeated and rephrased into a poem that has been credited to him, hence its different versions. For others, words said verbally in several occasions (so in several ways) are all from him, just like many of his sermons, which are now poems.

We do not intend to resolve these questions. As philosophers of law, we accept all the versions as genuine. This said, we can now look more closely at the poem in its German version:

> Als die Nazis die Kommunisten holten,
> habe ich geschwiegen;
> ich war ja kein Kommunist.
>
> Als sie die Sozialdemokraten einsperrten,
> habe ich geschwiegen;
> ich war ja kein Sozialdemokrat.
>
> Als sie die Gewerkschafter holten,
> habe ich nicht protestiert;
> ich war ja kein Gewerkschafter.
>
> Als sie die Juden holten,
> habe ich nicht protestiert;
> ich war ja kein Jude.
>
> Als sie mich holten,
> gab es keinen mehr, der protestierte.

For those initiated in the German language, even if only a little, these words, though simple, echo the mind.

By their rhythm and tone, even by their melody, these words jostle together as a reality in which time and space collapse in a brute logic. As if we were there, as if we could hear the sound of the boots and the men heavily climbing up the stairs. Are they here? What do they want? Who will they arrest this time? Our neighbours? For the occupant of the 5th floor who has a funny last name? Are they coming for us?

It is easy to imagine this poem on the scene in a play à la Bertolt Brecht. Just imagine a modern theatre like those that do not exist anymore. Then try to recreate the scene, with its cement walls, pipes opened in the ceiling, nude architecture and, above all, the heartrending and hard music of a Kurt Weill or, even better, the atonal music of a Hanns Eisler.

Combined with the direct and political realism of a Brecht, the effect can be easily imagined: the scene plunged into the darkness, no décor, but only black sheets falling, the light targeting the speaker, the noises and violence into the background, the shrill cries that, at first, seem far away, but then come closer, closer, nearly there, a combination of events that culminates in a crescendo of boots and shouts that explodes right before our eyes: violence revealed as the human person.

Couldn't this poem find a way to be a part of the play called *The Resistible Rise of Arturo Ui*,[6] dedicated to the fight against Hitler by Brecht? With the dramatic magic of a Brecht, this poem can only fill us with horror, to the point of shaking our fundamental beliefs, in total disregard of further thought and content.

5 Then They Came for the Communists

But let's try to understand the poem within the context of Germany in 1933. It is a fact that, for partisanship, if not to fuel some dark scheming and power strategies, Hindenburg brushed aside the political institutions and democratic procedures, then deliberately handed the power of Germany into the hands of Adolf Hitler, without any democratic legitimization.[7]

Once in power, the question became one of consolidation. Remember, that although Hitler's dictatorship could perpetuate immediately by the elimination of Communists, Jews and Unionists, it was only through specific and highly planned mechanisms that the logic of "industrial death" could be carried out.

It began through a policy of euthanasia for people suffering of mental or degenerative illnesses, or simply for people without any hope of recovery. It was a State logic delivering "easy deaths" (standing for euthanasia) as required by racial eugenics.

Furthermore, concentration camps started at the beginning of 1933 a campaign of "violent death" by deprivations, hunger, illness and forced labour. It was first aimed at the opponents of the regime, like Communists, Unionists and religious dissenters (like Niemöller), but it then spread to the "undesirables", like Jews and Gypsies.

In Germany, and then in other European countries occupied by the German army, every year this logic of death was becoming more and more an industrial strategy focussed on the undesirables.

At the Wannsee conference of 1941, Nazi officials established a coherent, functional and totally industrial planning that resulted in the most horrible genocide in history.

Hannah Arendt, in her book, *Eichmann in Jerusalem*,[8] describes this elimination

[6] Bertolt Brecht (1898–1956) *The Resistible Rise of Arturo Ui* in his *Collected Plays* ed. Ralph Manheim & John Willett, VI (ii) (New York: Random House/Vintage 1970–1976). Also see his *Fear and Misery in the Third Reich* in idem., IV (iii).

[7] Bjarne Melkevik 'Légalité et légitimité: Réflexions sur les leçons de Weimar selon David Dyzenhaus' *Les Cahiers de droit* 40 (1999) 2, pp. 459–477.

[8] Hannah Arendt *Eichmann in Jerusalem* A Report on the Banality of Evil (New York: Viking Press 1963). Cf. also *Hannah Arendt Revisited* »Eichmann in Jerusalem« und die Folgen, ed. Gary Smith (Frankfurt: Suhrkamp 2000); Seyla Benhabib 'Arendt's *Eichmann in Jerusalem*' in *The Cambridge Companion to Hannah Arendt* ed. Dana R. Villa (Cambridge: Cambridge University Press 2000), pp. 65–85; Richard J. Bernstein *Hannah Arendt and the Jewish Question* (Cambridge, Mass: MIT Press 1996); Dana R. Villa *Politics, Philosophy, Terror* Essays on the Thought of Hannah Arendt (Princeton: Princeton University Press 1999).

technique through an explanation of how the official ADOLF EICHMANN, a soulless and unscrupulous being, put his talents together to implement the train system transporting Jews toward the concentration and death camps.

Given his organizational skills, Eichmann was able to overcome all war-related constraints to the plan. He negotiated with other national governments, and persuaded different leaders of the soundness of the Nazi plan to solve the fate of the Jews. When ARENDT told her story, she was listening to EICHMANN's defense, who at the time was arguing his case before the Supreme Court of Israel, accused of "crime against humanity", and claiming that he only "followed orders"[9] and "organized train transports".

6 "I didn't Speak up, because I wasn't a Communist"

It is true that the Nazi regime had been fought from the first day it came to power, and before. I am referring to men and women who sacrificed everything, including their lives, to fight the Nazi machine.[10] Indeed, the culture of violence and terror created by the Nazis was not only an offensive instrument; it was also a continuing effort to overcome the opposition.

The fact that not everyone behaved like a hero, does not allow us to label everyone as cowards, opportunists, or silent collaborators. A good amount of lucidity should protect us against those hasty judgments. And yet, the fact remains that, as early as 1933, large sections of Germany agreed with HITLER's coming to power.[11] For them, he was a saviour; a leader who could restore Germany's lost dignity and implement appropriate monetary and industrial policies. In short, he could fuel the economy.

After 1936, for the middle-class German, Germany was synonym of *Volkswagen* and *Autobahnen*, and the promise of the rise to middle-class for the disadvantaged groups of society. So they seem to perceive, terribly wrong in fact, that even if the regime had hidden and sometimes evident barbarian sides, everything would work out in the end. Unfortunately, the fact that our judgements about such perceptions and behaviours can retrospectively be appalled by the pain and suffering they allowed, does not change the historical facts.

If we insist so much on this aspect, it is because NIEMÖLLER refers to it implicitly in his poem.

Like the poem states, "they" first came for the Communists.

Among Conservatives and Liberals, there was a general perception that communists were traitors, only loyal to STALIN and the partisans of the Bolshevist dictatorship, and that they deserved to be punished. Did anyone protest? Only a few, but nobody listened to them.

[9] Bjarne Melkevik 'Obedience, Law and the Military' *Professional Ethics* 10 (2002) 2–4, pp. 267–283 {or 'Diritto, obbedienza ed istituzione militare' *Rivista Internazionale di Filosofia del diritto* LXXX (2003) 1, pp. 31–50}.

[10] Peter Hoffman *The History of the German Resistance* 1933–1945, 3rd ed. (Montréal & Kingston: McGill-Queen's University Press 1996).

[11] See Daniel Jonah Goldhagen *Hitler's Willing Executioners* Ordinary Germans and the Holocaust (New York: Alfred A. Knopf 1996).

When "they", the Nazis, came for the Social Democrats, why shouldn't the Conservatives and Liberals keep their eyes closed, thinking that they were only "Communists in disguise" with their insistence on equality, or a plague that did not have a lot of respect for the order, property and formal nature of law? Who was protesting? A few did, but not enough.

Then, when the Nazis attacked Unionists, who could cry, since the German media had instilled for a long time that Unionists had too much power, that they were abusing it, and were most likely responsible for the economic collapse of Germany. So who protested? Once again, a few did, but they were not enough.

Then, when the Nazis came for the Jews? Who protested? A few, but did anyone listen?

The plan of the Conservatives and Liberals to stop the Socialists and to get rid of them, which has been a constant political feature throughout the political and philosophical history since the 19th through the 21th century, backfired. Their stratagems crumbled and their Faustian pact with Hitler and the Nazis caught them up cruelly. In the end, they were dreadfully alone, since there were no Socialists left to protect them against the Nazis.

There was simply nobody left to defend them against their own stratagems and the hatred they allowed to be reproduced through inaction. Of course, they had read Faust,[12] and they had most probably ponder over the Faustian pact, but they had never understood that it wasn't only a classical novel but also a lesson that should have been learned: the one who makes a pact with the devil does not loose only his life, but also something even more precious, that is, the innocence so essential for the judgement that, in the end, we have to make of ourselves and our destiny.

7 "No one was Left to Speak up"

There is a religious component in Niemöller's poem.

A subtle pastoral feeling and even the thunder of a sermon, becomes palpable throughout the narrative. It is simply the ultimate reflection of a Good Samaritan[13] who had not been able to save anyone, because he was confined to a concentration camp.

Niemöller could have suffered the same fate of Dietrich Bonhoeffer,[14] a protestant theologian who died by hanging on April 9 1945, a few days before the final fall of the regime. Evidently, the Nazis did not want him to survive.

In the English version of the poem, the emphasis is first on three political categories (Communists, Social Democrats, and Unionists), and then ends *in crescendo* with three religions. It is first the Catholics who are persecuted, then the Jews, to finally realize that it is the Protestants of the Confessing Church that suffer from the Nazi persecution.

[12] Cf. Fernand Ouellet. Johann Wolfgang von Goethe (1749–1832) *Faust* 1–2 (Paris: Flammarion 1984). See the "modern" version of Klaus Mann *Mephisto* (New York: Penguin Classics 1995), in which the "Führer" is none other than Mephisto.

[13] Luc, 10, 29.

[14] Dietrich Bonhoeffer (1906–1945) was sentenced for his part in Operation 7 which allowed a group of Jews to cross the border toward Switzerland. He was also involved into the planning of Adolf Hitler's assassination. He is now mostly known for his books like *Ethics* (SCM Press 1955) and *Letter and Papers from Prison* (SCM Press 1953). Cf. also Kenneth Earl Morris *Bonhoeffer's Ethic of Discipleship* A Study in Social Psychology, Political Thought, and Religion (University Park: Pennsylvania State University Press 1986).

In fact, the Confessing Church preached, like the Catholics, that Jesus was Jewish. And that the Nazi message and its insistence on a "positive Christianity" (within an openly pagan philosophy!) was plain fraud. And that their so-called "positive Christianity" was a deception made up by the Nazi officials to manipulate a population that had grown accustomed to mixing the language of power with the message of Christ.

To be sure, Niemöller pleaded for Christianity, and struggled against Neo-Paganism and its seductive call to the German race. His words reminded us what each and every Christian needs to know: Jesus was not a nationalist. This basic fact is present throughout the Gospels, and Paul the Apostle (who began his religious life as a Jew) stressed it by describing what the Christian awakening is made of.

But Niemöller did not need to discourse on the last centuries' misunderstandings between Judaism and Christianity, but only to stress on the certainty that the Nazis, by attacking the Jews, also attacked Christians and the nature of Christianity. Their Nazi religion based on "race, blood and nationality" was the complete opposite of Christianity.

In this specific sense, the culpability of not being able to protect the Jews, their older brothers, falls on all Christians as a fault of not being at the height of the situation, being genuinely Christians, faced with a world that, like so often, venerates their new Golden calves.

Read this way, within a Christian paradigm, the emphasis is always put on the one we want to wake up, to shake as it were: the German middle-class Protestant Christian. The one who, during the 30's was so happy and hopeful to see factories going well again, and roads being built and maintained, and shops full of products he could finally buy.

So the door in front of which "they", the Nazis, eventually stopped was one of the Confessing Church's opponents, or simply in front of Niemöller's house who, like it was said before, will be arrested, imprisoned and sent to a concentration camp in 1937. Who was there at that point to protest, testify and take the lead? Who was there to simply say no? Probably a few, but then, why did nobody say anything?

8 "Then, they Came for us"

Now, it is time to stress on the major differences between two of the English versions. Where one clearly speaks of Nazis, the other only says "they":

> First they came for the Communists,
> and I didn't speak up,
> because I wasn't a Communist.
>
> Then they came for the Jews,
> and I didn't speak up,
> because I wasn't a Jew.
>
> Then they came for the Catholics,
> and I didn't speak up,
> because I was a protestant.
>
> Then they came for me,
> and by that time there was no one left to speak up for me.

If we cannot feel Brecht's style in this version too, it nevertheless explains differently the need for tolerance and, mostly, to fight for a society that can eradicate intolerance by its roots. Wasn't it a lesson cruelly learned from the Nazi time?

While one English version accurately sets the poem in the time of the Nazis' atrocities, the other resumes it only in a timeless and abstract way. By the fact that "they" can nowadays mean any force of oppression and discrimination, this "they" takes a more accentuated picture of contemporaneousness and topicality.

Because, " t h e y " didn't stop their war against mankind, against the fact that men and women escaped (or tried to) from their ideology of religious, ethnic, or tribal fanaticism. T h e y seem to be the only human beings who never sleep but carry on their war against human autonomy, against humans that are beyond their control, at every hour, as if nothing happened. Moreover, it also follows the deadly logic of Niemöller's poem, namely counting on the silence of others, on our non-heroism and on our so common discretion.

9 Conclusion: Experiencing Dignity as a Committed Awareness to Building Tolerance with Truly Different Others

Niemöller's poem ignites powerful narratives for us, because it stimulates imaginative frameworks capable of linking human's rights not only to tolerance but also to individual and social commitment. He calls upon us to assume responsibility, not through the kind of guilt which is only capable of engendering sorrow and self-pity, but through a renewed sense of conviction and willingness that sincerely acknowledges who we truly are, and engages others constructively, so as to build and explore with them the normative references and practical deeds needed to implode our individual dignity, by boldly daring to explore and share it with others.

To be sure, tolerance and dignity are difficult and troublesome concepts, because the narratives that construe them make us evaluate our character, assess our personality and values, but most of all, they demand from us to come to terms with our personal histories, the things we have done and have left undone for or against others. Ultimately, I am suggesting that experiencing tolerance demands from us a commitment to find out what exactly we are made of, but not as an isolated exercise, rather as a communicative experience in which we truly come out of ourselves to really get in touch with others so as to transform and be transformed with them.

Didn't we first state that the idea of "who are you?" and "who do you want to be?" is a part of the concept of tolerance? Because then, the issue of tolerance formulated this way cannot be only a theoretical conception of duty, and neither an ethical duty à la Kant. Quite frankly, we should rather think about tolerance in union with the resources that can be mobilized by societies and individuals.

In this perspective, our approximation is truly brought to fruition, so as to include the human and material resources needed to augment the possible levels of tolerance in specific human groups, and thus enhance the visible and palpable indicators of tolerance around the world. Only a few countries, but unfortunately too few, can now really

claim that they have the necessary mentality, legal references and democratic cultural "resources" to openly manage the issues of tolerance.

The question of tolerance, so conceived and understood within its social background, evokes that it is not only a matter of the inspiration or persuasion of a few, but most importantly, it demands that all of us work towards the developing a mentality that engenders actors and scenarios of tolerance.

FACULTY OF LAW
LAVAL UNIVERSITY, QUÉBEC, CANADA
BJARNE.MELKEVIK@FD.ULAVAL.CA

Deconstruction as a Tool in American Legal Theory and Jurisprudence

Françoise Michaut

The act of deconstruction as theorized by Jacques Derrida has had a tremendous appeal on American legal theory and jurisprudence. Derrida himself was invited to take part in the research work on the impact the notion he developed can have on the way law is perceived. He intervened in a symposium held on 'Deconstruction and the Possibility of Justice' at the Cardozo Law School in New York, at which papers both in legal theory and jurisprudence were presented.[1] But before that, American legal theorists had already used the notion and brought about significant results.

Deconstruction has, in some circles, been considered a way of 'trashing', of discrediting established theories by bringing ridicule on them and undermining their validity. It seemed to offer leftist critics an easy means to demonstrate contradictions within the theories they disliked.[2] In fact, as Jack M. Balkin has been stressing, people who want to express dissatisfaction with the way things are may feel more interested in using this particular approach, yet deconstruction in itself has no marked political agenda and can be applied to investigate any text with the same amount of success.[3]

Deconstruction is the result of a meditation on the conditions under which texts —whether written or oral—and human institutions in general, are produced. Behind the apparent unity or mastery, there is always something lacking, something differed, something not yet arrived, and something jarring, something contradictory, the piling up and articulation of multifarious and ill-accorded heritages.

The aim of deconstruction is not to demolish but to understand, to permit awareness and 'de-layering',[4] to discover how what we are confronted to, has been built in order to be able to evaluate it more accurately and to be ourselves as efficient actors as possible.

[1] *Cardozo Law Review* 11 (1990) 5–6, pp. 919–1726.

[2] On 'Trashing', see Mark G. Kelman 'Trashing' *Stanford Law Review* 36 (1984), pp. 293–348. Kelman himself (on pp. 298–299) makes a distinction between pure deconstruction and trashing. Similarly, Balkin writes: "I hope to demonstrate that 'deconstruction' as I use the term, is not simply a fancy way of sticking out your tongue, but a practice that raises important philosophical issues for legal thinkers." J. M. Balkin 'Deconstructive Practice and Legal Theory' *Yale Law Journal* 96 (1987), pp. 743–786 at p. 744.

[3] Jack M. Balkin 'Deconstruction's Legal Career' *Cardozo Law Review* 27 (2005), pp. 719–740 at pp. 721–722.

[4] See *A Hermeneutic Reader* ed. Sanford Levinson & Steven Mailloux (Evanston, Illionis: Northwestern University Press 1988), Preface, pp. x–xi.

We will not escape the common situation governing writing, speaking and the creation of institutions but if we are conscious of it, we may perhaps be mindful of a few traps and avoid being the victims of some illusions.

Deconstruction was born of the philosophical, epistemological endeavour of a man who had known from the start a multicultural environment and had very early experienced the cruelty of official injustice. As Drucilla Cornell has remarkably underlined, deconstruction is not to be confused with nihilism. She justly points to the place occupied by Emmanuel Levinas in Jacques Derrida's writings to interpret deconstruction as a response to the call to responsibility.[5] In a dialogue between Jacques Derrida and Hélène Cixious held for a literary journal, we may find direct confirmation of what seemed evident. We first discover an author and teacher meticulously pondering every word of the text he will utter or publish, careful of tone and rhythm. Then we find Cixous telling Derrida how much his writings are self-portraits of a particular kind. And finally there arrive considerations on truth where Derrida recognizes how he is prudent in the use of that term while denying he is the sceptic or nihilist his enemies imagine.[6]

There has been a controversy between two champions of deconstruction, Pierre Schlag and Jack M. Balkin, who can both be considered members of the Critical Legal Studies movement, although Balkin could also be regarded as a representative of the Law and Literature, or at least the Law and Language trend.[7] The controversy bears upon the way of using deconstruction in law: may it simply be used as a tool for the scrutiny of law and its language or language in general, or does it above all imply a change of attitude on the part of the people of the law concerning their ability to fully master what they are doing? Schlag criticizes Balkin for having finally reduced deconstruction to an analytical tool, when it ought to lead to a new general attitude concerning the self. Which attitude? It is difficult to figure out. For Schlag, legal actors should beware of current legal discourse that invites "a rhetorical self" to seek answers outside of the text, in his own self supposed to be autonomous, whereas it "has been largely replaced as a decisional site by [...] a language game run by bureaucratic, institutional, and linguistic practices."[8] One might give him credit for saying that there is nothing but the text. Yet the text must be interpreted and this can be done only by a responsible self however limited its abilities are. Schlag admits that he is not easy to understand. He specifies: "What is at stake here is a d i s p l a c e m e n t , a d e c e n t e r i n g , not an annihilation, of the individual self. The claim i s n o t that the self does not exist, nor even that the self

[5] Drucilla Cornell 'From the Lighthouse: The Promise of Redemption and the Possibility of Legal Interpretation' in *Cardozo Law Review* [note 1], pp. 1687–1714.

[6] 'Du mot à la vie : un dialogue entre Jacques Derrida et Hélène Cixious' in *Dossier Derrida* [Magazine Littéraire] 430 (Avril 2004), pp. 22–29.

[7] Balkin has rather compare legal interpretation to musical interpretation than to literary interpretation. Yet in his works in the field of deconstruction, he puts forward theories of interpretation and the functioning of language which can take place in a law and literature agenda or in a law and language agenda. On the preference for the comparison with musical interpretation, see Sanford Levinson & J. M. Balkin 'Law, Music and Other Performing Arts' *University of Pennsylvania Law Review* 139 (1991), pp. 1597–1658. On Law and Literature and Law and Language, see, e.g., Françoise Michaut 'Le mouvement »Droit et Littérature« aux Etats-Unis' in *Mélanges Paul Amselek* (Bruxelles: Bruylant 2005), pp. 565–592 at p. 583.

[8] Pierre Schlag '»Le hors de texte, c'est moi«: The Politics of Form and the Domestication of Deconstruction' in *Cardozo Law Review* [note 1], pp. 1631–1674 at p. 1671.

is always fragmented, n o r e v e n that the individual self never exists".[9] But what is he expecting? That is not at all clear. One is tempted to make a parallel with the question of intention. Derrida puts forward the existence of "a free »play« of the text" but he does not forgo the importance of intention: neither reference can be considered to dominate over the other.[10]

Unquestionably Balkin has been the American legal theorist most occupied with deconstruction. In 1987, he wrote an article "to introduce legal readers to the ideas of the French philosopher Jacques Derrida and to his philosophical practices regarding the interpretation of texts, sometimes known as deconstruction".[11] In 2005, in an article entitled 'Deconstruction's Legal Career', he tried to sum up what has been done as deconstructive work in law, in the United States.[12] In the meantime, his writings had been strewn with references to deconstruction and he has produced three texts totally devoted to deconstruction : one dealt with the notion of 'nested oppositions',[13] another was a funny-looking, yet very deeply thought analysis of a famous footnote which had commanded the way the Supreme Court had read its task of interpreting the constitution ever since it was issued and still does,[14] the third, for the symposium on Deconstruction and the Possibility of Justice, bore upon the relationship between deconstruction, morals and politics.[15]

Throughout these several contributions, Balkin embraces every aspect of deconstruction in American legal thought. Yet one may wonder whether he masters them all that perfectly. One may consider there are two main themes for deconstruction in law in American legal theory and jurisprudence. The first one is scrutinizing the text to discover what it hides; the second is drawing consequences from the situation of non-achievement in which we currently live—and it is this second point that seems to escape Balkin.

The present essay will be divided into two parts: the first one bearing on deconstruction and the scrutiny of texts, the second one on the longing for a not yet, in which the question of justice but also those of the precedent and of the rule of law from the perspective of American deconstructionist legal theorists will be examined.

1 Deconstruction and the Scrutiny of Texts

The Metaphysics of American Law by Gary Peller of 1985 may be regarded as one of the first published attempts to apply Derrida's theory of deconstruction to American legal discourse. Peller does not pretend to write as a perfect disciple of Derrida; he admits other influences but the title he gave his text and the vocabulary he uses constantly send

[9] *Ibidem.*
[10] See Balkin 'Deconstructive Practice…' [note 2], pp. 777–785.
[11] *Ibid.*, p. 743.
[12] Balkin 'Deconstruction…' [note 3].
[13] Jack M. Balkin 'Nested Oppositions' *Yale Law Journal* 99 (1990), pp. 1669–1705.
[14] Jack M. Balkin 'The Footnote' *Northwestern University Law Review* 83 (1989), pp. 275–320.
[15] Jack M. Balkin 'Tradition, Betrayal and the Politics of Deconstruction' in *Cardozo Law Review* [note 1], pp. 1613–1630.

us back to Derrida's works.[16] He wants to prove that the liberal theory of law is wrong, that law cannot be isolated from politics (or other disciplines, more precisely)[17] and he recognizes that this question brings him away from Derrida's field of investigation.[18] Yet Derrida's deconstructive enterprise seems to be his leading source of inspiration.

At the heart of his demonstration lies Derrida's analysis of language. Language defines by differentiation rather than by making the reality of the signified present: "the signified is always already a concept".[19] The signifier is a word which conveys meaning depending on social conventions but may also because of these conventions be incapable of transmitting the intent of the speaker.[20] "Language speaks through us rather than we speak through language, writes Peller who immediately cautions his readers against taking the formula too radically: "This view of the autonomy of »structures«, however, suffers from the same metaphysical pretense as the notion of the autonomy of subjects."[21] We will see with Balkin below how the deconstructive approach is a way of taking one's distances from structuralism. Peller rejects the idea that context will supply the indeterminacy generated by the difficulty of discovering intent: the context has a priori no boundaries: the interpreter defines it by distinguishing what to consider relevant and what not.[22]

Peller insists that meaning "is generated through the socially created system for dividing things in the world".[23] But the systems, as Peller recognizes and as Richard Hyland will later emphasize, are different from one language to another, for example.[24] Language permits to give meaning, to interpret the world but not to reach beyond it, a perfect, unmediated representation. The representation will be ideological, that is it will depend upon assumptions ("background structures") that have become embedded in ordinary discourse and tend to reify (to be taken as natural) while they have been built, they are contingent constructs, amenable to change. Peller finds behind legal reasoning, in what he calls the liberty of contract era, a radical dichotomy between subject and object, the term of which are simply reordered in American legal realism: whereas, in the first case, a transcendental subject is presupposed at the basis of law, in the second case, it is replaced/displaced by a transcendental object.[25]

The existence of unacknowledged, underlying assumptions leads Peller to deny the rationality argument put forward by advocates of the rule of law. He emphasizes that underneath there may well be will or power which ruins the appeal to reason in his eyes.[26] One might suggest that the argument of rationality is always limited in its validity to the premises of the person putting it forward; it is always a closed system: if you start from different premises you will get a different reasonable answer.

[16] See Gary Peller 'The Metaphysics of American Law' *California Law Review* 73 (1985), p. 1152–1290 at pp. 1160–1161.
[17] Peller, p. 1153.
[18] *Id.*, pp. 1160–1161, note 6.
[19] *Id.*, p. 1163.
[20] *Id.*, p. 1162.
[21] *Id.*, p. 1177 and note 42.
[22] *Id.*, p. 1173.
[23] *Id.*, p. 1165.
[24] Richard Hyland 'Babel: A She'ur', in *Cardozo Law Review* [note 1], pp. 1585–1612.
[25] Peller [note 16], pp. 1153–1154.
[26] *Id.*, p. 1155-59.

Remarkably, Peller admits the honesty of the judge: the decisions taken in the liberty of contract era are qualified by him as "as »legal« as law gets". They are not subjective or a political choice, they were dictated by "the legal representational language" that gave the opinion "a coherence and a sense of necessity…"[27] To my mind, this type of analysis is extremely precious for legal theory if we want to understand what really goes on.

Also, Peller points to the "freezing" role of categories, which may constitute an obstacle to the free development of analogies.[28] And wittingly he remarks to conclude that "we are inevitably thrown into social struggles as either reproducers or resisters to the reigning order". That's life! We may find reasons for either position but we may also discover among them a question Peller doesn't mention: what makes a law just?

Balkin's first presentation of deconstruction followed shortly after that. Today this work of 1987 must be approached together with a later writing of the same author in which he tried a synthesis on deconstruction in American theory so far and with other texts in which he dealt with particular aspects or otherwise referred to deconstruction applied to legal discourse.

Derrida is a philosopher, Balkin insists, but he is a philosopher mainly interested in the lag between what we want to say and what the signifiers we use permit us to convey: what we want to say is each time unique, the signifier means through the different usages ("reiterations") that are made of it. Derrida's works and the "practice" of deconstruction were introduced in the departments of literature before gaining law schools' attention. Balkin points to a frequent misinterpretation of both deconstruction and reader response theory which simultaneously hit literary criticism and were often mistaken as one. Neither asserted that the reader could give any interpretation he wanted and this misreading seems the less understandable to Balkin that both inscribed themselves in a context where the subject was culturally, linguistically and socially constructed.[29] Deconstruction reacts against the immutability supposed by structuralism, it emphasizes constant change made possible by diversity but it admits the individual's embedding in a historical and geographic context which determines the cultural and social background he will confront the world with. His personal experiences will allow him to transform what he has received but he cannot do without this heritage. It seems we are not far from the notion of an interpretive community which other legal theorists have emphasized. Yet Balkin, carefully listening to Derrida is almost going further: "Deconstructionists argued that structures of social meaning are always unstable, indeterminate, impermanent and historically situated, constantly changing over time and accumulating new connections, associations and connotations".[30] The importance is in the nuances as every practicing lawyer ought to know! They may announce a change of considerable magnitude.

In 1987, Balkin assigned three tasks to deconstruction applied to legal texts: helping to criticize contemporary doctrines by pointing to internal contradiction in particular; bringing forward the role played by ideologies in the formation of legal arguments, which

[27] *Id.*, p. 1194.
[28] *Id.*, p. 1155.
[29] By Balkin, 'Deconstructive Practice…' [note 2], pp. 743–746 and 'Deconstruction…' [note 3], pp. 719–720.
[30] Balkin 'Deconstruction…' [note 3], p. 720.

can be useful for legal historians, legal philosophers as well as for would-be reformers and introducing new perspectives in the debate over interpretation.[31]

Attacking prevalent doctrines may be considered to have been the favourite game of American legal deconstructionists who count among themselves an important number of representatives of the Critical Legal Studies movement and feminists. A good example is the deconstruction of the contract doctrine conducted by Clare Dalton as early as 1985. At the beginning of her article, Dalton may give the impression of simply repeating the common manifesto of the Critical Legal Studies movement insisting on the relation of self and other but a reading informed of her ultimate preoccupation with new forms of legal union between men and women and their fragile guarantees in this study of contract will also find an echo of it in those introductory words. She writes thus:

> "The stories told by contract doctrine are preoccupied by what must be central issues in any human endeavor of our time and place. One set of questions concerns power: What separates me from others and connects me to them? What is the threat and the promise to me of other individuals? Can we enjoy the promise without succumbing to the threat? Am I able to create protective barriers that will not at the same time prevent me from sharing the pleasures of community? What is the role of the state in regulating my relations with others? The other set of questions concerns knowledge…"[32]

They take a new resonance there and we may think the institution of contract is transformed by the new instances for which it is used. Otherwise as far as the deconstruction of the doctrine of contract is alone concerned, after many other authors, we may turn to the writings of the British legal scholar P. S. Atiyah, who without any explicitly expressed will to do so deconstructs the doctrine of contract first in linking it and its variations to different periods in intellectual history and then shows how the doctrine of implied promises conflict with the theory of contract.[33] This example might serve to conclude that deconstruction may have been practiced before its theory was invented and that others in the future may continue to use it unknowingly. It may also be a further proof that it is not necessarily linked with a particular school. For Balkin, "Atiyah is wrong […] in thinking that a new ground of explanation will succeed where the old one has failed". He prefers to find in Atiyah's demonstration the proof of a relation of differ*a*nce between the will theory and the benefit/reliance theory of promissory obligation.[34]

The originality of Balkin's writings lies in his focusing on questions of methods and questions of impact. Given the context in which deconstruction developed in American legal theory and given the place occupied in Derrida's thought by the opposition of writing and speech, Balkin puts special emphasis on the study of the hierarchies established between opposed terms and the characterization of the opposition.[35] He insists on

[31] Balkin 'Deconstructive Practice…' [note 2], p. 744.

[32] Clare Dalton 'An Essay in the Deconstruction of Contract Doctrine' [*Yale Law Journal* 94 (1985)] in *A Hermeneutic Reader* [note 4], pp. 285–318 at pp. 285–286.

[33] By P. S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press 1979) and *Promises, Morals and Law* (Oxford: Clarendon Press 1981).

[34] Balkin, 'Deconstructive Practice…' [note 2], p. 772.

[35] *Ibid.*, pp. 746–772 and Balkin 'Deconstruction…' [note 3], pp. 722–724, as well as Jack M. Balkin 'Nested Oppositions' [reviewing John M. Ellis' Against Deconstruction] *The Yale Law Journal* 99 (1990), pp. 1669–1705.

Derrida's proposal in this field as being one of a temporary reversal of the order of priorities in order to test the opposition, to get what Balkin calls "new insights" on what is at stake.[36] For Derrida, according to Balkin, what awaits us is the need to acknowledge a mutual dependence rather than a hierarchy between the two, whereas in the hierarchy, the first term is invested with a "presence" the other lacks and the first is used to define the second as a negative of it.[37]

Balkin points to the centrality of the question of similarity and difference in lawyer's argument and refers to Edward H. Levi's characterization of legal reasoning as reasoning by analogy. He contrasts a logical contradiction which opposes propositions and "involves two terms, a proposition and its logical denial" with a "conceptual opposition" which concerns two terms within a certain context: whereas in some context, the terms will be taken in opposition, in another one they will be used in a way that emphasizes similitude between them: red and green, for example, have come to symbolize opposite signals for action (in the traffic system, notably) but they are both names for colours. Terms may also depend one from the other in an historical or in a conceptual perspective: there is "nested opposition" when both terms involved in it are in a relation of difference but also of similarity (Derrida speaks of differ*a*nce to designate such an instance) or when there are "traces" (another term used by Derrida) of one of the concepts in the other.[38] Balkin defines the "trace" as a metaphor for the effect the opposite concept has left on the other concept.[39] While Derrida's paradigm case has been the speech/writing opposition, one of the most studied oppositions by American legal deconstructionists has been the public/private distinction. In Balkin's eyes, a distinction "creates a conceptual opposition because it separates things inside the category from things that fall outside of it" and the deconstructionist will examine what has been considered as justifying the classification made and the validity of the criteria : "[s]he can argue that the justifications for the distinction undermine themselves, that categorical boundaries are unclear or at odds with the proffered justifications, or that the boundaries shift radically as they are placed in new contexts of judgment".[40]

When Balkin objects to the importance the Critical Legal Studies' representatives give to indeterminacy in law, he brings forward the argument that ideology is a source of determinacy. In his book review, 'Ideology as Constraint', he makes clear that he uses the term "ideology" with no "pejorative connotations", no presupposition of a "false consciousness"—an idea long supported by Duncan Kennedy—but rather as a synonym of "the social construction of the subject", that is rather in the way Clifford Geertz did.[41] He puts "structures and events" and "social norms and individual behaviour" in nested oppositions: "[s]ubjective experience is socially constructed, but culture, ideology, and language exist only as instantiated in the experiences of individual subjects".[42] He makes

[36] Balkin, 'Deconstructive Practice…' [note 2], pp. 746–747.
[37] *Id.*, pp. 747–748.
[38] Balkin 'Nested Oppositions' [note 35], pp. 1674–1676.
[39] Balkin, 'Deconstructive Practice…' [note 2], p. 752.
[40] Balkin 'Deconstruction…' [note 3], p. 724.
[41] Jack M. Balkin 'Ideology as Constraint' [reviewing Andrew Altman's Critical Legal Studies: A Liberal Critique] *Stanford Law Review* 43 (1991), pp. 1133–1169 at p. 1138.
[42] *Id.*, p. 1143.

a distinction between what he calls "social norms" and legal rules; social norms tend to play unconsciously and may be evaluated severely when discovered.[43] He compares ideology to "a glue that binds the law together" and renders it intelligible to its addressees.[44] He invites to reverse—not temporarily, it seems—the place acknowledged to determinacy and indeterminacy in judicial decision.[45] Deconstruction can surely help struggling against reigning ideologies by pointing to their existence, it may help the legal historian understand the extent he must give to his investigations but it cannot do away with ideology; simply it may happen, if the context is fit, that one ideology replaces/displaces another.

Elsewhere he will define ideology as "cultural software", a set of tools for apprehending and understanding who you are and what is happening to you, what the world around you is like, and so on'.[46] In 'The Rhetoric of Responsibility', he shows how arguments we use in the field of responsibility are shaped by ideology, how the way of telling the facts and building the context will be different and the influence these stylistic elements in turn may have on the way a case is decided.[47] Balkin examines the utility of deconstruction at the grassroots level also, starting from the acknowledgment that language as a means of communication is unable to give a perfect expression of speaker's or writer's intent. Neither the intent of the author nor "the free play of the text" can be considered as controlling its meaning: "The intent theory and a theory of free play must coexist in an uneasy alliance in which neither can be master nor servant. The relation of differ*a*nce between them prevents either from serving as an originary ground of interpretive practice".[48]

The text says more or different things than its author intended: because words have a life of their own, because style says something, because the text taken as a whole may reveal tensions, contradictions in what is expressed. This is true for legal texts as well as for other texts. Balkin draws our attention to different phenomena to be looked for by a deconstructionist: form may contradict substance ("often the rhetorical features of a text undermine or contradict the argument made by the text"), the economy of the text may be troubling ("Deconstructionists may also look for unexpected relationships between seemingly unconnected parts of a text, or use the marginal elements of a text as an uncanny commentary on what appear to be its central elements"), the words used may also be carefully studied to discover what they may suggest ("which may be conflict or ambiguity", Balkin mentions), puns and plays on word may not be innocent.[49]

In 'The Footnote', an article on a famous footnote under a United States Supreme Court decision, Balkin brilliantly illustrates some of these techniques and the powerful

[43] *Id.*, p. 1148.

[44] *Id.*, p. 1151.

[45] *Id.*, p. 1153. One may draw a parallel with the phenomena underlined by Michaels when he shows how professional usages will make perfectly clear what is referred to in a particular context. See William Benn Michaels 'Against Formalism: Chickens and Rocks' [*Poetics Today* 1 (1979)] in *A Hermeneutic Reader* [note 4], pp. 215–225 at p. 218.

[46] Jack M. Balkin 'The Proliferation of Legal Truth' *Harvard Journal of Law and Public Policy* (2003), pp. 101–113 at p. 106.

[47] Jack M. Balkin 'The Rhetoric of Responsibility' *Virginia Law Review* 76 (1990), pp. 197–263.

[48] Balkin, 'Deconstructive Practice…' [note 2], p. 785.

[49] Balkin 'Deconstruction…' [note 3], p. 726.

effect that can be theirs.[50] At first the reader is thrilled by a marvellous exercise of skilful writing, a deployment of literary art, fireworks with words, then he discovers that the artist has put forward that the apparently negligible decision (save its footnote 4) does have an importance of its own, that, in its entirety, it speaks more of adulterated democracy and adulterated control than of adulterated milk and the constitutionality or unconstitutionality of its prohibition by a federal law in interstate commerce: "*Carolene Products* is the post-1937 Court's first extended discussion and elaboration of a theory of judicial review proclaimed in a very famous opinion: *West Coast Hotel Co. v. Parrish*".[51] As Balkin remarks, *Carolene Products* is at the beginning of a new era in American judicial review, where the Supreme Court applies a double standard of scrutiny: lesser control in economics, strict scrutiny in matter of civil liberties. The fireworks is going on and, for the finale, comes the exclusion of the question of economic rights from the agenda of the Court this new conception of judicial review permits today, a question Balkin links to the quality of the functioning of a democracy.

Another example of deconstruction at work on a legal text is John Leubsdorf's article '*Deconstructing the Constitution*'.[52] Leubsdorf wants to go beyond the familiar statement that a constitution is the mirror of compromises and harbour ambiguities. He invites his readers to forget this insistence on "blurred boundaries" and to conceive a constitution as "a whirlpool preserving its shape by catching us all in motions and countermotions".[53] It seems thus to become a system in constant search of an equilibrium. There are full contradictions in the text, due to contradictory objectives embedded in it. Silence of the text may be meaningful: the word "slave" is carefully avoided although the institution of slavery is taken into account. The lack of the name may be read as a refusal of legitimization. A constitution confers powers and brings limits to those powers. "Powers and limits, then, entwine and struggle throughout the constitution".[54] A constitution is a text among other texts. "Other voices" speak through it by mechanisms it has itself instituted or because of where it comes from or because of its ultimate addressees and supposed authors, the people it is to administer and which it constitutes as a people.

Balkin stresses some points in response to both deconstructionists and adversaries of deconstruction. Deconstruction is not an enemy of reason: it uses reason to criticize some forms of reasoning.[55] It does not conclude that texts have no meaning or any meaning somebody wants to give them but that there is a surplus of meaning to be discovered and analyzed.[56] It does not want to abolish categories but invites to be aware of the limits of their validity and of their assumptions.[57] It does not deny that there are readings and misreadings, interpretations and misinterpretations but rather considers that interpretation or reading can never be crystal-clear and complete that all readings and interpretations can only be misreading (imperfect readings and interpretations). Yet in most instances

[50] Balkin 'The Footnote' [note 14].
[51] *Id.*, pp. 293–294.
[52] John Leubsdorf 'Deconstructing the Constitution' *Stanford Law Review* 40 (1987), pp. 181–201.
[53] Leubsdorf, p. 181.
[54] *Id.*, p.194.
[55] Balkin 'Deconstruction…' [note 3], p. 727.
[56] *Ibidem.*
[57] *Ibidem.*

a test of acceptability will be passed by several different interpretations and readings in general while others can only be deemed to be misreading and misinterpretation for their blatant discrepancies in view of the text read or interpreted.[58] What is true of the discussion of the law may also be true of the findings of facts as Anthony d'Amato illustrates in his contribution to *Deconstruction and the Possibility of Justice*: he analyzes a case in which a judge manages to justify his decision that one person probably killed another whereas conclusive factual evidence goes against this possibility.[59]

Balkin is brought to the conclusion that we thus arrive at a new theory of interpretation that excludes that any of our traditional theories of interpretation in law may pretend to be sufficient, that they all need to be supplemented. For him, deconstruction pleads in favour of a conception of interpretation as "a pragmatic enterprise drawing on each of these modes of argument in a creative tension".[60] We may add that, depending upon her own ideology, each interpreter will tend to put more emphasis on one or the other of these traditional bases for interpretation. For example, her conception of the constitution will justify one ordering over another. More interestingly we may think that this "*bricolage*" will serve as a precious tool to answer contradictory exigencies of stability and renewal to fit new circumstances. It will require imagination, statesmanship and responsibility on the part of judges. Any interpret is responsible for her choices and she must assume that, if she is the author of the interpretation, she is not the author of what she interprets and that this state of fact must induce a certain attitude in her: she has to be the servant of the text.

2 The Longing for a Not yet: A Justice Ahead of us

When Derrida intervenes during the symposium on "Deconstruction and the Possibility of Justice", he opens a new dimension for deconstruction in law. He opposes justice in law and justice, the first one being deconstructible, the second non deconstructible, being deconstruction itself.[61]

The revelation of an ethical bent buried in some deconstructive endeavours cannot come as a surprise. Yet Derrida goes far beyond this perspective. Following Levinas, he opposes totality and infinite.[62] Justice is not something already there or to be found there in some totalitarian thought or all-encompassing philosophical system. We cannot put it into a mathematical formula. It is the name of the matter of an infinite quest for a perfect relation of self to other. Law and justice in law are not foreign to this quest but they are always lacking, necessarily lacking.

Drucilla Cornell goes back reading Robert Cover when he writes:

> "Law may be viewed as a system of tension or a bridge linking a concept of a reality to an imagined alternative—that is, as a connective between two states of affairs, both

[58] Balkin, 'Deconstructive Practice…' [note 2], pp. 774–777.

[59] Anthony d'Amato 'The Ultimate Injustice: When a Court Misstates the Facts' in *Cardozo Law Review* [note 1], p. 1313–1347.

[60] Balkin 'Deconstruction…' [note 3], p. 732.

[61] Jacques Derrida 'Force of Law: The »Mystical Foundation of Authority«' ['Force de loi: le »Fondement Mystique de l'autorité«'] in *Cardozo Law Review* [note 1], pp. 920–1045 at pp. 942/4–943/5.

[62] Derrida, pp. 958 and 959.

> of which can be represented in their normative significance only through the devices of narrative. Thus, one constitutive element of a *nomos* is the phenomenon GEORGE STEINER has labelled »alternity«: »the 'other than the case', the counterfactual propositions, images, shapes of will and evasion with which we charge our mental being and by means of which we build the changing, largely fictive milieu for our somatic and our social existence«."[63]

COVER worked again on the idea of law as a bridge in another study where he tried to elucidate the relations and differences between legal and eschatological perspectives.[64] It would be too long to enter into his entire argumentation here but there remains the central place given to an incremental change in law generated by the emergence of new normative convictions within society, maybe we should say the impression of a progressive betterment.

DERRIDA's conception of justice in law also sends us back to another aspect of COVER's writings on law, to his insistence on the multiple, often inevitable links between law and violence. For both DERRIDA and COVER, violence is everywhere in law: law is "enforced", as DERRIDA remarks, law is struggling against differences, law does not speak the language of the other, new legal systems have their origin in violence. All these themes had already been developed by COVER who, at the time of Derrida's speech, had already died.[65]

The opening of the horizon on a not yet, on an "*à venir*"[66] is already part of the conception of reading as re-writing adopted by many legal deconstructionists or, we may say, American followers of DERRIDA, even if they often scrupulously mention that they do not pretend to write as perfect disciples of DERRIDA. It is especially important in a system where common law has a powerful place. Already American legal realists emphasized the reworking, the rewriting of the precedent in further cases. They found the judge intuiting what the right solution was in a particular case but unable to formulate the exact rule that should come to justify it. The path to the decision, once brilliantly clear, had disappeared from view before being put into writing[67] or the writing would take the intervention of several successive authors to be refined, a little bit like in DWORKIN's chain novel.

It is in this context that we can understand ARTHUR J. JACOBSON's theory of three successive writings of the precedent: it is written at first, it is read to be applied to the case at hand—which is a second writing—and then it is anew read and rewritten in a third, different instance. The successive writings, which may bring to a "fresh judgment"

[63] Robert M. Cover 'The Supreme Court 1982 Term: Foreword – Nomos and Narrative' *Harvard Law Review* 97 (1983), pp. 4–68 at p. 9 [with footnote omitted] and Cornell [note 5], pp. 1711–1712.

[64] Robert M. Cover 'Bringing the Messiah through the Law: A Case Study' in *Religion, Morality and Law* ed. J. Roland & John W. Chapman (New York & London: New York University Press 1988), pp. 201–217 [Nomos {Yearbook of the American Society for Political and Legal Philosophy} XXX].

[65] Derrida [note 61]; Cover [note 63]; and also by Robert M. Cover, 'Violence and the Word' *Yale Law Journal* 95 (1986), pp. 1601–1629 and 'The Bonds of Constitutional Interpretation: Of the Word, the Deed and the Role' *Georgia Law Review* 20 (1986), pp. 815–833.

[66] Derrida [note 61], pp. 970 and 969/971.

[67] Joseph C. Hutcheson, Jr. 'The Judgment Intuitive: the Function of the »Hunch« in Judicial Decision' [1929] in *Recueil d'Études en l'honneur de François Gény* (Paris: Librairie du Recueil Sirey 1935). HOLMES depicted a different scenario: the writing itself survived for a time but with a different meaning before being modified. Oliver Wendell Holmes, Jr. *The Common Law* (London: MacMillan and Co. 1881), pp. 5 and 35.

as Derrida would have it,[68] that is a judgment in which the interpret assumes full responsibility for the rule, are the only way to avoid transforming rules into idols, if we follow Jacobson in his demonstration.[69] The interpreter is an actor fully responsible for his acts, a creative interventionist on the legal scene. "[T]he rewriting involved in reading a past writing", Michel Rosenfeld explains, "is not arbitrary, if it is constrained by the openings and closings of semantic paths that result from punctuation of the free flow of meaning attributable to genuine historically grounded efforts to reconcile self and other".[70]

All this, of course, supposes a commitment to a philosophical approach of the hermeneutic type, where the subject is not considered as totally separated from the object, where the subject is considered as always having a personal part to play whether in knowledge or in action.

What of the ideal of the rule of law? Margaret Jane Radin underlines the fact that no "canonical" meaning of the expression has been adopted and also that some representatives of the Critical Legal Studies movement considered it was mere ideology to be rejected. In general, the Rule of Law is associated with the idea of a government of law and not of men and with the definition of law as a system of rules, she notices. She pleads for a re-reading of it, which would take into account the fact that rules need to be understood in context and reformulated in context, with the consequence that "[I]t seems that we would at least have to drop the slogan, »the Rule of Law, not of individuals.« If law cannot be formal rules, its people cannot be mere functionaries."[71] It would oblige interpreters to turn their back on "the downgrading and erosion of the »*subtilitas applicandi*« in favour of semantic understanding and explication" that Hans-Georg Gadamer deplored.[72]

Balkin invites his readers to discover that the rule of law, which supposes the reading of a text, to be applied, is thus based on what he calls the 'iterability' of the text, which does not permit to discard the possibility of an imperfect understanding or even of a misunderstanding. He points to the variety of interpretations given the United States Constitution over two centuries, to the difficulty of either putting them aside or preferring them to the original text and argues in favour of a third alternative of conscious choice between the two attitudes, issue by issue and he is led to conclude that "the ideals of the Rule of Law depend upon the very thing that they deny—change, unpredictability and retroactivity".[73]

However, in the eyes of most of these authors, it is not a reason to despair of the rule of law but to adopt a new conception of it, which reckons the necessary part played by creativity and personal intervention in reading, interpreting and applying legal texts

[68] Derrida [note 61], p. 960 (an expression he acknowledges having borrowed from Stanley Fish).

[69] Arthur J. Jacobson 'The Idolatry of Rules: Writing Law according to Moses, with Reference to Other Jurisprudences'in *Cardozo Law Review* [note 1], pp. 1079–1132.

[70] Michel Rosenfeld 'Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptations of the New Legal Formalism' in *Cardozo Law Review* [note 1], pp. 1211–1167 at p. 1260.

[71] Margaret Jane Radin 'Reconsidering the Rule of Law' *Boston University Law Review* 69 (1989), pp. 781–819 and especially at pp. 781–782 and 817–819.

[72] Fred Dallmayr 'Hermeneutics and the Rule of Law' in *Cardozo Law Review* [note 1], pp. 1449–1469 at p. 1461.

[73] Jack M. Balkin 'Constitutional Interpretation and the Problem of History' [reviewing Raoul Berger's Federalism: The Founders' Design (1987)] *New York University Law Review* 63 (1988), pp. 911ff at p. 939.

and does not confuse responsible endeavour with arbitrary action. The rule of law in this perspective supposes responsible actors, conscious that they must act as interpreters under the law, as interpreters and not as power-thirsty men or women.

The deep concern for respect of differences and building of non-oppressive communities shown by deconstructionists reinforce the credibility of this ideal.

3 Conclusion

Deconstruction may be considered above all as a precious instrument to try to reach more acute knowledge. Richard Hyland, in his contribution to the symposium often referred to, gives us a recipe towards this objective: each language corresponds to a different culture or different cultures, different ways of thinking being embedded in these languages and one can get new perspectives only by opening oneself to different cultures, whereby, in his eyes, the confusion of Babel becomes a blessing.[74]

national centre for scientific research (cnrs), paris, france
michaut3@wanadoo.fr

[74] Hyland [note 24]. He sums up his thesis at p. 1611 thus: "The potential wealth of diversity is at least threefold. First, since the articulations of meaning present in the particular languages and traditions are each limited, each will find much that is evidently and practically useful in the other cultural projects. [...] Second, the interplay between diverse traditions offers one of the few opportunities for the creation of truly new ideas, ideas that arise outside the scope of any one tradition's particular experience. Finally, diversity is a prerequisite to serious self-reflection. Without the existence of diverse traditions, it would become literally impossible to assess the peculiar characteristics of any particular understanding. Human beings who know only one language have little alternative but to consider the articulation of meaning within that language to be absolute. There is little they can do to step outside that understanding in order to relativize it. The articulation of meaning in their language will permeate everything they think or write and render it difficult to avoid totalizing reductionism. Should they become aware that other different perspectives exist, they are of course capable of tolerance. But wisdom is not simply tolerance, never merely a recognition *of* diversity, no matter how generous and humanitarian. Wisdom rather is a vision f r o m diversity, an understanding constituted in fragmentation. The multiplicity of languages is its irreducible condition."

Sovereignty in a Seven-Trigeminus Construct Legal Culture Diagram within the Frame of the »Nomos–Physis« (Society–Culture–Nature)

Hayrettin Ökçesiz

1

The law, a cultural phenomenon itself, forms a criterion and basis for the evaluation of the relation between politics and positive law, and particularly between politics and "legal culture".[1]

Explaining the structure of legal culture in *nomos–physis* interaction as a dialectic synthesis of "what is required" and "what has happened" (or, simply, "law" and "power") by a seven-trigeminus construct can be useful for treating the transformation and legality/illegality problems of sovereignty.

All such explanations may find their largest and most comprehensive basis in an "environment" in which "nature" and "culture" are inherent in the relevant diagram. For instance, one can approach "natural law" and "legal culture" in it from the point of view of the "nature of the objects", in regard of their *causa efficiens* (instead of their *causa finalis*).

2

Within this frame, human existence falls within the scope of the anthropology-based seven-trigeminus legal culture construct. "Sovereignty" with its legal construct may easily be examined in two diagrams within such a contextual legal culture structure. This seven-trigeminus construct constructing legal culture involves three identities in subject, three fundamental integrities and three fundamental requirements in human, three elements of the justice in law and three dimensions of the law, three dimensions in the State and three fields in politics.

[1] Georg Mohr 'Zum Begriff der Rechtskultur: Kulturen des Rechts' *Dialektik* [Enzyklopädische Zeitschrift für Philosophie und Wissenschaft] 3 (1998), pp. 9–29. Peter Haeberle *Verfassungslehre als Kulturwissenschaft* 2., erw. Aufl. (Berlin: Duncker & Humblot 1998) [Schriften zum öffentlichen Recht 436], pp. 9 et seq. & 1163 et seq. regards legal culture in an artwork in which constitutional theory is the subject-matter as a cultural field in this sense.

These are classified as human, individual and person in the subject; as bionic (vital), spiritual (intellectual) and emotional (conscience) integrities, as well as in their quality of requirements of freedom, safety and equality in the human; as equality, fitness for a purpose and legal security, as well as in their quality of fact, norm and value of the concept of law in the law; as freedom, safety and equality dimensions of the State; and, finally, as private, public and official spheres in politics.[2]

Interactions amongst the items of this trigeminus with their characteristics specifying each other do indeed explain a sort of political form of the human existence which may define the way for its development as well. Political acts and processes, described as order, are political structures introduced by this trigeminus in various versions.

In order that the human as an individual and as a person may have competence in bionic (vital), spiritual (intellect) and emotional (conscience) integrities, the requirements of freedom, security and equality must be fulfilled to the highest level. They are to be imposed upon the State as final purposes and purpose-values, and the State is to be qualified as three-dimensional.

It is possible to arrive at "private", "public" and "official" sphere constructs in a political sense from three fundamental characteristics of the human. The establishment of a competent "public sphere" is dependent on the reflection of humanitarian integrity.

This seven-trigeminus construct in the tension between law and politics affords the foundation for all interaction between law and politics, and presents a structure plan by moulding the violence into patterns bearable for the human. Each of the trigeminus items enters another trigeminus item by correcting and developing the latter's meaning.

3

Efforts for satisfying the requirements of equality, freedom and security, imposed upon the State as three dimensions and three purpose-values, lead to the design of a State of Law in the public sphere, and transform the dominance of the State on public sovereignty as an official sphere into the dominance of the public on itself.

The injustice done with all its supplies constitutes a sub-culture that stands against legal culture. Distinction is to be made between occasional unjust acts by individuals and the "injustice done with all its supplies". The latter may be the case of a consciously "equipped injustice sub-culture". For instance, it is misleading to explain Nazi violence merely by diagramming legal positivism as a kind of state act. Ideologists of Nazism also asserted designs of State, Law, and the Human, even if they deemed it necessary to ensure their people's unconditional obedience for providing themselves a totalitarian power.

Legal culture is not the law-related culture of whatever power. This is the platform of humanitarian existence to judge all kinds of power.

[2] Haeberle mentions a private [*privat*] / public [*öffentlich*] / official [*staatlich*] trio in the republic sphere [*die republikanische Bereichtrias*] in a way not similar to what I mean.

4

This seven-trigeminus construct is to serve as a scheme of explaining what "changes in the understanding of sovereignty", "transformation of the sovereignty in the process of globalization" and "future of the national sovereignty", as well as "the problem of legitimacy in the changing sovereignty process" and "effects of the changing understanding of sovereignty on the understanding of rights and freedoms" are to mean.

According to this diagram, types or styles of sovereignty such as "state sovereignty", "public sovereignty" and "legal sovereignty" as well as "national sovereignty" with domestic and foreign sovereignties may be characterized. Since the right to resist is the core of any law and there is a sound position of "human rights" against sovereignty, even "human sovereignty" may also be specified from it.

All sovereignty designs presuppose "legitimacy problem" that conditions the idea of "co-legitimacy".[3] Since process features of sovereignty have come to the foreground with Habermas,[4] one cannot simply originate it from the term of "sovereign" formed within the Middle Age "*superanus*". Whereas all three carriers are individually "souveraen", each and any of them may be promoted to the level of "suzeraen" for all the others.

Sovereignty turns into pluralism in an "environment" emphasized by nature, society and culture and within a triangular political context, the cornerstones of which are formed by power, law, and subject, providing that they are involved in the public sphere on a large scale.

5

Law as a culture is superior to politics, power, dominance, and the State. Law is fed by its feature being itself a culture, and the State of Law is fed by its positive law. Accordingly, democracy[5] according to Carl Schmitt's understanding would cause a rather important legitimacy problem. Or, due to other competitors it becomes apparent that the sovereignty of the public or the nation is by far not "unconditional".

The first reason of legitimacy for sovereignty is the protection of the human against "interior" and "exterior" factors. When the criteria of "benefit" and "obligation" in protection of the power in a Machiavellian point of view were left to the free will of the Prince, this position effectuated both the Equipment of the State and numerical democracy (according to Max Weber's formal rationalist approach) to deprive themselves from the chances of correction.[6]

[3] Hayrettin Okcesiz 'Ein vorlauefer des zivilen Ungehorsams: Sokrates' *Archiv für Rechts- und Sozialphilosophie* 81 (1995) 1, pp. 65–72.

[4] Jürgen Habermas *Faktizität und Geltung* Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats [1992] (Frankfurt am Main: Suhrkamp 1994), pp. 600 et seq. The concept of sovereignty is confronted with theories of Luhmann and Habermas in Marcelo Neves *Zwischen Themis und Leviathan* Eine Rekonstruktion des demokratischen Rechtsstaats in Auseinandersetzung mit Luhmann und Habermas (Baden-Baden: Nomos 2000), particularly pp. 122 et seq.

[5] For human rights and sovereignty in the context of democracy, see Heiner Bielefeldt *Philosophie der Menschenrechte* Grundlagen eines weltweiten Freiheitsethos (Darmstadt: Primus Verlag 1998), p. 102 et seq.

[6] *Ibid.*, pp. 105 et seq.

The first legitimacy problem is experienced upon objections by relevant parties to the inadequacy of sovereignty dogmas using mono-logical explanations. Either individualistic or universalistic (moreover, even supra-individualistic) points of view may lead one to the search for a world state or an authoritarian-totalitarian dogma on state sovereignty. The legal idea of Radbruch[7] by its trans-personal approach has initiated such change here. A kind of sovereignty that is meaningful as a construction based on the autonomy of a dialogical and pluralist world is in transcendence of previous designs: it indicates the inadequacy of all former legitimacy models. Or, the legitimacy problem has originated here from the changes of the reason for legitimacy in respect of substance without, however, surpassing Weber's explanations on what the formal legitimacy is.

6

According to Kriele,[8] the fundamental style of approaching public law should be based on the correct investigation of the roots of all the institutions concerned. Therefore one has to determine what kind of targets, benefits and powers prevails behind such institutions; which dangers they try to prevent; which benefits and powers are against them; whether or not previous legitimacy reasons are still valid under today's changing conditions; what is that historical experience teaches us in respect of meaning, protection or stability of such institutions (and what may jeopardize them); and, finally, what are the chances of any reform requirement.

For Kriele, the modern State shares the classical concept of sovereignty in terms of favouring peace to civil war, opting for the fiduciary and the spiritual amongst the absolute variables in order to become itself a constitutional state or a State of law, securing freedom against terrorism. The modern state has transformed into a social state of law devoted to justice as a reaction to misery, slavery and class conflicts. Solidarity and cooperation have come to the foreground in facing global problems such as securing world peace, eliminating mal-nutrition of parts of the humanity, solving energy and infrastructure problems, procuring balance between regions, participating in mass education and culture, increasing life standards while elevating reasonably life niveau—in sum, institutionalising global actions even at the cost of limiting the external sovereignty of States.[9]

The concept of "brotherhood" follows the terms of "freedom" and "equality", and these are transubstantiated into "solidarity" and "cooperation" as today's non-pathetic expression. Once the first historical appearance of the design of "legal sovereignty" gained institutional status for grounding its legitimacy. Now, social and political duties burden us to be longing for "peace", "freedom", "equality", and "brotherhood".

Within such a framework, the legal culture structural diagram includes the concepts of both the nation-State and supra-national entities, that is, domestic and global dimensions of our timely existence as well. "Interior" and "exterior" within the context of sove-

[7] Gustav Radbruch *Rechtsphilosophie* 8. Aufl. (Stuttgart: K. F. Koehler 1973), p. 294 & »Das Völkerrecht«, p. 300.

[8] Martin Kriele *Einführung in die Staatslehre* Die geschichtlichen Legitimitätsgrundlagen des demokratischen Verfassungsstaates (Reinbek bei Hamburg: Rowohlt 1975) [Rororo Studium; 35 / Rechtswissenschaften], pp. 11 et seq.

[9] *Ibid.*, pp. 12 et seq.

reignty may be freely debated in this diagram. Their distinction, however, is not a prime concern. Once the concept of "national sovereignty" needs a distinction of them, the diagram will also be considered according to its "national" dimension.[10]

Diagram 1

The Structure of Legal Culture by Seven-Trigeminus Construct Within the Frame of the "Nomos–Physis" (Society–Culture–Nature)

SUBJECT
Three Identities:
HUMAN / INDIVIDUAL / PERSON

HUMAN
Three Integrities:
BIONIC / SPIRITUAL / EMOTIONAL

Three Fundamental Requirements:
FREEDOM / SECURITY / EQUALITY

LAW
Three Items of the Legal Idea:
EQUALITY / FITNESS FOR A PURPOSE / LEGAL SECURITY

Three Dimensions of the Law:
NORM / FACT / VALUE

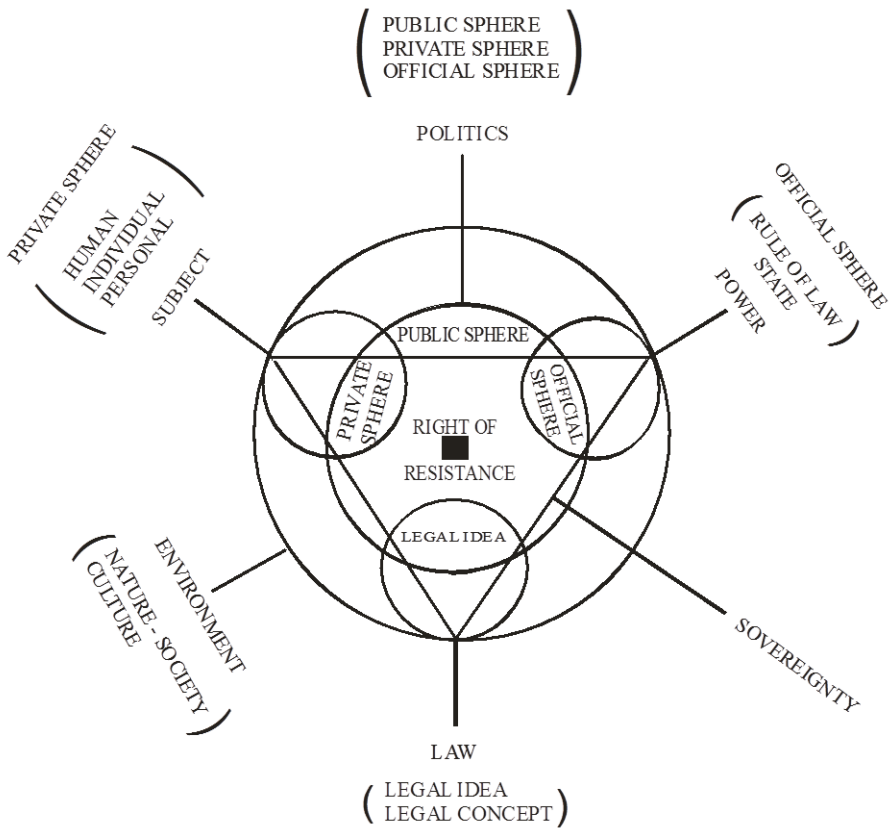
STATE
Three Dimensions of the State of Law:
FREEDOM / SECURITY / EQUALITY

POLITICS
Three Spheres:
PRIVATE / PUBLIC / OFFICIAL

[10] Translation by Çiğdem Sever.

Diagram 2

Explication of Sovereignty in the Legal Culture
Diagram Explained bySeven-Trigeminus Construct
Within the Frame of the "Nomos–Physis" (Society–Culture–Nature)



FACULTY OF LAW
AKDENIZ UNIVERSITY, ANTALYA, TURKEY
HAYRET@AKDENIZ.EDU.TR

The rebus sic stantibus *Balancing of* pacta sunt servanda*: Are Regional Ethos and Archetypes the only »Essential Basis of the Consent«? A General Problem Considered through the Lenses of the* Gabčikovo-Nagymaros *and the* Questech *Cases*

Peter Th. Ørebech

> "a totalitarian, gigomaniac monument which was against nature […]"[1]

Introduction

"*Rebus sic stantibus*" is a defense to contract and treaty performance. Parties claim a right to breach arguing that the circumstances [*rebus*] that constituted an essential basis for their consent have changed both in a way that was not foreseeable at the time the agreement was concluded and to such an extent that the circumstances necessary to perform are now out of the breaching party's control. Originating from Roman law, the c l a u s u l a *Conventio omnis intelligitur rebus sic stantibus* means that "Every agreement is understood as being based on the assumption that things would remain as they were", that is, the way they were at the time of the parties formed the agreement. The doctrine of *rebus sic stantibus* is now considered a general principle of international law and found in the 1969 Vienna Convention on the Law of Treaties, Article 62.[2]

Do instances of 'political hemorrhage' provoke the *clausula rebus sic stantibus*? Most legal scholars do not take a clear or consistent stand on this doctrine. They prefer to state that the *clause* applies exclusively to "extreme cases".[3] This rather vague assertion prompted my curiosity.

[1] Václav Havel, Czechoslovak President (15 February 1991); cf. www.gabcikovo.gov.sk/doc/msden/.

[2] See, e.g., Rudolf B. Schlesinger *Comparative Law* Cases, Text and Materials 4th ed. (Mineola: Foundation Press 1980), p. 693ff. The doctrine was codified by the 1969 Vienna Convention on the Law of Treaties, UN Doc. A/Conf. 39/27, ("VCLT") art. 62. The VCLT was signed on May 23, 1969 and entered into force on January 27, 1980.

[3] See e.g. Akehurst's *Modern Introduction to International Law* 7th rev. ed. Peter Malanczuk (London: Routledge 1997), p. 144.

In this article I analyze and compare the Gabčikovo-Nagymaros case[4] with the Questech holding.[5] Do the political developments in Central and Eastern Europe give rise to such fundamental changes as to justify Hungary or the Slovak republic, or both, to escape their joint-venture duties in the hydroelectric sector performance under the *clausula*? Has the demise of Stalinism so changed the circumstance upon which these nations premised their consent that they are no longer able to perform? Does the essential basis of consent relate not to politics alone, but also to religious, cultural or moral norms?

In addition to addressing these central questions, a possible spin-off goal of mine is to contribute to the understanding of possible support for the methods of legal economics.[6]

Clearly the *clausula* allows—under the codified rule of the 1969 Vienna Convention, Article 62.1—fundamental changes only. Fundamental changes are defined as "circumstances [...] which were not foreseen [...] [that] constituted an essential basis of the consent of the parties to be bound of the treaty; and (b) the effect of the change is radically to transform the extent of obligation". The focal point of the provision is the "essential basis", not the consent as such. While sub-section (b) refers only to the treaty terms, subsection (a) governs the "overarching structures". Sub-section (a) does not merely address changes wrought or incurred by one of the parties. Instead, it speaks to changes that affect the relationship of the two parties, particularly with respect to how those changes affect or impact the object of the treaty.

As I will demonstrate, the vital part of the Article 62 discretion is not centered around the Hungarian or Slovak "essential basis" of consent, separately speaking, but around the Hungarian-Slovak relationship, or interrelationship, as embedded in the 1977 treaty.[7]

In order for a party to avoid its treaty duties under *rebus sic stantibus*, the party must show an unforeseen change not in brute hard facts, or in artifacts, but in institutional facts. The necessary evidence of sufficiently changed institutional facts requires a showing that the overarching normative structures imbedded in overly individualistic political, religious, moral and cultural structures ("*ethos*") and individual tradition, habits and skills typical to the region ("*archetypes*")[8] have crucially and critically changed not one or the other party, but the parties' relationship with each other, such that the aim of the agreement makes no sense.

[4] The Case Concerning the Gabčikovo-Nagymaros Project (1997) ICJ, p. 7, relates to the building of locks, reservoir, dam, and a canal in the Danube River.

[5] See Questech, Inc. v. Ministry of National Defence of the Islamic Republic of Iran, in The Iran-United States Claims Tribunal at the Hague, 9 IRAN-U.S. C.T.R. 9, 107ff, regarding the Iranian purchase of a US defense system.

[6] A provocative text is Martha C. Nussbaum 'The Costs of Tragedy: Some Moral Limits of Cost-benefit Analysis' *Journal of Legal Studies* XXIX (2000), p. 1005–1036 on pp. 1029 & 1032: "cost-benefit analysis [...] does not entail consequentialism, that is, the view that the right way of assessing alternatives in a choice situation is to look to the consequences they produce". "Cost-benefit analysis does not pose the tragic question; if anything, it suggests that there is no such question, the only pertinent question being what is better than what".

[7] Hungary-Czechoslovakia Treaty of 16 September 1977 Concerning the Construction and Operation of the Gabčíkovo-Nagymaros System of Locks [hereinafter the "Hungary-Czechoslovakia Treaty" or the "Gabčíkovo-Nagymaros Treaty"].

[8] This is fabulously illustrated by the film of the Serbian producer Goran Rebic *Donau, Duna, Dunaj, Dunav, Dunarea* (2003).

Clearly Central and Eastern Europe constitute a region.[9] (Do the two constitute a single *region*, for purposes of the archetypal attributes, or two regions?) The region's vitality "can be seen from the point of view of foundations defined by traditions".[10] Accordingly the law is convoluted by the "superstructure of modern legal culture" which is the "law's formal-institutional, professional, ideological and deontological, conventional and traditional prerequisites, all components that can be considered *sine qua non* of legal establishments in Europe".[11]

A valid *clausula rebus sic stantibus* position overrules *pacta sunt servanda*. Where a party successfully demonstrates—or convinces the court of—the existence of *rebus sic stantibus*, the party will defeat, or be excused from adhering to the doctrine of *pacta sunt servanda*.[12] In fact, the schism presented by the conflicting doctrines—*rebus sic stantibus* and *pacta sunt servanda*—is the sovereign states' battleground whenever they seek to gain approval of unilateral declarations regardless of the international society's urge for disciplined, mutual solutions. Rule of law fails, of course, where *rebus sic stantibus* is easily proven and lightly granted. Thus, courts must construe the defense strictly, and in limited circumstances, to maintain a semblance of legality.

Hypothesis

The puzzle is whether the *clause* is satisfied by a political schism provoked by the exit of so-called Stalinism,[13] which was the law, or at least, the political system, under which the agreement was signed and ratified.[14] Is a change in politics too superficial a reason for excusing parties' performance, thereby defeating *pacta sunt servanda*?

International law welcomes the application of extra-legal norms for purposes of legal reasoning and analysis. International courts will typically apply extra-legal norms when construing open-ended terms, lacunae, contradictions, or redundancies. The validity of doing so is acknowledged due to the intrinsic merits of such norms to the legal system. As the hypothesis goes, all legal cultures contain incumbent prerequisites, which could by the "widest possible historical and comparative analysis [...] lead us to meaningful generalisations revealing some common features in the various preconditions, functions and performances of codification".[15] These prerequisites embody and give voice to a regional cast of *archetypes* and *ethos*.

In this work I subscribe to the "approach [...] that there is a coherent set of principles underlying the positive expressions or sources of law, which are considered to be part

[9] See Csaba Varga 'On Vitality of the Region' in his *Transition to Rule of Law* On the Democratic Transformation in Hungary (Budapest: Eötvös Loránd University "TEMPUS" Project 1995), pp. 10–18.

[10] *Id.*, p. 11.

[11] *Id.*, p. 13.

[12] Vienna Convention on the Law of Treaties (1969), Article 26: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

[13] Varga *Transition* [note 9], pp. 19–23.

[14] Here the Hungary-Czechoslovakia Treaty [note 8]. Csaba Varga characterizes this treaty as a "peace treaty." See Varga *Transition* [note 9], p. 41.

[15] Csaba Varga *Codification as a Socio-Historical Phenomenon* (Budapest: Akadémiai Kiadó 1991), Introduction.

of and are used to interpret and apply the real or actual law".[16] A credible legal study should consider processes by which judges come to their legal holdings. I was driven to study these cases so that I could respond to the "logical error of absolutism [...] in the revolutionary as in the conservative camp—the love of undue simplicity".[17] A further error I seek to challenge is the propensity to construe logical structures, out of touch with the living fabric of life.

Background Position

Inspired by Jes Bjarup, I subscribe to legal decision-making as a cognitive activity, i.e., the process of acquiring knowledge by the use of reasoning, intuition, or perception "to arrive at rational beliefs about the world."[18] This article tracks the influential movement called logical positivism.[19] First, I conduct empirical investigations into matters of fact, *in casu* courts' pursuits of religious, moral, ethical, political and other principles within international law. Secondly, I discuss the true meaning of these findings. I want to know whether courts are chasing all sorts of norms in their attempt to orient themselves to the rules. At the outset, I base my findings on the conceptual debate on the use of terms, i.e., "legal norms versus extralegal norms," and "normative expressions versus descriptive expressions."

Case Law: The Moral Platform – A Quick Glance

If fundamental changes to the *ethos* are all that matters when *rebus sic stantibus* is at stake, it could be that extra legal norms have a place in international law more generally. If that is so, then duty avoidance under a finding of *rebus sic stantibus* is nothing out of the ordinary.

Clearly international judges are moral agents like everyone else, directed by a normative order of morality that is conceived as valid independently of political or other power and still universal in scope.[20] Thus, I expect to find moral reflections in legal reasoning and holdings. What is more, there is room for them: under Article 38 of the Statute of the International Court of Justice, the court is entitled to consider not only international conventions, but also customary law as well as general principles of law and judicial decisions as bases for its decisions. Under International Court of Justice case law,

[16] Richard W. Wright 'Principled Adjudication: Tort Law and Beyond' *Canterbury Law Review* (1999), pp. 1ff at p. 8.

[17] Morris Raphael Cohen 'Absolutism in Law and Morals' *University of Pennsylvania Law Review* 84 (1936), pp. 181ff at p. 194 or in his *Reason and Law* (New York: Collier Books 1950), p. 86.

[18] Jes Bjarup 'Social Interaction: The Foundation of Customary Law' in Peter Orebech, Fred Bosselman et al. *The Role of Customary Law in Sustainable Development* (Cambridge: Cambridge University Press 2005), p. 108.

[19] See, e.g., *The Emergence of Logical Empiricism* From 1900 to the Vienna Circle, ed. Sahotra Sarkar (New York: Garland Publishing 1996), pp. 330ff. According to Michael Friedman *Reconsidering Logical Positivism* (Cambridge: Cambridge University Press 1999), p. xv, logical positivism is a "central philosophical innovation [...] not a new version of radical empiricism but rather a new conception of a priori knowledge and its role in empirical knowledge".

[20] Neil McCormick *Questioning Sovereignty* Law, State, and Nation in the European Commonwealth (Oxford: Oxford University Press 1999), p. 12.

moral norms—as illustrated in the next section—have a place among these general principles.

1 The Permanent Court of International Law did not ignore moral principles in its adjudication. On the contrary, as indicated by the dispute related to the navigation on the River Oder:

> "The community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the use of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others. It is on this conception that international river law, as laid down by the Act of the Congress of Vienna of June 9th 1815, and applied or developed by subsequent conventions, is undoubtedly based".[21]

As stated, treaty and convention rules are based upon non-codified principles. Here the court adheres to the "principle of no double standards" from which the "equal footing principle" evolves. These principles are embedded not only in the golden rule ('do unto others as you would have others do unto you'), but in the categorical imperative, by which all actions pursued should qualify as legal actions, not only when isolated in the actual setting, but as if they were to become a universal law: "Act only on that maxim whereby thou canst at the same time will that it should become a universal law".[22]

2 In reaching its legal holdings, the International Court of Justice regularly relies on principles that are not based in the actual, textual language of international conventions. See as an illustration the Corfu Channel Case: "every state's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states".[23] Accordingly, the Albanian government was liable for accidents incurred by a British naval ship that sailed into mines in Albanian waters, the location of which Albanian authorities must have known, and the existence of which Albanian authorities failed to disclose to British sea captains. Here the court imposed strict limitations on national sovereignty, and did so without a basis in convention or treaty-based principles. One of the principles stated here was that all states have the obligation to prevent harm to foreigners and foreign property when in their realm. A second principle upon which the court relied was the duty to give notice. States have an affirmative duty to convey vital information to those parties who stand to suffer pursuant to the parties' lack of knowledge. Here, the court applied domestic law principles of tort negligence and liability to international law without making any direct reference to them or explaining why they were applicable.

The court took a very different constructive approach the following year, however: In the 1950 Advisory opinion on Namibia, a decision that authorized the amalgamation of

[21] Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16 (1929) PCIJ, Series A, No. 23, p. 27.

[22] Immanuel Kant *Fundamental Principles of Metaphysic of Morals* Second Section, on will and law.

[23] Corfu Channel ICJ (1949), 4, 22. This principle is also claimed to be relevant in the Case Concerning the Gabčikovo-Nagymaros Project (1997) ICJ, 7, at 53.

private principles and international law, the court expressly debated whether and to what extent domestic legal principles should be transformed into international legal principles:

> "International law recruited […] many of its rules and institutions from private systems of law […]. The way in which international law borrows from the source is not by means of importing private law institutions »lock, stock and barrel« […]. [T]he true view […] is to regard any features or terminology which are reminiscent of the rules […] of private law as an indication of policy or principle rather than as directly importing these rules and institutions".[24]

"Policy or principles"—underlying private law—are incorporated into international law here. We are not explicitly told that these norms have an extra-legal basis in the 1950 Advisory Opinion on Namibia. In 1970, however, the International Court of Justice was very clear. In deciding the Barcelona Traction case, the court explicitly stated that its role is not only to consider moral implication as an interpretative factor but "to confirm and endorse the most elementary principles of morality".[25] Here, the court approves originally extra-legal principles in its adjudication, which thus transforms these principles into legally valid elements.

Such import is particularly important wherever there are gaps, lacunae or loop-holes in the law. The Nuclear Weapons Advisory opinion [26] illustrates the rift between positivist and anti-positivist judges at the International Court of Justice. According to the positivists, if the case is *non liquet* (what the law is, is unclear) the court is prohibited from taking any action beyond referring the case to the legislator simply because there is "no right to judicial legislation".[27]

The position taken by the other half of the court in the Nuclear Weapons case is that the parties have referred a case to the court. In doing so, they have no expectation of a *non liquet* in return.[28] These judges articulated their position as follows: "the judge's role is […] to decide which of two […] norms is applicable […]. As these rules indubitably exist, there can be no question of judicial legislation".[29] These rules, which "indubitably exist", clearly seem to include not only legal, but also moral and political norms. Thus the court here adheres to the position that what the courts do is to find the individual just solution that existed *ex tunc*, by working creatively within the legal framework.

Moral Norms have "A Say"

As the Gabčikovo-Nagymaros case illustrates, the court will not excuse states parties from their legal duties based on altered or unforeseen political norms. On the other hand, where the defendant breaching state argued for *rebus sic stantibus* on the basis of the moral tenets that drove the politics and political changes in its country (Hungary, from

[24] Judge McNair (1950) ICJ, p. 148.
[25] The Barcelona Traction Case ICJ (1970), p. 23.
[26] ICJ (1996), p. 226 (7:7).
[27] Judge Vereshchtin, ICJ (1996), p. 279–280.
[28] As was also stressed by Judge Huber in Island of Palmas Case (1928) PCA [The Permanent Court of Arbitration].
[29] Judge Higgins, ICJ (1996), p. 583 et seq. at 592.

1948–1993), the court appeared to be more open to admitting and weighing these "moral" norms.

What are these moral norms? Why do courts consider moral norms to have evidentiary weight or validity for purposes of construing legal arguments? The term "morality" is used in a variety of ways. Therefore, we need to define it clearly and precisely in order to continue our discussion.

I understand the term 'morality' and its adjectival form, 'moral', to mean frame of reference. This referential framework, 'morality', is often called a 'pre-eminent good'[30]—from which duties derive and subsequent action is judged as praiseworthy, or not. A legal duty is distinguished from a moral duty. The distinction is often drawn claiming that moral obligations

> "are those [...] which do not give birth to any right. I think it will be found that this distinction exactly coincides with that which exists between justice and the other obligations of morality [...]. Justice implies something which it is not only right to do, and wrong not to do, but which some individual can claim from us as his moral right. No one has a moral right to our generosity or beneficence, because we are not morally bound to practice those virtues towards any given individual".[31]

Clearly, a sanctions paradigm that separates legal from moral obligations while purportedly doing so to identify or determine the meaning of justice, is not a satisfactory model. Rejecting this paradigm, it is my claim that moral sentiments have a *de facto* position in juridical decisions making processes. Legal as well as moral sentiments are clearly accessible to human cognition in terms of scientific judgments. I am also sympathetic to the understanding that the positive law per se embodies quite a few moral rules. Two questions arise at this juncture. First, what morality should laws embody? Secondly, what kind of moral arguments can be used when making and applying laws?

To me, "the law is not at any time completed but is always being modified in the process of judicial decision. Not only is the common law what the judges have made it but this is also largely the case with our statutory law, of which constitutional law is a special instance."[32] At any given moment in time, the law is neither the initial nor the implemented text. Instead, the law can be found in the version addressed to the parties disputing it.

When deciding which solution, i.e., which factual alternative, is lawful, judges give presumptive weight to those principles that appear, *a priori*, to be moral principles. Because judges use moral principles in solving legal problems, morals have, by definition, become legal. It is the mechanism of recruiting moral norms, not necessarily "lock, stock and barrel", as Judge McNair stated, but as an indication of valid policy and principle.[33] For those courts sharing Judge McNair's understanding, moral norms may not be conclusive, but they are most definitely admissible and presumptive evidence of the law. Thus I am interested in extra-legal moral norms which, when used to support a legal holding, instantly create *ex nunc* or possibly even *ex tunc* legal principles.

[30] Kant, *ibidem*.
[31] John Stuart Mill *Utilitarianism, Liberty & Representative Government* (London & Toronto 1931), p. 46.
[32] Cohen, p. 81.
[33] The International Court of Justice in the Hague (1950) ICJR, p. 148.

The Questech Case

The Questech Case[34] set forth the elements necessary for a breaching state to prevail on a claim of *rebus sic stantibus*. In this case, the Iran–United States Claims Tribunal at the Hague concluded that the circumstances under which Iran had consented to be bound to contracts with an American defense contractor (Questech), whereby Questech was to modernize and expand the Iranian Air Force's electronic intelligence-gathering system, were so fundamentally changed due to profound changes of a political nature—the Iranian revolution—that Iran's performance was excused and its termination of the contract with plaintiff Questech was authorized under the *rebus sic stantibus* doctrine. The Iranian revolution embodied profound changes of a fundamental nature that excused Iran's termination of the contract. The Questech tribunal took the following position:

> "the inclusion of the term »changed circumstances« means that changes which are inherent parts and consequences of the Iranian Revolution must be taken into account.
>
> The fundamental changes in the political conditions as a consequence of the Revolution in Iran, the different attitude of the new government and the new foreign policy especially towards the United States which had considerable support in large sections of the people, the drastically changed significance of highly sensitive military contracts as the present one, especially those to which United States companies were parties, are all factors that brought about such a change of circumstances as to give the Respondent a right to terminate the Contract. When the Ministry of Defence decided not to go on with Contract 114 and when it notified the Claimant of that decision in its letter dated 16 July 1979, it opted for the termination of a contract which the Parties probably would not have entered into had it been known that such fundamental changes would occur.
>
> The fact that the Contract does not contain a clause authorizing the Respondent to terminate the Contract for its convenience does not change this result. The action taken here by the Respondent is not a termination for convenience as it is sometimes provided for in private law contracts. The principle of changed circumstances may be invoked in the absence of express provisions regulating the termination of a contract. Furthermore, taking into account the nature of this Contract as well as the fact that its contract Party was a government entity which would be particularly affected by potential changes of the type described above, the Claimant could have been aware that such changes in this particular area were more foreseeable than in other fields of contractual relations. The Claimant could therefore not expect that the Contract would remain unaffected by changes in such a highly sensitive military domain".[35]

The critical language used by the Tribunal in arriving at its holding include: "inherent parts", "different attitude", "new foreign policy", "considerable support", "drastically changed significance", "would not have entered into had it been known", "the Claimant could have been aware that such changes in this particular area were more foreseeable", and "not expect that the Contract would remain unaffected."

[34] See Questech, Inc. v. Ministry of National Defence of the Islamic Republic of Iran. The Iran-United States Claims Tribunal at the Hague.

[35] The Case Concerning the Gabčikovo-Nagymaros Project (1997) ICJ, 7, p. 122.

Nonetheless, the decision does not clarify which circumstances are particularly relevant when arguing or deciding excused performance under the doctrine of *rebus sic stantibus*. Instead, under this decision, parties do not need to agree, as part of the contract terms, as to which events will justify non-performance. Instead, under Questech, a party may have an evidentiary basis for excused performance that arises by operation of law. The Tribunal found sufficient legal basis, in the evidence set forth and described in the terms of the decision, which are highlighted in the previous paragraph, to excuse Iran's contractual duties.

Secondly, the Tribunal confirmed that a contra factual approach may be accurate when deciding *rebus sic stantibus*. Would the parties have entered into this contract if the turn of the events had been known at the formation stage, prior to signing? If the answer is no, *rebus sic stantibus* is within reach. An additional argument is made available to the breaching party under Questech, however. Even though the turn of the events was not considered by the American party—the revolution that took place between contract formation and contract performance was not entirely unforeseeable to plaintiff. The Tribunal imposed an objective, rather than a subjective standard of foreseeability. Thus, even though plaintiff does not foresee the changed circumstances at the time of contract formation, defendant may still find *rebus sic stantibus* to be within reach.

Finally, the court did not appear totally convinced that the plaintiff could not or did not foresee—subjectively—that circumstances could fundamentally change and alter the relationship of the contracting parties. This was so given the industry in which plaintiff worked and the services which plaintiff agreed to provide to defendant Iran. Plaintiff Questech was in the business of gathering highly sensitive military information. A reasonable military information provider must have been on some notice that the Islamic revolution was foreseeable. It is highly likely that the overthrown regime, who contracted with Questech, had hired Questech to help it gather information on the same militants and the very revolutionary movements that eventually deposed it. This certainly alters the very core of the inter-partes relationship!

Underlying all the evidence the Tribunal considered in coming to its decision is the concept of "inherent parts" of the revolution. This relates to the normative sea change of political values and moral, religious and cultural structures. Secular, westernized Iran vanished; and up popped the theocratic Islamist Iran in its stead. This is indeed a fundamental change of circumstances to the essential basis of the consent. Clearly the overarching principles of the agreement—a U.S.–Iranian alliance—were affected by a revolution that expressly sought to exclude the "great Satan", i.e., the U.S. Although the Questech Tribunal does not expressly state which extra legal norms *in concreto*, it relied upon to come to its holding, the contextual setting makes it clear to all that religious beliefs sparking the revolution were and are among the changes in overarching structures relevant to the *rebus sic stantibus*.

As will be explained in the next section, the facts and the underlying interparties' relationship in the Gabčikovo-Nagymaros case were sufficiently distinguishable from Questech as to merit a different, and thus a negative result for the breaching state party, Hungary.

Gabčikovo-Nagymaros Case (1): Outline

The purpose of this section is to find an answer to the following question: "What are the legal effects of the notification, on 19 May 1992, of the termination of the Treaty by the Republic of Hungary?"[36] Hungary advanced five arguments in support of the lawfulness, and, therefore, effectiveness, of its unilateral action: "existence of a state of necessity; the impossibility of performance of the treaty; the occurrence of a fundamental change of circumstances; the material breach of the treaty by Czechoslovakia; and, finally, the development of new norms of international environmental law".[37] This case provides detailed clarification as to which unilateral actions constitute defenses to a charge of breach as well as a thorough explanation of the factual situations necessary to meet the high legal bars thereto. Of the five available defenses discussed by the International Court of Justice in this case, I shall focus on the *rebus sic stantibus* argument, solely.

The conflict surfaced when Hungary unilaterally terminated the 1977 Treaty between the Republic of Hungary and the Czech and Slovak Federal Republic (Czechoslovakia) for the construction and operation of a system of locks ("Barrage System") along the Danube River, the main channel of which constitutes the natural border between the two States.[38] The parties had not provided an opt out clause,[39] so Hungary asked that a judgment be given as to whether she "was entitled to suspend and subsequently abandon the works",[40] on the basis of (inter alia) the *clausula rebus sic stantibus*.

After unsuccessful attempts at negotiation, undertaken at the request of Czechoslovakia, and mediated by the Commission of the European Communities, the two parties drew up a Special Agreement outlining their differences, which they submitted to the International Court of Justice in July of 1993.[41]

The purpose of the works contemplated by the treaty was to attain "the broad utilization of the natural resources of the Bratislava–Budapest section of the Danube river for the development of water resources, energy, transport, agriculture and other sectors of the national economy of the Contracting Parties".[42] One issue particularly important was to alleviate water management problems for both countries and to produce electricity through hydroelectric power plants.[43] In addition to the locks, the two States also agreed to build a reservoir, a dam, and a canal.[44]

Work commenced in 1978.[45] On different occasions, and both times on Hungary's initiative, pursuant to the terms of two Protocols signed in1983 and 1989, the two states agreed, respectively, to slow down and to accelerate the work.[46] Although the actual work was done in the two different countries, at Gabčikovo (Czechoslovakian Territory) and

[36] The Case Concerning the Gabčikovo-Nagymaros Project (1997) ICJ, 7, para. 89.
[37] para. 92.
[38] para. 15.
[39] para. 100.
[40] para. 13.
[41] para. 1.
[42] para. 15.
[43] *Ibid.*
[44] *Ibid.*
[45] para. 21.
[46] para. 57.

Nagymaros (Hungarian Territory), Article 1 of the treaty specifically provided that the works were to constitute a "single and indivisible operational system of works."[47] Technical specifications for the system were outlined in a Joint Contractual Plan drawn up and signed in accordance with the treaty.[48] Further treaty articles provided that the operations were a joint investment; that the contracting parties were to bear the costs in equal measure; and that certain key works, such as the dam (in Hungarian territory), the bypass canal (in Czechoslovakian territory), and the two series of locks in each of the territories were to be jointly owned.[49] Finally, the contracting parties agreed to jointly bear the reconstruction costs of all jointly-owned works in equal measure.[50]

Gabčikovo-Nagymaros Case (2): clausula rebus sic stantibus

To investigate the substance of the *clausula*, we have to look to the Gabčikovo-Nagymaros Court and how it construed the *rebus sic stantibus* requirements under Article 62 of the 1969 Vienna Convention. A vital premise to understanding this case is the International Court of Justice's *ratio decidendi* that "the purpose of the treaty and the intentions of the parties in concluding it should prevail over its literal application. The principle of good faith obliges the parties to apply it in a reasonable way and in such a manner that its purpose can be realized."[51] My interest, however, is limited to one of the issues raised in the case. I am interested in the court's response to Hungary's repudiation of the 1977 Treaty on the basis of its original goal of "socialist integration".

Csaba Varga's descriptions of Marxism explain to me why the court was not sympathetic toward the Hungarian position. Indeed, the court found that once the communists

> "were in possession of power, they only learnt from Marxism [...] that law is but state command, the will of the ruling class now represented by themselves. It is not the expression of social integration as in sociology; it is not the basic feature of social organization as in anthropology (*ubi societas ibi ius*); it is not the agent of mediation which makes social co-operation possible [...] it is simply a one-sided instrument aimed at enforcing the power policy of the state".[52]

Thus, socialist input had not really rocked the Danube *ethos* and fundamentally altered its *archetypes*. In this case, plaintiff Slovakia was right in arguing that the socialist integration, "had not altered the nature of obligations under the Treaty from those originally undertaken, so that no entitlement to terminate it arose from them."[53]

As shown in the next section, the court's reasoning will drive its rejection of Hungary's defenses to its breach and the court's insistence on the continuing existence of and duty to perform under the treaty. The question is: why so?

[47] para. 18.
[48] *Ibid.*
[49] *Ibid.*
[50] *Ibid.*
[51] para. 142.
[52] Varga *Transition* [note 9], p. 51.
[53] para. 142.

1 The argument advanced by Hungary went as follows: due to the fundamental political changes, which were impossible to foresee in the 1970s, when the parties formed the treaty, Hungary should be freed from its obligation to perform under the treaty. Under the realm of "No-law Stalinism"[54] and the Cold War, no party to the 1977 treaty could foresee the collapse of the socialist regimes in Eastern Europe.

Be that as it may, what should be the effect upon the 1977 treaty and the parties' duties there under? One view is that because Hungary has returned to "rule of law", it must honour international covenants instead of abolishing them. From another perspective, the changed premise necessitates the opposite conclusion: Since the Gabčikovo-Nagymaros agreement was concluded under a "No-law regime," why should the parties, when finally returned to a state of "law and order", suddenly express confidence in such Stalinist instruments?

Csaba Varga responded with a three-part answer structured in accordance with the three main characteristics of "implementing Stalinist political theory into practice."[55] First, Stalinism is all about the "domination of current political necessities and current tactics over theory."[56] Secondly, the Stalinist solution does nothing, in essence, but make declarations. Thus, the means becomes the ends. "Verbal Solutions" replace "concrete factual achievements."[57] Thirdly, "the tactics of the day" are superior to the "wider horizons" or the long-term view. This constant power-mongering engenders an "apparaturus in which democracy withers away",[58] and ultimately "make[s] genuine social dynamism illusory."[59] The demise of Stalinist political theory can only be measured by "the success of any legal renewal [...] [and] can be guaranteed only by full social and political support."[60] Thus, parties must embrace law or remain in the clutches of the Stalinist "no-law" they allegedly reject.

Apparently the communists were fighting windmills; "Stalinist revolutionaries tried to make people believe that mere texts called laws could determine real-life processes. Law and its practice, however, are not the rote learning, copying or mechanical application of texts. Law in the largest sense is, above all, one of the basic aspects of the life and survival of a culture".[61] I agree completely with the Hungarian observer of the Muscovite life of the early thirties: "commenting upon the Bolshevik attempt at transcending (by setting the final course for) world history, one cannot jump in history at wish [...]. At least, when doing so your past and tradition, habits and skills will also jump with you."[62]

Csaba Varga summarizes his experience in the face of the yearly socialist international "funeral feast" of capitalism. The "bourgeois state organization ideal", despite declarations to the contrary, never vanished.[63] My impression, thus, is that Hungary, like other states, experienced "how fragile and hopeless the intention of the legislator is if it is

[54] Varga *Transition* [note 9], pp. 19–23.
[55] *Id.*, p .21.
[56] *Ibidem.*
[57] *Ibidem.*
[58] *Ibidem.*
[59] *Ibidem.*
[60] *Id.*, p. 79.
[61] *Id.*, p. 84.
[62] *Id.*, pp. 82–83.
[63] *Id.*, p. 80.

not supported by other social forces, that is, the will of genuine reform."[64] Csaba Varga stresses "the law's excessive instrumentalization [...]. The reduction of the *ius* [...] to the *lex*", resulted in "[o]ver-reliance on enactments of enlightened ideas [...] instead of the attempts at tiresome implementation of genuine reforms. Centuries later, the practice was continued by the Communists who took over the country."[65] Thus, both the ethos and the archetype of this region appear rooted in unilateral proclamations that never become law. Grandiose and bombastic statements were not a Communist invention or innovation in this region.

Professor Varga illustrates just how difficult it is to introduce new norms:

> "Driven by wishful thinking [...] everybody took for granted for long that the will for reform provoked a thorough breakthrough and drastic change in local conditions too [...]. And the consequence was the splitting of the legal entity into two components unbridged and unbridgeable: the transplanted law in books, practiced in the metropolis, and the old law actually lived with, which survived in the countryside."[66]

Thus, it turns out that the Stalinist No Law takeover never reached or transformed fundamental circumstances nor did it produce a new socialistic *ethos*. Under the 1977 treaty terms, "socialist integration" was mostly window-dressing.

2 Now that we have seen the Stalinist "No Law" position, it is time to look more concretely into the arguments and analyses advanced by the International Court of Justice in the Gabčikovo-Nagymaros case. What element of force was used to drive neighbouring countries to the Stalinist goal of socialist integration? Hungary argued that this force underpinned the reason why these countries entered into covenants of many kinds, including its 1977 treaty with Czechoslovakia. Hungary claimed that the main purpose of the Danube lock and dam arrangements were simply to contribute to that socialist unity. Since the communist era was over, Hungary's position was that the 1977 agreement could no longer accomplish the intended results:

> "Hungary identified a number of »substantive elements« present at the conclusion of the 1977 Treaty which it said had changed fundamentally by the date of notification of termination. These included the notion of »socialist integration«, for which the Treaty had originally been a »vehicle«, but which subsequently disappeared; the »single and indivisible operational system«, which was to be replaced by a unilateral scheme; the fact that the basis of the planned joint investment had been overturned by the sudden emergence of both states into a market economy".[67]

Thus Hungary claimed that socialist integration policy was the necessary condition for the Gabčikovo-Nagymaros treaty. Hungary argued that it was entitled to invoke a number of events—cumulatively—that would constitute a change of circumstances sufficiently fundamental to its consent to be bound that its performance under the treaty

[64] *Id.*, p. 78.
[65] *Id.*, p. 8.
[66] *Id.*, p. 14.
[67] The Case Concerning the Gabčikovo-Nagymaros Project (1997) ICJ, 16, para. 95.

should be excused.[68] These were (i) profound changes of a political nature; (ii) the project's diminishing economic viability; (iii) progress of environmental knowledge; and (iv) development of new norms of international environmental law.[69] This strategy failed as the court held against Hungary on every single claim.[70] Perhaps the real reason was that its own legal counsel remained unconvinced. The lawyers for Hungary had a hard time arguing that a country that in "an everyday saying [...] were a nation of lawyers",[71] should be released from its own legal duties because the former communist regime had been "rule deficient." Understandably so.

In this article, my interest is limited to the political-economic issue only.

3 Among the cumulative conditions advanced by Hungary to support its argument of *rebus sic stantibus,* we can see that the parties' ability to foresee fundamental political changes was close to non-existent.[72] Thus Hungary clearly made it here. The court acknowledged that Hungary had undergone profound changes in political circumstances since concluding the treaty: "The prevailing political situation was certainly relevant to the conclusion of the 1977 treaty."[73]

4 Other conditions, however, were less applicable and did not support a claim that Hungary merited a release from its treaty duties. First of all, the undisputed political changes during the late 1980s did not greatly impact or alter the overall objectives of the treaty. The Court—in its holding—did not find that the Hungarian political reform revolted against the object and purpose of the treaty.

> "The court will recall that the Treaty provided for a joint investment programme for the production of energy, the control of floods and the improvement of navigation on the Danube. In the Court's view, the prevalent political conditions were thus not so closely linked to the object and purpose of the treaty that they constituted an essential basis of the consent of the parties and, in changing, radically altered the extent of the obligations still to be performed".[74]

The Court found that the new political circumstances were an insufficient evidentiary basis for excusing Hungary's duty to perform under the doctrine of *rebus sic stantibus*. This was so because the socialist political reality was not sufficiently linked to the treaty's object and purpose to constitute an essential basis of the consent.[75] Thus, the court did not give much weight to the changed political circumstances in this case. Floods need to be controlled regardless of whose ideology is running the nation. That being a fact, the Court refused to acknowledge political revolution as a carte blanche basis for excused performance under the *rebus sic stantibus* doctrine.

[68] Par.104.
[69] *Ibidem.*
[70] *Ibidem.*
[71] Varga *Transition* [note 9], p. 23.
[72] Even though some system critics had forecast the USSR breakdown, see Andrej Amalrik *Will the Soviet Union Survive until 1984?* (New York: Harper & Row 1970).
[73] The Case Concerning the Gabčikovo-Nagymaros Project (1997) ICJ, 7, p. 64, para. 104.
[74] *Ibidem.*
[75] *Ibidem.*

5 The court concluded that none of Hungary's circumstances had changed so radically that they transformed the extent of its obligations still to be performed sufficiently to excuse, or exempt it from, its duty to perform.[76] Instead, when setting forth the legal consequences of the judgment, the Court held: "What is required in the present case by the rule of *pacta sunt servanda* […] is that the Parties find an agreed solution within the cooperative context of the Treaty."[77]

The Court correctly finds that the stability of treaties is paramount. All people and parties under international law are obligated to be rule oriented. By abandoning rule orientation, you abandon legal structures. Under the 1969 Vienna Convention, a treaty is an international agreement between States governed by international law. Sovereign states consent to be bound not only by the provisions of the pertinent treaty but also by the applicable rule of international law. The whole idea of international law or rule of treaties is that they are to be obeyed. If easily applied, *rebus sic stantibus* would provide an alternative rather than an exception to the international law of *pacta sunt servanda*, thereby disorienting parties from the rule of law.

The *rebus sic stantibus* bar is a justifiably high one because it challenges, and where successful, overcomes the legal structure governing treaties and excuses performance under international law.

Lessons learned (1): Bottom line

The Gabčikovo-Nagymaros and Questech cases demonstrate that changed political norms do not overcome the rule of *pacta sunt servanda*. The *rebus sic stantibus* defense cannot stand if both parties experience changes simultaneously. Instead, where only one party undergoes seminal political change that results in an irreparable and irreconcilable gap in its relationship with the other party, that party may be able to terminate or withdraw from the treaty using the defensive framework of *rebus sic stantibus*.

Where both parties undergo change during the same time period, due to changed circumstances, the purpose of the treaty ceases to exist, both parties, not just one or the other, may agree to terminate.

I think that a critical situation arises when parties look differently at the basis for and implications of political changes. This is an important distinction, one not yet considered in the literature. The political norms that underpin the law's creation are one thing. Moral norms, however, are quite another. We must also consider the morality of a normative order that is seen as valid independently of political or other power. As stated earlier, my goal in this article is to contribute to the research on whether non-legal norms have a place in legal decisions, but also to determine whether legal norms and moral norms actually exist in separate categories. Thus, political norms are not *per se* outside the scope of this inquiry. The morality framework is different from policy based 'purpose' and 'utility'. It is a maxim depicting a pre-eminent good. One such "good" is the *categorical imperative*. In turn, and – derived from this principle – is the *golden rule*: "do unto others as you would have others do unto you."

[76] *Ibidem.*
[77] *Id.*, p. 78 para. 142.

An evenly matched political hemorrhage occurring to or inflicted upon both parties is insufficient to overcome these moral duties. In order to excuse the parties from the moral obligations that they owe each other, the policy change should correspond to fundamental changes to *archetypes* and *ethos*. International courts and arbitration tribunals discuss and analyze the intrinsic moral code underlying all legislation. The questions that arise are: (i) what are the applicable laws of morality? and (ii) what kind of moral arguments can be used when making and applying laws?

In the next section I will discuss the changes that satisfy and those that fail to satisfy the requirements of the doctrine of *rebus sic stantibus*.

Lessons Learned (2): A Political Topcoat But Scratches the Surface of the Danube Ethos

On the one hand surface-level makeover is insufficient to prevail on a defense of *rebus sic stantibus*: The court did not buy Hungary's position that its circumstances were fundamentally changed because change that does not alter or transform the *archetypes* and *ethos* of the region do not suffice to excuse states parties from their international law duties. If the imposition of Stalinist ideology (in 1948)—not just its phraseology—had fundamentally altered the Danube *archetypes* and *ethos*, such a binding change might suffice to excuse the parties from their duties. One could reasonably argue that "other people" had consented to the terms in such a case. One cannot reasonably argue, however, that the transition from the Stalinist époque to a pluralistic democracy was a change so fundamental that it altered the Danube archetype and ethos, changing them irrevocably from what they had been at the time the 1977 treaty was signed. One main reason why this argument is devoid of merit is that the 1977 treaty was far from a typically Bolshevist proclamation. Thus, the treaty terms are not irreconcilable with a free democratic rule, either.

On the policy plane, Hungary questioned whether a Soviet-influenced agreement should remain intact without even questioning its validity? It is indisputable that the parties had entered into the treaty prior to *Glasnost*. They were still performing, or being told to perform, now that they had fully adapted to the rules of western democracy.

> "[T]he 1977 Treaty [...] had changed fundamentally by the date of notification of termination. These included the notion of "socialist integration", for which the Treaty had originally been a "vehicle", but which subsequently disappeared [...] the basis of the planned joint investment had been overturned by the sudden emergence of both States into market economy".[78]

You have to admit that the paradigmatic r e b u s s i c s t a n t i b u s maxim gives parties a break only where fundamental amendment has been made to overarching circumstances that represent an essential basis of the consent of the parties under the convention. There is, however, no guarantee that an even blatant political change is sufficient to satisfy the requirements of the doctrine. Clearly the Gabčikovo-Nagymaros incident

[78] Id., para. 95.

never approached the "fundamental change of circumstances" that is required under Article 62 of the 1969 Vienna Convention?

The fundamental source or well-spring of culture is far more permanent than changes wrought by some surface-like political turnaround. Police and military force can control a great deal of public conduct, but cannot control or readily change the minds and hearts of the masses. To put it another way, the archetypes and ethos of Central and Eastern Europe were not really changed by the presence, and later withdrawal of Soviet-influenced politics. They simply altered their public conduct for a time. There is and was a Danube regional cultural core that was never shaken by a "political avalanche" of the communist takeover type. Could it be that the transition from the "*Corpus Iuris Hungarici*"[79] to the "No-law Stalinism" and back again, was, after all, nothing more than two pages of surface-like makeover? Could this explain the result in the Gabčikovo-Nagymaros case? Could one say that Hungary's one-sided termination of the bilateral agreement was simply not compelling enough to satisfy the principle of *rebus sic stantibus* because the Danube Project after all, was not initiated by a particular socialistic policy and thus not influenced by the change in politics, either. Instead, the surrounding facts concerned an environmental issue regulated by (at that time) Czechoslovakia and Hungary. Thus, it simply did not entail much of paradigmatic shift w h e n t h e p o l i t i c s , b u t n o t t h e e n v i r o n m e n t , h a d c h a n g e d . These changes clearly did not meet the evidentiary demands of the *clausula rebus sic stantibus*?

The discussion in the next section relates to events that may qualify as "fundamental change of circumstances", which "constituted an essential basis of the consent."

Lessons Learned (3): "Upper Deck"

On the other hand, if the parties' changed circumstances affect overarching principles, not only minor political ones, their duties change dramatically. In such instances, the defense of *rebus sic stantibus* may be readily available to them. The fine line between those circumstances that satisfy the doctrine of *rebus sic stantibus* and those that do not are made clear by comparing the Gabčikovo-Nagymaros Case with the Questech Case.[80] While the Gabčikovo case illustrates a common and parallel development between the two disputing parties, the Questech case demonstrates a very different quality of development between the parties: The American company, plaintiff "Questech" that was to modernize and expand the Iranian Air Force's electronic intelligence-gathering system. Questech, however, was fully integrated in the western defense alliances. Iran, due to its religiously and culturally (otherwise the atheists make no sense) driven revolution, sought Arabic, Russian and Chinese alliances. Based on this evidence, the Questech court concluded that the circumstances under which Iran consented to be bound to contracts with this American defense contractor were so fundamentally changed, resulting from the profound changes of a political nature (i.e. the Iranian revolution) that Iran was "off the hook" and its termination of the contract was authorized under the *rebus sic stan-*

[79] Varga *Codification* [note 15], esp. ch, 6, pp. 11 & 12.

[80] See Questech, Inc. v. Ministry of National Defence of the Islamic Republic of Iran, in The Iran-United States Claims Tribunal at the Hague, 107ff.

tibus doctrine. The inter-partes relationship of the parties was irreconcilably altered by the change in Iran's political regime. Last but not least, the AYATOLLAH's revolution "had considerable support in large sections of the people." Thus the popular *ethos* was put in charge, and had taken over from the former top-down westernized *ethos* of Iran.

In Hungary the popular element was not put in charge by pursuant to the communist takeover. Moreover, the communist party never gained electoral support.[81] The court did not accept Hungary's assertions that the 1977 treaty was actually a socialist integration project. Thus the fall of the communist era did not change anything for the purposes of the inter-partes relationship of Hungary and Czechoslovakia.

Unlike in the Gabčikovo-Nagymaros case, the factors supporting the changed circumstances in the Questech Case happened to only one party. The different attitude of the new revolutionary government and its new foreign policy, especially toward the United States went to the heart of the consent. This was particularly true due to the drastically changed significance of highly sensitive military contracts, especially those to which Questech, among others, were parties. In *Questech*, the changed political circumstances went to the very object and purpose of the agreement, and clearly altered the extent of the obligations still to be performed.

The Iranian revolution concerned state security. A long-term defense agreement with a national from a now unfriendly state would represent a potential threat to its sovereignty. Iran would, said the Court, need to either develop its own electronic intelligence-gathering system, or contract with a corporation from an allied or at least friendly state. Due to the changed circumstances, the U.S. was no longer a friendly state.

You could say that Iran symbolizes the exact opposite situation from Hungary: The *Shia* Muslim society and culture were dominant just under the surface of the Shah PAHLAVI dictatorship. The Iranian *ethos* and *archetypes* did not support western alliances based on personal contacts. After the revolution took hold, the official policy changed to reflect the region's ethos and archetypes. The agreement between the Shah and the US was incompatible with the Iranian religious and cultural basis from the very start.

In Hungary the ruling Bolshevist that were in charge at the time of the 1977 treaty did not really have profound influences into the masses. The entire world remembers the 1956 Budapest revolt, and in Czechoslovakia the famous DUBČEK Spring of 1968. The STALINist No law era was more or less surface-like. The state machinery was fully controlled by the Bolsheviks, but the regional *archetypes* and *ethos* were, as always, influencing the cultural at the grass roots level. The 1977 Treaty demonstrates this very point: Nothing in the Hungary-Czechoslovakia agreements indicates that this instrument was negotiated during the STALINist era. The Iran-US agreement, however, is clearly inspired by the political alliances of the Shah. These alliances are diametrically opposed to those sought by the *Shia* Mullahs. Thus, while the international agreement of Hungary had no outer signs of the ruling political ideology, the Iranian one definitely did.

[81] See Peter Kenez 'The Hungarian Communist Party and the Catholic Church, 1945–1948' *The Journal of Modern History* 75 (2003), pp. 864ff at p. 875: "The Small Holders' Party, achieved a great victory, getting over 57 percent of the vote, to the bitter disappointment of the Communists, who received less than 17 percent".

A further distinction between Iran and Hungary occurs in relationship to the symmetry of events or changes that each party's treaty partner underwent between formation and performance of the treaty duties. Iran went through a revolution that transformed its entire political and legal structure. Its treaty partner, the US, did not. This is very different from the treaty partners in the Gabčikovo-Nagymaros case. In this case, both Hungary and Slovakia experienced similar political changes. Iran definitely satisfied the criteria that it experience changes that go to the essential basis of the consent between the parties.

The Gabčikovo-Nagymaros situation was fundamentally different from the Questech case in that both contracting state parties in Gabčikovo had abandoned the socialist state in favor of a democratic free market society. Thus, while each one's political norms changed, their inter-partes relationship did not change one iota. Nor did their physical and cultural environment undergo changes subsequent to the demise of communism. The Danube still plays "a vital part in the commercial and economic development of its riparian States," underlining and reinforcing their interdependence.[82] International cooperation is still essential, and the Joint Contractual Plan, which they drew up and signed in accordance with the Treaty, contains the technical specifications concerning the production of energy, control of floods and improvement of navigation on the Danube. If technical alterations are needed, both parties have engineers. If re-interpretation of treaty terms is a must, both parties have attorneys. Most important, however, is that the two states involved have not become enemy states as a result of the demise of the Soviet Union.

The Gabčikovo-Nagymaros court ultimately rejected the argument that the political upheaval impacted the essential basis of the consent of the parties to be bound by the treaty. The court emphasized that political change erupted simultaneously in the disputing states. That fact reduces the relative importance of politics when balanced against the overarching brute hard facts of the Danube waterway, the artifacts and institutional facts of these neighboring peoples. In such an environment, the political changes, unforeseen as it were, were superfluous and secondary. The parties should, consequently, have to keep the promises they made.

The story ends with a possible cliff-hanger. Hungary might have argued that the demise of the Stalinist state resulted in a breach to its ethos. Could it be said that the situation of 1977 was influenced by materially different moral norms from those that buttressed the new democratic regime of the 1990s? If you read the case, however, you will see that Hungary never even advanced such a claim. Thus this escape was not even slightly opened.

Conclusion

In this article, I have examined two instances of political hemorrhage that turned out differently. In order for a state party to be excused from its international law duties under the doctrine of *rebus sic stantibus*, political changes to the state should evidence fundamental changes to the *ethos* and *archetypes* of the society. In other words, the mere fact that ethos

[82] Para. 17.

and archetypes exist is not sufficient to support a claim of changed circumstances that go the basis of the parties' consent. Instead, the ethos and archetypes must influence the ruling political party before the court will balance the burden of the changed circumstances against the benefits of avoiding treaty-based duties.

The categories of moral, religious and cultural norms are presumptively valid evidence to demonstrate a case of *clausula rebus sic stantibus*. The Iranian incident shows that courts refer to overarching principles embedded in regional *archetypes* and *ethos*. In this case, the popularly supported the Ayatollah's fundamental rule. Here the fundamental change related to religious beliefs that affected the governing state.

Gabčikovo-Nagymaros and the Questech cases made it clear that the religious norms can and do resist changes in political norms. The strong Catholic Church of Hungary never lost its grip on the Hungarian people, not even after the 1948 communist takeover of the country. Put another way, the Hungarian revolution was not analogous to the Iranian revolution. Unlike the Iranian revolt in 1978, the Hungarian revolution in 1948 was not a grass-roots uprising against non-representative autocratic rule. By the same token, communist rule did not eliminate the religious culture that thrived beneath the political surface of doctrinaire atheism. Thus, the Iranians and the Hungarians were not similarly-situated parties. Not surprisingly, their inter-partes relationships with their contracting state parties were not analogous, either. As a result, the court did not interpret their "essential basis of consent" in the same way, and did not construe their right to overcome the doctrine of *pacta sunt servanda* in the same fashion.

First of all, the *inter-partes* relationship: Hungary and Slovakia followed an identical, parallel political path. Both countries had been one-party states in the 1970s. Both were western democracies by the early 1990s. Whereas each of the two countries experienced a drastic change in policies on an individual basis, the relationship of the two did not. The Iran–U.S. relationship, on the other hand, changed out of all recognition. It had started out as an alliance based on shared ideology of the Iranian dictator and the United States. The relationship was torn asunder, however, by the hostility toward and utter rejection of U.S. ideology prompted by the Ayatollahs. For many years following the Iranian revolution, the U.S. and Iran failed to have any relationship at all. As one of its revolutionary acts, Iran took over the U.S. embassy (November 4, 1979) and held Americans hostage for 14 months. President Jimmy Carter, a Democrat, froze Iran's governmental assets held in U.S. banks. The current Republican administration is openly hostile to the current Iranian government, and the Republican candidate for U.S. presidency has repeatedly indicated that he would attack the country if elected. For sure, the inter-partes relationship has drastically changed.

Secondly, what constitutes the "essential basis of the consent." In order to satisfy the *clausula rebus sic stantibus* the claimant must demonstrate a fundamental change of circumstances that challenges and changes this "essential basis" between the parties. *In casu*, the "essential basis" underlying the defense contract with Iran switched from a political alliance based on shared western values and Anglo-American worldview to political enmity and a rejection of western secular values in favor of a *Koran*-inspired theocracy. The

claims tribunal in the Questech case found this change sufficient to alter the essential basis of the parties' consent, and to excuse Iran's performance under the doctrine of *rebus sic stantibus*.

NORWEGIAN HIGH SCHOOL FOR FISHERIES
UNIVERSITY OF TROMSØ, NORWAY
PETER.OREBECH@UIT.NO

Russian Legal Philosophy

Assya Nikolaevna Ostroukh

Introduction

Russia is undergoing a renaissance of the philosophy of law.[1] After the long period of lethargy due to the dominance of legal positivism under the Soviet regime this science has risen from the ashes like a phoenix and soars freely over the contemporary Russian legal system. Manuals, dictionaries and articles appear as if out of a cornucopia.

Nevertheless, one cannot infer that this abundance of materials corresponds to the wealth and profundity of their contents. Russian philosophy of law is actually going through the stage of determining its subject, method and paradigms. The bounds of its contents and its delimitation from other legal sciences are a stumbling-block for scientists.

The principal aim of this article is to delineate the process of the resurrection of the philosophy of law in Russia during the last fifteen years and its principal tendencies. The main issues covered by the author are the following: definitions of this discipline, given by modern Russian legal philosophers, delimitation of the philosophy of law and other legal sciences, and the dominant approaches developed by the thinkers. In order to describe the environment in which the modern Russian philosophy of law has grown, as well as to show its continuity with the previous scientific experience, it is useful to outline some principal characteristics of pre-Revolutionary philosophy of law and Soviet jurisprudence.

1 Flourishing of the Philosophy of Law (1861–1917)

The years that followed the great social reforms of the 1860s became the golden age of Russian legal science. These reforms called for intensification of scientific research in different branches of law. The requirements of social life were superimposed on the excellent grounding of law professors and the brilliance and originality of their thought. Almost all of them were educated not only in Russia, but in Western Europe as well. By virtue of its cultural influence and historical perspective, it was German legal science that exerted the greatest influence upon Russian legal thinkers. The most popular trends

[1] The author is grateful to Professor William T. Têtе for his help in writing and reviewing this paper.

in Russian philosophy of law, indubitably, were Hegelianism, represented by Boris N. Tchicherin[2] and textscIvan I. Iliyn,[3] and Neo-Kantianism, developed in the works of Pavel I. Novgorodtsev[4] and Bogdan A. Kistiakovsky.[5] But in spite of the popularity of these two schools, other legal schools were present as well. Legal positivism was developed by Gabriel F. Shershenevitch,[6] sociological jurisprudence by Nikolay M. Korkunov,[7] Sergey A. Muromtsev[8] and Maxim M. Kovalevsky,[9] phenomenological legal theory by Nikolay N. Alekseev,[10] a psychological theory of law by Lev Pertrazhitsky.[11] Some Russian philosophers created their legal doctrines taking into consideration not only the achievements of European legal science, but the experience and originality of Russian social life as well. The religious philosophy of law, represented by Vladimir S. Solovyov,[12] Evgeny N. Trubetskoy,[13] Nikolay A. Berdyaev,[14] Sergey N. Bulgakov,[15] was unique since this school aspired to conciliate law as a social phenomenon with the foundations of orthodox Christianity.

[2] The structure of his *Philosophy of law* reminds noticeably of that of Hegel's outstanding work. See Борис Н. Чичерин [Boris N. Tchicherin] *Философия права* [Filosofiya prava / Philosophy of law] (Санкт-Петербург: Наука [Sankt-Peterburg: Nauka] 1998).

[3] See his «Общее учение о государстве» [Obshchee uchenie o prave i gosudarstve], «О сущности правосознания» [*O sushchnosti pravossoznaniya*] in Иван И. Ильин [Ivan I. Iliyn] *Собрание сочинений* [*Sobranie sochineniy*] 1–10, 4 (Москва: Русская книга [Moskva: Russkaya kniga] 1994).

[4] See, by Павел И. Новгородцев [Pavel I. Novgorodtsev], *Введение в философию права. Кризис современного правосознания* [*Vvedenie v filosofiu prava Krizis sovremennogo pravossoznaniya*] (Москва: Лань [Moskva: Lan] 1996) & *Сочинения* [*Sochineniya*] (Москва: Раритет [Moskva: Raritet] 1995).

[5] See Богдан А. Кистяковский [Bogdan A. Kistiakovsky] *Философия и социология права [Filosofia i sotziologia prava*] (Санкт-Петербург: Издательство Русского Христианского гуманитарного института [Sankt-Peterburg: Izdatelstvo Russkogo Khristianskogo Gumanitarnogo Instituta] 1998). For the exposition of this thinker's legal ideas in English, see Susan Heuman *Kistiakovsky*: The Struggle for National and Constitutional Rights in the Last Years of Tsarism (Cambridge, Massachusetts: Harvard Ukrainian Research 1998).

[6] See Габриель Ф. Шершеневич [Gabriel F. Shershenevitch] Общая теория права [*Obshchaya teoriya prava*] (Москва: Издательство братьев Башмаковых [Moskva: Izdatelstvo bratiev Bashmakovikh] 1910–1911).

[7] See Николай М. Коркунов [Nikolay M. Korkunov] *Лекции по общей теории права* [*Lektsiy po obshchey teoriy prava*] (Санкт-Петербург: Юридический центр Пресс [Sankt-Peterburg: Yuridichesky Tsentr Press] 2003).

[8] See Сергей А. Муромцев [Sergey A. Muromtsev] *Определение и основное разделение права [Opredelenie i osnovnoe razdelenie prava*] (Санкт-Петербург: Издательский дом Санкт-Петербургского университета [Sankt-Peterburg: Izdatelsky dom Speterb gos universiteta] 2004).

[9] See Максим М. Ковалевский [Maksim M. Kovalevskiy] *Сочинения* [*Sochineniya*] 1–2, 1: Социология [Sotziologiya] (Санкт-Петербург: Алетейя [Sankt-Peterburg: Aleteiya] 1997).

[10] See Николай Н. Алексеев [Nikolay N. Alekseev] *Основы философии права* [*Osnovy filosofiy prava*] (Санкт-Петербург: Лань [Sankt-Peterburg: Lan] 1999).

[11] See Лев И. Петражицкий [Lev I. Petrazhitsky] *Теория права и государства в связи с теорией нравственности* [*Teoriya prava i gosudartsva v svyazy s teoriey nravstvennosty*] (Санкт-Петербург: Лань [Sankt-Peterburg: Lan] 2000) .

[12] See Владимир С. Соловьёв [Vladimir S. Solovyov] Сочинения [*Sochineniya*] 1–2 (Москва: Правда [Moskva: Pravda] 1989).

[13] See Евгений Н. Трубецкой [Evgeny N. Trubetskoy] Энциклопедия права [Entziklopediya prava](Санкт-Петербург: Лань [Sankt-Peterburg: Lan] 1998).

[14] See Николай А. Бердяев [Nikolai A. Berdyaev] *Царство духа и царство Кесаря* [*Tzarstvo dukha i tsarstvo kesarya*](Москва: Республика [Moskva: Respublika] 1995).

[15] See Сергей Н. Булгаков [Sergey N. Bulgakov] *Два града: исследование о природе общественных идеалов* [*Dva grada Issledovanie o prirode obshchestvennikh idealov*] (Санкт-Петербург: СКХГИ [Sankt-Peterburg: SKHGI] 1997).

In sum, pre-revolutionary philosophy of law was a well-developed field of intellectual activity, the level of Russian doctrine was comparable to its Western European counterparts. Georgy Sinchenko justly affirms: "There is no need to idealize the pre-revolutionary Russian philosophy of law. It reflected great talent, contained different styles but, as any other social incarnation of values, fragile".[16] Russian philosophy of law was in fact so fragile, that it became possible to cast it away and forget about it for about seventy years.

2 The Lethargy of the Philosophy of Law (1917–1980s)

After the 1917 revolution further development of the philosophy of law was out of question. In the first years of the new regime Soviet jurists adhered to the Marxist idea of the state and of the law's inherently temporary character. The legal profession was perceived as archaic and transient as well.[17] Law in general as a means of social regulation did not enjoy great importance in this period and even less was the new regime eager to encourage a critical study that constituted the keystone of pre-revolutionary philosophy of law.

Nevertheless, after years of institutionalization by the state, it became clear that Soviet power and Soviet law would exist for a good long while. The controversy of the 1920s among Dmitry I. Kursky,[18] Mikhail A. Reisner,[19] Evgeny B. Pashukanis,[20] Petr I. Stuchka[21] and others had quieted down by the 1930s and died in 1938. On the 16th through 19th of July at the *Meeting on the Questions of the Science of Soviet State and Law* the official definition of law in general and socialist law in particular proposed by the General Procurator of the USSR at that time Andrey Yanuarievich Vishinsky was adopted. According to it,

> "Law is an aggregate of norms of behaviour, expressing the will of the ruling class, fixed in a legislative way, and customs and rules of everyday life sanctioned by the state power. Application of these norms is secured by the coercive force of the state,

[16] Георгий Ч. Синченко [Georgy C. Sinchenko] «Русское столетие философии права» ['Russkoye stoletie filosofiy prava'] *Вестник Омского университета* [*Vestnik Omskogo Unversiteta*]1 (1998), pp. 7 et seq.

[17] On the development of the Soviet jurisprudence, see Сергей С. Алексеев [Sergey S. Alekseev] *Философия права* [*Filosofiya prava*] (Москва: Издательская группа Инфра М Норма [Moskva: Izdatelskaya groupa Infra M Norma] 1998), pp. 148–182 and Владик С. Нерсесянц [Vladik S. Nersessiants] *Философия права* [*Filosofiya prava*] (Москва: Издательская группа Инфра М Норма [Moskva: Izdatelskaya groupa Infra M Norma] 1997), pp. 163–311.

[18] See Дмитрий И. Курский [Dmitry I. Kurskiy] *Избранные статьи и речи* [*Izbrannie statiy i rechi*] (Москва: Юриздат мин-ва юстиции [Moskva: Yurizadt mva yustitsiy] 1948).

[19] See Михаил А. Рейснер [Mikhail A. Reisner] *Право. Наше право, чужое право, общее право* [*Pravo Nashe pravo, chuzhoe pravo, obshchee pravo*] (Ленинград-Москва: Госиздат [Leningrad & Moskva: Gosizdat] 1925).

[20] See Евгений Б. Паушканис [Evgeny B. Pashukanis] *Избранные произведения по общей теории права и государства* [*Izbrannie proizvedeniya po obshchey teoriy prava i gosudarstva*] (Москва: Наука [Moskva: Nauka] 1980).

[21] See Петр И. Стучка [Petr I. Stuchka] *Избранные произведения по марксистско-ленинской теории права* [*Izbrannie proizvedeniya po marksistko–leninskoy teoriy prava*] (Рига: Латвийское госиздательство [Riga: Latviyskoe gosizdatelstvo] 1964).

> aimed at the protection, establishment and development of an order favourable and advantageous to the ruling class".[22]

Soviet law was specifically defined as

> "An aggregate of norms of behaviour, fixed in a legislative way by the power of the working people and expressing the will of these people. Application of these norms is secured by the whole coercive force of the Socialist state, aimed at the protection, establishment and development of relations and an order favourable and advantageous to the working people, aimed at the absolute and complete extermination of capitalism and its remnants in economy, everyday life and people's consciousness; aimed at the construction of the communist society".[23]

Theoretically this official definition of law was founded on sociological positivism. However, in practice this type of positivism was supplanted by l e g a l p o s i t i v i s m or normativism, since neither the people nor the working class had ever created Soviet law and the official legal theory recognized as law any commands emanating from the official power.

Thus, under the Soviet power the only philosophy of law, or, to be more precise, legal doctrine, since one can hardly call it a legal philosophy, was Marxism interpreted (more precisely, vulgarized) by Soviet jurists and professional bureaucrats, charged with administration.

It was during this period that a tradition of treating philosophical problems of law in university and institute courses on the theory of the state and law appeared. The philosophy of law as such had never been taught in Soviet law schools. However, there existed a course called "The Theory of State and Law". Such questions as "law and other social regulators", "genesis of law", "social essence of law", "notion of law", etc. were examined in this course. However, we should keep in mind that this course examined also general questions of positive law, such as "legal responsibility", "legislation process", "legal system", "legal norms", "implementation of law", that is the elements of introduction into law. I should also remember that a separate theory of law did not exist but only a theory of s t a t e and law. It means that legal institutions were inseparably related to the state and law in general was perceived solely as an emanation of the state without the attention paid by the normal European ministry of justice to harmonizing legislation by sociological study with the actual *consensus iuris* of the people.

However, during the decline of the Soviet regime (from the 1970s to the 1980s) the official theory of state and law became less and less rigorous and more and more tolerant towards new ideas. The first really philosophical treatises on law appeared.[24] But a true real renaissance of the philosophy of law was not possible until the 1990s.

[22] А. Я. Вышинский [Andrey Ya. Vishinsky] «Основные задачи науки советского социалистического права» ['Osnovnie zadachi nauki sovetskogo socialisticheskogo prava'] in his *Основные задачи науки советского социалистического права* [*Osnovnie zadachi nauki sovetskogo socialisticheskogo prava*] (Москва: Б. и. [Moskva: n.p.] 1938), p. 183.

[23] *Ibidem*.

[24] See Джангир А. Керимов [Dzhangir A. Kerimov] Философские-основания политико-правовых исследований [*Filosofskie osnovaniya politico-pravovikh issledovaniy*] (Москва: Мысль [Moskva: Mysl] 1972) and *Философские проблемы права* [*Filosofskie problemy prava*] ed. Джангир А. Керимов [Dzhangir A. Kerimov] (Москва: Мысль [Moskva: Mysl] 1972), as well as Владик С. Нерсесянц [Vladik S. Nersessiants] Право

3 Resurrection of the Philosophy of Law (1990–2000s)

Just as the liberal reforms of the 1860s in the Russian Empire stimulated the development of the pre-revolutionary philosophy of law, the liberal economic and political reforms of the 1980s-1990s stimulated the renaissance of the philosophy of law.

About a dozen manuals on such a course have been published in the last decade. The Journal *Philosophy of Law* came out in 2000. Teaching of this course was restored in several law schools in the former USSR (Academic Legal University, Kuban State University, Saint-Petersburg State University, Saratov State Law Academy, Ural State Law Academy in Russia, Yaroslav Mudry National Law Academy in Ukraine). Numerous articles on this course have also been published by other leading legal journals. Not only philosophy of law in general has been developed at this time, but also the philosophy of different branches of law, that is philosophy of crime, philosophy of humanitarian law, philosophy of labour law.[25] Such a tendency was justly characterized by scientists as "a philosophy of law boom".[26]

As for the objective, that is to say, material, reasons for this restoration, reforms transformed the Soviet society into a bourgeois one founded on liberal values. However it is extremely important to recognize that there were also subjective factors that contributed to the contemporary reawakening of the philosophy of law. In particular the restoration of this science and of the university course is deeply rooted in the scientific achievements, teaching, research and supervision of doctorate candidates, and other personal activities of Doctor Vladik S. Nersessiants from the Institute of the State and Law.

3.1 Primus inter pares*: Vladik S. Nersessiants and the Rebirth of Legal Philosophy*

One could hardly overestimate the significance of Vladik S. Nersessiants's influence on the formation of the contemporary Russian philosophy of law. Starting as a specialist on Hegelian legal philosophy[27] down to the 1980s he became a distinct and original legal philosopher. The skeleton of his future philosophical system can already be traced in his

и закон. Из истории правовых учений [*Pravo i zakon Iz istoriy pravovikh ucheniy*] (Москва: Наука [Moskva: Nauka] 1983).

[25] See Владислав А. Бачинин [Vladislav A. Bachinin] *Философия преступления. Конспект лекций* [*Filosofiya prestupleniya. Konspekt lektsiy*] (Санкт-Петербург: Изд-во Михайлова В.А. [Sankt-Peterburg: Izdvo Mikhailova V.A.] 2000); Эльгиз А. Поздняков [Elgiz A. Pozdnyakov] *Философия права* [*Filosofia prestupleniya*] (Москва: Б. и. [Moskva: n.p.] 2001]); Кирилл Л. Томашевский [Kiril L. Tomashevsky] «Философия трудового права. Новое направление междисциплинарных философско-правовых исследований» ['Filosofiya trudovogo prava. Novoe napravlenie mezhdisciplinarnikh filosofsko-pravovykh issledovaniy'] *Трудовое право* [*Trudovoe pravo*] (2006) 7, pp. 3–9; Сергей В. Бахин [Sergey V. Bakhin] «Философия гуманитарного права и унификация национального законодательства» ['Filosofiya gumanitarnogo prava i unifikatsiya natsionalnogo zakonodatelstva'] in *Российский ежегодник международного права* [*Rossiiskiy Ezhegodnik Mezhdunarodnogo prava*] (Санкт-Петербург [Sankt-Peterburg: SKF «Rossiya-Neva »] 2000), pp. 115–121.

[26] Синченко [Sinchenko] [note 15], p. 9.

[27] Both doctorate theses of him were devoted to Hegel's Philosophy of Law. In 1998 he published a vast monograph dealing with this great German thinker. See Владик С. Нерсесянц [Vladik S. Nersessiants] *Философия права Гегеля* [*Filosofiya prava Hegeliya*] (Москва: Юрист [Moskva: Yurist] 1998).

monograph *Jus et Lex*: *Essays on the History of Political and Legal Thought*.[28] Several other fundamental works of the same author were devoted to this subject as well. However, it was his *Philosophy of Law*[29] that crowned his scientific quest. This treatise called by his author a manual is in fact a monograph; such is the wealth and profundity of its content. In his book Nersessiants not only traces the historical evolution of the philosophy of law as a science both in Europe and in Russia starting with ancient Greece and finishing with the 20th century philosophy of law, but he articulates his own theory of law grounded in philosophy as well.

According to this theory, the subject matter or object of the philosophy of law is "*jus* in its distinction and correlation with *lex*".[30] The author insists that in every legal system and legal thought corresponding to this system, there exists a distinction between law as an objective phenomenon (*jus*) and positive legislation (*lex*). *Jus* reflects a social ideal that should be embodied in *lex*. But in the course of history a disparity between these two phenomena may occur. *Lex* sometimes even can be of "antilegal" (to borrow Bentham's oxymoronic term for what might better be called "unlawful") character; a character that is *contrary to right*, that is inconsistent with jus as a body of principles which society continues to recognize as right notwithstanding the promulgation of a statute which would normally be accepted by society as changing the law as a whole. This is precisely what happened under totalitarian regimes: the device of statutory law was pushed beyond the limits set by the historical phenomenon of the law in the sense of *jus* as reflected in the phenomenon of the law achieved by the classical Roman jurists as it unfolded in European history subsequent to Rome as *le droit, diritto, derecho*—in the German *Recht*—and in Russian and other Slavic tongues as *pravo*. The task of the philosophy of law is to reveal and describe elements of *jus* in the legal traditions existing in history and to provide means of prevention of antilegal legislation.

The other paradigm on which Vladik S. Nersessiants bases his philosophy of law is that law is a triad of principles of equality, liberty and justice.[31] An aim of the philosophy of law is to give substance to the legal character of these principles and to provide means for their implementation in positive law. Starting from such an understanding of law, the legal philosopher puts forward his own vision of the development of the country on the basis of equality and justice.[32]

A Continental European jurist might well discern the influence of Hegel in the articulation by Nersessiants in the principles of equality and liberty as foundations of law as *jus* has unfolded in history (as perhaps distinguished from the traditional non-historic French conceptualization). This author in his theory has added to these two principles a third one that is that of justice. He has made further refinements and adjustments of the basis taken from Hegelian philosophy to contemporary social conditions. But in general, Nersessiants's legal philosophy assimilates Hegel's legal ontology and episte-

[28] I find appropriate to translate the first part of the monographs' title rather in Latin than in English since in modern English there is no distinction made between 'law' as the totality of legal rules [*jus*] and 'a law', that is, a single enactment rule [*lex*]. Нерсесянц [Nersessiants] [note 22].

[29] See Нерсесянц [Nersessiants] [note 16].

[30] *Ibid*., p. 164.

[31] Нерсесянц [Nersessiants] [note 16], pp. 17–31.

[32] However such proposals have never been realised by the official power of contemporary Russia.

mology. For a country that has liberated itself from the practices of a totalitarian regime, from legal positivism as an official theory and from an understanding of law deprived of any axiological content, Nersessiants's well-considered development of contemporary legal philosophy from an historical study in the tradition of Hegelian theory was an innovation whose significance to both legal thought and praxis cannot be emphasised too much. It has enabled Russians to provide a coherent, intelligible and teachable theory for constitutional reform, the affirmation of liberal values, and the postulation of the rule of law as the substantive basis of the Russian state.

So great was the talent and the convincing force of this thinker that only after the publication of his book did other scientists reinforce their scientific and teaching activities in the field of philosophy of law. If Nersessiants had not undertaken this colossal work on the revival of the philosophy of law, other researchers would hardly have ventured to publish their works substantiating the status of philosophy of law as a fundamental university course of paramount importance, "a must" for law students. Even the critique of his philosophical system that appeared shortly after its publication,[33] contributes to the development of the philosophy of law in Russia.

3.2 In Search of the Definition of the Subject of Legal Philosophy

After Vladik S. Nersessiants' famous treatise, textbooks and manuals on philosophy of law came out in profusion. With the increase of sources on philosophy of law, arguments increased as well. The most significant current discussion has been held on the problem of the definition of the subject matter of the philosophy of law.

There is no consensus among philosophers on this question and there is no single definition of the subject matter of this discipline. Firstly, one can point out the definition of the subject matter that reflects the philosophical paradigms of an author. A good example of such an approach is the definition of Nersessiants' that takes as a subject matter of philosophy of law the correlation between *jus* and *lex*. Original and demonstrating the fidelity of the scientist to the chosen philosophical system, this definition nevertheless can hardly serve as a universal explanation that covers all philosophical problems of law.

The authors of a dictionary on philosophy of law give the following definition of this science:

> "philosophy of law is an interdisciplinary field of knowledge, combining cognitive efforts of philosophy, legal science, sociology, psychology and other social and human sciences in investigating the essence of legal reality, in analysing the cause-and-effect relation between this reality and ontological and metaphysical principles of being".[34]

While this definition contains an attempt to place the philosophy of law in its environment (that is to attach it to other social and human sciences), nevertheless one can

[33] [Dzhangir A. Kerimov] [*Metodologiya prava* (*Predmet, funktziy, problemi filosofiy prava*)] (Москва: Аванта+ [Moskva: Avanta+] 2001), p. 14 as well as Генриетта И. Иконникова, Виктор П. Ляшенко [Genrietta I. Ikonnikova & Viktor P. Lyashenko] *Философия права. Учебник* [*Filosofiya prava. Uchebnik*] (Москва: Гардарики [Moskva: Gardariki] 2007), p. 12.

[34] Владислав А. Бачинин, Виктор П. Сальников [Vladislav A. Bachinin & Viktor P. Salnikov] *Философия права. Краткий словарь* [*Filosofia prava. Kratky slovar*] (Санкт-Петербург: Лань [Sankt-Peterburg: Lan] 2000), pp. 330–331.

hardly trace in it an independent status of philosophy of law in particular and philosophy in general. The same point of view is shared by Dzhangir A. Kerimov who thinks that "philosophy of law is a complicated symbiosis of philosophy, sociology, general theory of law, branches of law and other different sciences".[35] In fact, historically these are other social sciences and humanities that branched from philosophy. As for sociology and psychology it happened not earlier than in the 19th century. Sometimes the definition of the subject of philosophy of law is substituted by a simple enumeration of the problems which this science has to deal with. Such is a definition of Sergey V. Moisseev: "Philosophy of law examines questions of the essence and social nature of law, correlation between law and morals, analyses the basic principles and notions of legislation: »justice«, »law«, »obligation«, »legal responsibility« »legal equality«."[36] Recognizing the necessity of such a listing, one should be aware that an enumeration is not the same as a definition.

There is also a definition that is centred on *homo juridicus* and perceives philosophy of law as a science that examines Man as a legal being: "philosophy of law is a doctrine about the sense of law, i.e. about universal reasons owing to which Man creates law and about universal purposes which he pursues creating this law".[37]

One can find an axiological definition of the subject of philosophy of law as well. Thus, according to Igor D. Osipov, "the subject of philosophy of law is law as idea and value".[38]

Another way to determine the subject of philosophy of law practiced by Russian scientists is to show the vocation of this science. According to Sergey S. Alekseev, the vocation of philosophy of law is "to give a cosmo-visional explanation of law, of its sense and predestination, to substantiate law from the point of view of Man's being and existing system of values".[39] Other authors understand the vocation of this science in a different way that is "to bring law into accord with morals on condition that Man is not a means but a goal".[40] This definition, far from being original, is a simplified retelling of Kant's categorical imperative and does not conform to another definition of this discipline given by the same authors. They assert that philosophy of law investigates "the most general principles of legal reality and its study".[41] Another author in three sentences has formulated three definitions of philosophy of law subject, insisting that it is a single definition:

> "The subject of philosophy of law is the sense of law and its essence as an expression of social justice. The philosophy of law investigates the utmost grounds of law, aimed at revealing its role in the life of men and society. In other words, the philosophy of law is an application of the method of philosophical analysis in the field of law, a critical reflection concerning the fundamental notions and problems of jurisprudence."[42]

[35] Керимов [Kerimov] [note 31], p. 14; Иконникова, Ляшенко [Ikonnikova & Lyashenko] [note 31], p. 58.

[36] Сергей В. Моисеев [Sergey V. Moisseev] *Философия права. Курс лекций* [*Filosofia prava. Kurs lektsiy*] (Новосибирск: Сибирское унив. изд-во [Novossibirsk: Sib univ izdvo] 2003), p. 7.

[37] Юрий В. Тихонравов [Yuriy V. Tikhonravov] *Основы философии права. Учебное пособие* [*Osnovy filosofiy prava. Uchebnoe posobie*] (Москва: Вестник [Moskva: Vestnik] 1997), p. 46.

[38] Игорь Д. Осипов [Igor D. Osipov] *Философия права. Конспект* лекций [*Filosofia prava. Konspekt lektsiy*] (Санкт-Петербург: Изд-во Михайлова В.А. [Sankt-Peterburg: Izdvo Mikhailova V.A.] 2000), p. 6.

[39] Алексеев [Alekseev] [note 16], p. 2.

[40] Иконникова, Ляшенко [Ikonnikova & Lyashenko] [note 31], p. 7.

[41] *Ibid*., at 12.

[42] Игорь И. Кальной [Igor I. Kalnoy] *Философия права. Учебник* [*Filosofia prava. Uchebnik*] (Санкт-Петербург: Юридический центр Пресс [Sankt-Peterburg: Yuridichesky Tsentr Press] 2006), p. 35.

Not denying that all these problems are included in the subject of philosophy of law, one should point out that these are different problems and visions of this discipline and the author did not succeed in reaching unity.

All these definitions of philosophy of law as a science about universal legal questions and its subject matter as the most general principles, ideas, values of law would be more or less acceptable if there did not exist in Russia another course that covers the same questions: the theory of law. In the existing curriculum one should either eliminate the theory of law and substitute it with philosophy of law (that seems impossible to me since the inertia of legal thought is still too strong in Russia) or to look for a more appropriate definition of philosophy of law and its subject matter.

Thus, if we still admit the existence of the theory of law as a separate science and course, could we formulate a definition that would demarcate these two fields of legal knowledge? It seems to me, that such a definition has already been formulated by Georgy S. Sinchenko:

> "Philosophy of law is a way of intellectual life founded on the recognition of the paradoxical super-complexity of the legally constituted liberty as well as a culture of understanding the fact that this liberty is profoundly implanted in the deep-rooted structure of the two worlds that we call Man and Society".[43]

It seems to me, that nowadays it is the most adequate definition of philosophy of law. If we were to accept it, it would not be difficult to distinguish it from the theory of law, since the latter is a pure science while philosophy of law contains not only elements of science, but also those of an intellectual art, a "way of intellectual life". One should not forget that understanding philosophy as a science was engendered by Enlightenment scientism and that philosophy rests on other ways of reasoning than "real" sciences do.

3.3 Main Features of Contemporary Legal Philosophy

3.3.1 Contention with Other Legal Sciences

One of the main problems facing philosophy of law as a growing science is finding its own place in contemporary Russian legal science. From one side it seems that the philosophy of law commits a "trespass" encroaching upon the domain of such disciplines as theory of state and law, the history of political and legal theories, legal anthropology and sociology of law. In the period of the oblivion of the philosophy of law other related disciplines treated the questions that formerly had pertained to the first one and sometimes not without success.

Today the theory of state and law is a compulsory course at Russian law schools provided by the federal curriculum, while philosophy of law teaching is left to a law school option. In such a situation it is the philosophy of law that has to prove its right to existence, originality of its subject and methodology and its value for law students.

Thus, demarcation between philosophy of law and the theory of state and law is a very intricate question. Being developed for many years as the Marxist theory of state and law, the latter endeavoured to solve some philosophical questions of law (e.g. the genesis of

[43] Синченко [Sinchenko] [note 15], p. 9.

law, the distinction between law and morals, the definition of law, the social value of law, legal consciousness, the rule of law, etc.). Nowadays the simultaneous existence of the two disciplines engenders an acute question of their relationship.

There is no unanimity among the researches on this issue, though several tendencies can be revealed.

A first group of scientists considers philosophy of law as part of general theory of law. The most faithful partisan of this point of view is Dzhangir A. Kerimov, who supposes that "sociology of law and philosophy of law are elements, trends of the same science: a general theory of law".[44] According to this author sociology of law deals with ontology of law while philosophy of law with epistemology of law.[45] This point of view is quite typical for theorists of law reluctant to concede conquered territory. On the one hand, one can hardly admit that the essence of a philosophy of law could be reduced to an epistemology of law. On the other hand, such a course as a general theory of law exists more in the imagination of scientists than in the actual teaching of law.[46] The only course that is taught now at law schools is theory of state and law and it definitely cannot be reduced to sociology and philosophy of law, which would leave problems of the state behind.

Others make unfounded pronouncements on the so-called fundamental difference between the theory and the philosophy of law. Thus, Igor I. Kalnoy affirms that "philosophy of law does not compete with the theory of law since the former has its own sources".[47] Genrietta I. Ikonnikova and Viktor P. Lyashenko assert that "philosophy of law and general theory of state and law have the same object but different subjects of investigation".[48] Oleg G. Daniliyan supposes that philosophy of law puts emphasis on the foundations of law, while the theory of law on the design of the conceptual framework

[44] Керимов [Kerimov] [note 31], p. 14; Иконникова, Ляшенко [Ikonnikova & Lyashenko] [note 31], p. 71.

[45] The same point of view is shared by Михаил Н. Марченко [Mikhail N. Marchenko] *Общая теория государства и права. Академический курс* [*Obshchaya teoriya gosudarstva i prava. Akademitchesky kurs*], 1–2, 1: Теория государства [*Teoriya gosudarstva*] (Москва: Зерцало [Moskva: Zertsalo] 2000), pp. 13–14.

[46] There are some shifts in this direction. Sergey S. Alekseev calls his course "The Theory of Law", Andrey V. Polyakov and Albert S. Pigolkin "The General Theory of Law". The main idea of these textbooks is omitting the word "state" from the title and the corresponding phenomenon from the thorough examination. See respectively Сергей С. Алексеев [Sergey S. Alekseev] *Теория права* [*Teoriya prava*] (Москва: Бек [Moskva: Bek] 1994]); Андрей В. Поляков [Andrey V. Polyakov] *Общая теория права* [*Obshchaya teoriya prava*] (Санкт-Петербург: Юридический центр Пресс [Sankt-Peterburg: Yuridichesky Tsentr Press] 2001); [*Obshchaya teoriya prava*] ed. Альберт С. Пиголкин [Albert S. Pigolkin] (Москва: Манускрипт [Moskva: Manuscript] 1994). Other authors do not deny the necessity of studying state for jurists, but give priority to law. Valery V. Lazarev & Vladik S. Nersessiants entitle their textbooks respectively "General Theory of Law and State", while Grigory N. Manov calls the same course "Theory of Law and State". See respectively Валерий В. Лазарев [Valery V. Lazarev] *Общая теория права и государства* [*Obshchaya teoriya prava i gosudarstva*] (Москва: Юрист [Moskva: Yurist] 2005); Владик С. Нерсесянц [Vladik S. Nersessiants] *Общая теория права и государства* [*Obshchaya teoriya prava i gosudarstva*](Москва: Издательская группа Инфра М Норма [Moskva: Izdatelskaya groupa Infra M Norma] 1999); Теория права и государства [*Teoriya prava i gosudarstva*] ed. Григорий Н. Манов [Grigory N. Manov](Москва: Бек [Moskva: Bek] 1996).

[47] Кальной [Kalnoy] [note 40], p. 36.

[48] Иконникова, Ляшенко [Ikonnikova & Lyashenko] [note 31], p. 21.

of the positive law.[49] Unfortunately, the authors do not provide comprehensive evidence to illustrate, elucidate or support their ideas.

Sergey S. Alekseev also points out that "between philosophy of law and general theory of law in all cases there exists a qualitative difference even if one applies philosophical data and methods correctly and intensively in general theoretical legal investigation".[50] But the arguments supporting this thesis leave much to be desired. The author implies that theory of law is always guided by branches of law and is aimed at solving important social questions relating to law, while the philosophy of law is a broad overall perception of law and, further, that the aim of the latter science is to elucidate fundamental social problems.[51] The author does not explain why he separates the philosophy of law from instruction in legal practice or branches of the law.

Valery P. Malakhov is a representative of the third approach to the problem of the distinction, if any, between the philosophy of law and the theory of law. He sees a difference in the approach of these disciplines to the problem of Man in his relation to law. According to this author, the theory of law treats the law as an objective phenomenon alienated from Man, law is perceived as an ontological self-sufficient form of social reality. According to the philosophy of law it is Man who is the source of law and law is an indispensable quality of Man.[52] However, such an understanding of the philosophy of law is just one of the variants of legal philosophy, or, to be more precise, l e g a l a n t h r o p o l o g y in the sense of an aspect of philosophical anthropology.

Some textbooks just pass over this complicated question in silence.[53] Thus, the question of the delimitation of the philosophy of law and theory of state and law remains unsolved. One cannot predict how Russian legal science and its educational frame of reference will evolve. Perhaps, the most cogent view is that the theory of state and law should restore fundamental questions of law to its rightful owner, i.e. to the philosophy of law, and, in the process of seeking wisdom about the relation of law to the nature of Man strive toward becoming a positive science—an introduction into positive law.

The other legal science closely related to philosophy of law is the history of political and legal theories. Before the 1917 revolution the latter was called the history of philosophy of law. There is no doubt that the border between history and contemporaneity in the examination of philosophical questions of law is rather unsteady. But it seems to me that some contemporary authors either are not able or do not want to separate the past from the present in philosophy of law. In some manuals the historical part occupies one-third

[49] *Философия права. Учебник* [*Philosophia prava. Uchebnik*], ed. Олег Г. Данильян [Oleg G. Daniliyan] (Москва: Эксмо [Moskva: Eksmo] 2006), p. 24.

[50] Алексеев [Alekseev] [note 16], p. 22.

[51] *Ibid*., p. 23.

[52] Валерий П. Малахов [Valery P. Malakhov] *Философия права. Учебное пособие* [*Filosofiya prava. Uchebnoe posobie*] (Москва: Академический проспект, Екатеринбург: Деловая книга [Moskva: Akademitchesky Prospekt & Ekaterinburg: Delovaya Kniga] 2002), p. 48.

[53] See Моисеев [Moisseiev] [note 34]; Константин К. Жоль [Konstantin K. Zhol] Философия и социология права [*Filosofiya i sotziologiya prava*] (Москва: Юнити-Дана [Moskva: Yuniti-Dana] 2005); Нерсесянц [Nersessiants] [note 15].

of the whole text.[54] Some of them, though entitled "Philosophy of Law", should be called "The History of Philosophy of Law".

The tendency of intruding into the realm of the history of political and legal theories is not difficult to explain. In the situation of philosophy of law crises due to the incertitude of its subject and to predicaments preventing scientists from formulating their own answers to the fundamental questions of the philosophy of law, the authors would rather give an illustrative description of philosophical systems of the past. The other subterfuge is to substitute for one's own original reasoning on philosophy of law a mere regurgitation of famous legal philosophers' points of view.[55] Such an approach is called usually a "scientific pluralism", but often this formula is used to conceal eclecticism and the absence of a proper philosophical conception. If the demarcation between philosophy of law and the theory of state and law is an objective problem, the distinction between philosophy of law and the history of political and legal theories is a subjective human factor. The latter problem requires from scholars elaboration of their own points of view on philosophical questions of law.

Some works even in their titles reveal inconsistency of authors in separating philosophy of law from other sciences or spheres of social life. The titles of such treatises speak for themselves: "Moral and Legal Philosophy",[56] "The History of Philosophy and Sociology of Law",[57] "Encyclopaedia of Philosophy and Sociology of Law",[58] "Philosophy and Sociology of Law".[59] Such a tendency can be explained partly by the domination of philosophers in contemporary Russian philosophy of law.

3.3.2 Reign of Philosophers

Among the scientists whose works are being analysed or cited in this article hardly ever can jurists be found. The overwhelming majority of researchers writing on philosophy of law problems are philosophers by their basic university education. From eleven authors of philosophy of law manuals only three (Nersessiants, Kerimov and Alekseev) are professional jurists. At the same time the difference between the "philosophical" and the "legal" approach to law is evident. Vladik S. Nersessiants justly affirms:

> "The interest of philosophy to law and to philosophy of law as a particular philosophical science in the scope of philosophical sciences results from inner desire of

[54] See, e.g. Моисеев [Moisseiev] [note 34]; Данильян [Daniliyan] [note 47]; Жоль [Zhol] [note 51]; Тихонравов [Tikhonravov] [note 35].

[55] See Тихонравов [Tikhonravov] [note 35]; Иконникова, Лященко [Ikonnikova & Lyashenko] [note 31]; Осипов [Osipov] [note 36].

[56] See Игорь Д. Осипов [Igor D. Osipov] *Морально-правовая философия* [*Moralno-pravovaya dilosofiya*] (Харьков [Kharkov] 2000).

[57] See Владислав А. Бачинин [Vladislav A. Bachinin] *История философии и социологии права* [*Istoriya filosofiy i sotziologiy prava*] (Санкт-Петербург: Изд-во Михайлова В.А. [Sankt-Peterburg: Izdvo Mikhailova V.A.] 2001).

[58] See Владислав А. Бачинин [Vladislav A. Bachinin] *Энциклопедия философии и социологии права* [*Entsiklopediya filosofiy i sotziologiy prava*] (Санкт-Петербург: Юридический центр Пресс [Sankt-Peterburg: Yuridicheskiy Tsentr Press] 2006).

[59] See Жоль [Zhol], note 51.

> the philosophy itself to make sure that its universality (objective, cognitive, and so forth) is really universal, that it covers such a particular sphere as law.
>
> In the same way legal science in its movement towards philosophy of law has an inner desire to make sure that its particularity (objective, cognitive, and so forth) is a real particularity of universal, its essential element, i.e. something indispensable but not arbitrary and accidental in the context of universal".[60]

Philosophers treat law as one of the social phenomena, comparing it with others. They do not address different branches of law or legal institutions, legislation or cases; in short, they are detached from positive law. Some of the works even indicate lack of basic legal knowledge. Philosophers look for the philosophical essence of law outside the law itself: in society, in morals, in human nature, etc. In the treatises of philosophers attention is paid to the axiological significance of law. Jurists, in their turn, aspire to deduce the philosophical sense of law from the law itself, to reveal the main principle of law and the logic of its development.

While admitting that both approaches have a right to existence and contribute to the development of the philosophical knowledge of law, it would be desirable that jurists do their own research in the field of philosophy of law.

3.3.3 Allergy to Marxism

Another peculiarity of the present-day Russian philosophy of law is its aversion to Marxist methodology in general and Marxist legal theory in particular. Strange as it seems, but after such a long period of predominance there are no partisans of this doctrine. We do not have any manual on philosophy of law founded on Marxist philosophy and methodology. On the contrary, some philosophers (formed in the socialist epoch by the way) are belligerent anti-Marxist. They are Nersessiants, Alekseev, Sinchenko. All the three support a thesis that communism is a philosophy denying law as a social phenomenon, a philosophy of legal nihilism. Thus the first one insists that "Communism by its very essence and definition denies Man as a personality, as an independent subject of economics, law and morals; and the practice of socialism denies all this in everyday life".[61] The second affirms that "classo- centrism destroyed the central idea of philosophy of law—an idea of law as a social geometry of liberty belonging to the multitude of equal subjects".[62] The third one asserts that "not a "philosophy", not a theory could commit what orthodox Marxism did. It became a gigantic destructive force and turned to be an inhuman tyranny and finally caused unprecedented destruction of Society and Man".[63]

One can understand this kind of intellectual allergy, taking into consideration the domination of the philosophy in question for almost 75 years. However, we should keep in mind that classical Marxism had never claimed to be a philosophy of law. The definition of law as a will of the ruling class "made to a will for all, a will, whose essential character and direction are determined by economic conditions of the existence"[64] of that class,

[60] Нерсесянц [Nersessiants] [note 16], p. 15.
[61] Нерсесянц [Nersessiants] [note 16], p. 131.
[62] Синченко [Sinchenko] [note 15], p. 6.
[63] Алексеев [Alekseev] [note 16], p. 149.
[64] Karl Marx & Friedrich Engels *Manifesto of the Communist Party* (Moscow: Progress Publishers 1967), p. 67.

which is taken by post-Soviet scientists as a Marxist philosophy paradigm, had never been interpreted by Marx and Engels in such a way. This definition, formulated in the *Manifesto of the Communist Party*, was no more than a characteristic of positive law, more exactly of the positive bourgeois law, precisely, of the positive bourgeois law of the 19th century. Strictly speaking, one cannot criticize textscMarx ist philosophy of law since the German thinkers did not create a comprehensive philosophy of law comparable with that created by Bentham, Hegel or Kelsen. As for Marxist social philosophy it definitely can be an object of just criticism. Time is required to separate the wheat from the chaff in writings which purport to draw upon the insights of Karl Marx.

3.3.4 Anthropologization of Legal Philosophy

Another evident tendency in contemporary Russian philosophy of law is its anthropologization. This feature distinguishes the modern legal discourse from pre-Revolutionary works, devoted to philosophical problems of law. The pre-Revolutionary Russian thinkers in majority were faithful to German legal philosophy and perceived law as an objective phenomenon[65], existing outside individual consciousness as an idea of law with its own logic of evolution. Present-day authors reckon that "the task is to make Man the focal point of the analysis of the nature of law and of legal consciousness. Law must become a human phenomenon rather than a social regime of normative regulation".[66] Sergey S. Alekseev characterizes the philosophy of law as a "science about law existence in Men's life, in human existence".[67] Genrietta I. Ikonnikova and Viktor P. Lyashenko assume that "the role of the philosophy of law is to teach Man to understand, to value and to assert his inalienable rights".[68] Others do not declare that they adhere to the anthropological approach towards law, but in their manuals problems of anthropology of law occupy a significant place. Thus in Igor I. Kalnoy's textbook there is a special chapter entitled "The anthropological discourse of law".[69] Oleg G. Daniliyan includes in his manual the chapter called "Legal anthropology and humane nature of law"[70] while Alexander F. Zakomlistov penned the chapter "Philosophical Anthropology of the legal norm".[71]

Such anthropologization and humanization of philosophy of law can be explained by two reasons. On the one hand, problems of Man and the anthropological dimension of social phenomena, including law, are of topical importance for a country that has recently liberated from the authoritarian regime that turned Man into a small cog in the wheels of the state machine. On the other hand, such a trend fits in the global tendency of the 20th century world philosophy that perceives law with the eyes of Man understood as a universal community.

[65] The only exception was probably Lev Petrazhitsky's physiological legal theory. See [Petrazhitsky] [note 10].

[66] Малахов [Malakhov] [note 50], p. 6.

[67] Алексеев [Alekseev] [note 16], p. 2.

[68] Иконникова, Ляшенко [Ikonnikova & Lyashenko] [note 31], p. 7.

[69] Кальной [Kalnoy] [note 40], pp. 139–160.

[70] Данильян [Daniliyan] [note 47], pp. 231–254.

[71] Александр Ф. Закомлистов [Alexander F. Zakomlistov] *Юридическая философия* [*Yuriditcheskaya Filosofiya*] (Санкт- Петербург: Юридический центр Пресс [Sankt-Peterburg: Yuridichesky Tsentr Press] 2003), pp. 160–339.

3.3.5 Isolation of Legal Philosophy

What can be easily pointed out in the development of modern Russian philosophy of law it is its detachment from foreign jurisprudence. The last highly qualified translations of foreign treatises were made before the revolution. In the last decade several foreign works on philosophy of law were translated into Russian. They are Surya Prakash Sinha's *Jurisprudence: Legal philosophy in a nutshell*,[72] Gustav Radbruch's Rechtsphilosophie,[73] and Kurt Seelmann's work[74] of the same title. There is also a Russian translation of Francesco Gentile's article on the role of philosophy of law in Italian law studies.[75] But all these translations are a mere drop in the ocean of philosophy of law treatises written in English, German, French and Italian in the 20th century.

Some philosophers of law in their investigations address the works of their foreign colleagues that have not been translated yet. The most active of them are Andrey V. Polyakov and Iliya L. Tchestnov.[76] But usually Russian treatises on the philosophy of law are limited to a circle of pre-Revolutionary philosophy of law and the works of European thinkers translated in the first half of the 20th century. One can hardly deny that in the epoch of modern society globalization, internationalization of law and legal science Russian philosophers of law will not be able to originate novel conceptions of the philosophy of law adequate to the challenges of our age.

Conclusion

Philosophy of law in Russia has always had an interesting while sometimes tragic story. After having passed the period of flourishing and lethargy it enjoys now a well-deserved popularity. Both philosophers and jurists have aimed their cognitive efforts at fundamental questions of law. The last decade can be characterized as the renaissance of this science.

Nevertheless contemporary society and legal systems throw some challenges at philosophy of law. The first is the definition of the subject of philosophy of law. The second is the problem of the delimitation of philosophy of law from other legal sciences. Russian scientists are still in search of adequate answers to these complicated questions.

[72] See Сурия Пракаш Синха [Surya Prakash Sinha] *Юриспруденция:философия права. Краткий курс* [*Jurisprudentsia*: *Filosofiya prava*. *Kratkiy kurs*] (Москва: Издательский центр «Академия» [*Moskva*: *Izdatelskiy Tsentr «Academia»*] 1996).

[73] See Густав Радбрух [Gustav Radbruch] *Философия права* [*Filosofiya prava*] (Москва: Международные отношения [Moskva: Mezhdunarodnie otnosheniya] 2004).

[74] See Курт Зеельман [Kurt Seelmann] *Философия права* [*Filosofiya prava*] (Владивосток: Право-Политика-Закон [Vladivostok: Pravo-politka-zakon] 2003).

[75] See Франческо Джентиле [Francesco Gentile] «О роли философии права в изучении юриспруденции в Италии» ['O roli filosofiy prava v izutcheniy yurisprudentziy v Italiy'] *Iосударство и право* [*Gosudarstvo i Pravo*](1995) 1, pp. 132–136.

[76] See Поляков [Polyakov] [note 44] and, by Илья Л. Честнов [Iliya L. Tchestnov], *Общество и юриспруденция на исходе второго тысячелетия* [Obshchestvo i yurisprudentsiya na ishode vtorogo tisyacheletiya] (Санкт-Петербург: Общество «Знание» [Sankt-Peterburg: Obshchestvo «Znanie»] 1999) and *Право как диалог. К формированию новой антологии правовой реальности* [*Pravo kak dialog. K formirovaniyu novoy ontologiy pravovoy realnosty*] (Санкт-Петербург: Б.и. [Sankt-Peterburg; n.p.] 2000).

Because of both the particularities of Russian society development in the 20th century and the specificity of Russian legal science, the contemporary Russian legal philosophy is characterized by some particular features that contribute to its originality.

In spite of some teething trouble of the growing science, contemporary Russian philosophy of law demonstrates a tendency to become an original field of research with impressive national success.

FACULTY OF LAW
KUBAN STATE UNIVERSITY, KRASNODAR, RUSSIA
ASSYA_OSTROUKH@YAHOO.CO.UK
TGP@LAW.KUBSU.RU

Capitalism and the Rule of Law: The Three Stages of Legal Order in Modern Society

Mehmet Tevfik Ozcan

The rule of law is a kind of equilibrium between legal and political sub-systems that typically came into effect in capitalist society. There are two close connections between the rule of law and the social formation: the first is between *laissez-faire* capitalism and the procedural rule of law and the second is between monopoly capitalism and the substantive rule of law. Whereas the former corresponded to liberal society, the latter matured under the strong pressure of working class politics and the mass society. When neo-liberal policy was steered after the fading away of the Soviet system, there seemed to be an effort to restore the procedural rule of law in order to put into effect an economic effectivity discourse. Although the neo-liberal ideology put forward deregulatory policy, economic and political power systems of the contemporary monopoly capitalism could not divorce from regulatory policy in national and international realms, but such regulations strictly favoured selfish economic interests of private investors or companies instead of legally mandated public interest, betterment of the life conditions of working classes and substantive provisions of the rule of law.

1 Introduction

The modern society revealed its being by means of freedom where human beings defined their virtues according to the enjoyment of freedom, to the extent that they can gain it. When an individual conflict emerged between someone and his/her fellow citizen or government, the grievance concerned drives him to cope with conflict under guidance of his/her personal will or the general will, as sum total of individual wills prevalent in society. The legal system of the country reveals a ubiquitous order between individual wills and the general will of society that are balanced in reciprocal and one-sided myriad relationships, but in settled equivalence concerning how to arrange the legitimate means and remedies. Although our personal being in society is supposedly an everlasting property of our individual volition we should not disregard self-respect and interest of other individuals and the general rest of society, where the legal community can be jointly demarcated as ordered social space by the political power system and the legal system. There is no historical society free of political power system and legal apparatuses; moreover both of

them jointly depict distribution of goods, virtues and powers for the sake of a taken-for-granted equilibrium which might be traced through its constitution and legal rules. On the one hand, the political power is open to strong inclination to biased work in its occasion; on the other hand legal means are fairly depoliticised whether or not they activated by private lawsuit or public indictment. Moreover, legal means, by definition, are congenial to equality between citizens with their exclusive properties as universality, objectivity and formality that they offer viable choices, regarding to self-respect and civic virtue of all members of the legal community.

According to liberal purview, we can presume the liberal individual who finds himself or herself on indispensable starting point, otherwise we presume a more moderate way to the extent that individuality is shaped by social environment, very likely to the communitarian philosophies, where anyway human individuals are decisive actors and subjects in legal relationships. As having been perceived by legal theorists since remote times of Roman law, personality is a legal artefact, delineated as bulk of rights and duties in a certain legal community.[1] The rule of law is a legally protected social environment by means of the legal rulings and the procedural provisions, in which the legal rights, immunities, liabilities and duties are portrayed as prior to any actual conflict. The rule of law was scrupulously defined by A. V. Dicey,[2] the pre-eminent British constitutional lawyer, as that binding force encompassing the legal system in order to safeguard legal freedoms of the liberal individuals. Dicey depicted the three essentials of the rule of law: 1) Every due punishment and redress to civil wrongs can only be sentenced when distinct breach of law before ordinary courts and in ordinary legal manner (i.e., due procedure) of established laws of the country were assigned before the actual conflict. 2) Every human being, whatever his rank or condition, is subject to the ordinary law of realm and amenable to the jurisdictions of ordinary tribunals. 3) Predominance of the legal spirit must be characteristic of the political realm, which means, as Dicey alleged for English institutions, that the constitution is pervaded by the rule of law. After more than one hundred years, Lord Bingham delineated eight sub-rules of the rule of law that safeguard individual freedoms through law:[3] 1) The law must be accessible and so far as possible, intelligible, clear and predictable. 2) Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion. 3) The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation. 4) The law must afford adequate protection of fundamental human rights. 5) Legal means must be provided for resolving, without prohibitive cost or inordinate delay, especially bona fide in civil disputes which the parties themselves are unable to resolve. 6) As the core principle of the rule of law, ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers. 7) Adjudicative procedures provided by the state should be fair. 8) Existing principle of the rule of law

[1] Cf. Thomas Hobbes *Leviathan* Or, the Matter, Forme & Power of a Commonwealth, Ecclesiasticall and Civill (Cambridge: Cambridge University Press 1904), pp. 110–114; Jean-Marc Trigeaud 'La personne' *Archives de philosophle du droit* 34 (1989), pp. 103–121.

[2] A. V. Dicey *Introduction of the Study of the Law of the Constitution* 8th ed. (London: MacMillan & Co. 1915), pp. 183–199.

[3] Lord Bingham 'Rule of Law' *Cambridge Law Journal* 66 (2007), pp. 67–85.

requires compliance by the state with its obligations in international law, the law which whether deriving from treaty or international custom and practice governs the conduct of nations.

Both of the two aforementioned approaches share a common character that the rule of law predominantly depends on procedural means to safeguard citizen's freedom. Lord Bingham's more elaborate view contains a principle, as fourth sub-rule, that the fundamental human rights are sum total of substantive legal provisions, additional to procedural rules. We must also note that Bingham's approach specifically cites some legal sources (in the last sub-rule) that emanated from the international law and the private international law. I want to point significant aspect on how political and legal subsystems duly arranged in the rule of law model that the rule of law is reconciliation between political and legal domains in a certain legal community, in which legal means has priority in the social system via diminished implementation of political discretion. The rule of law is a politico-legal system that takes into account reciprocal balance between political power and claims of citizens, which is maintained by means of legal system, as common denominator of all conducts, claims, legal actions and duty imposing acts. Therefore, according to that common principle of political and legal spheres, all people and the government should be not only ruled by the law but also guided and limited by it.[4] Regarding the political and legal history, the state apparatuses of all governmental systems impose duties upon their subjects in legal form while governing them, but the rule of law, as coupling of political and legal domains, embarks on governance through law. It requires certain constitutional provisions and checks and balance systems that constitute a fair equilibrium between political actions, rule enforcement mechanism and considerable degree of voluntary esteem to the rules on both the government and the people. It comprises a certain degree of the objectified legal rules, which are capable of functioning when they are abstract, general, certain, permissive to personal autonomy and implementing procedural means. As a corollary of those, they are impartially open to the parties of legal dispute according to viable equality before law and reciprocity where constitutional means must be viable in order to meet all substantive claims. The rule of law needs not only objectified rules, but also must encompass relevant procedures and legal officials that must already be reified by way of adjustment experience in a considerably longer time span.

2 The Rule of Law is Predominantly Procedural

Let us glance at social control of modern society. During a long transition of human society from pre-modern and agro-literate principalities to the capitalist social formation, pre-established mechanisms of social control inexorably dissolved together with their power structure, surrounding social ties and the state of mind, while they initially depended on political discretion, religious canon, custom and social morality. However, social change was not an unprecedented fact that the first great transition from primitive society to the early civilisation was harnessed by political power when it installed itself

[4] Joseph Raz *The Authority of Law* Essays on Law and Morality (Oxford: Oxford University Press 1979), pp. 210 et seq. and Cameron Stewart 'The Rule of Law and the Tinkerbell Effect: Theoretical Considerations, Criticisms and Justifications for the Rule of Law' *Macquarie Law Journal* 4 (2004), pp. 135–164.

as a dominant factor in the greater society at the expense of social control mechanism of primitive society. Therefore, the fusing imperial domination and ideological monopoly of official religion deposed reciprocity-based relationships of indigenous society and of their social control mechanism that were initially working, in which solidarity and social control were performed through non-differentiated power relations in bilateral or multilateral types of relationships. During the incremental decay of the traditional civilizations, which was especially conducted by the result of the conflicts between feudal power structures and growing effect of market relationships of the early capitalism where social order of the agro-literate societies[5] dramatically dissolved. Consequently, in the early phases of modernisation, social change deposed of established power structures and of religious institutions, which had been once achieving social order; meanwhile monarchical body politics were greedy to concentrate their potentiality at climax by way of their military achievements. The fact that the epoch of absolutism disentangled extravagant political bodies from twists wherewith to control, while they wastefully utilised their authoritative potential, backed by religious authority, meanwhile they unwillingly destructed the pre-established status system of the feudal society relating to their expectancy to collect excessive public revenue in the milieu of whirlpool compulsion of the military oppositions.

The rule of law strenuously tenders the legal means or resorts to minimal political recourse in social control that, in this context, the exclusive properties of law, which primarily embrace generality, certainty, universality and impartiality principles as in the transpersonal legal remedies, can govern human relations with duly implemented means and procedures. Despite some disputes on law whether it is to be considered as an extension of politics, as the critical legal studies approach puts forward[6] or from another point of view, which presumes law as an independent sub-system in society, apart from politics,[7] the rule of law necessitates an autonomous or semi-autonomous legal sphere which would regularly be effective in all conflicts at home issues, in spite of fluctuating nature of political discretion. Therefore, the legal provisions and the legal machinery are concerned not only to be freed from the political decision-making, but they also impose certain restraints on politics in the internal conflicts of country. As has been alleged by proponents of the institutional theory of law,[8] it is also necessary that all lawyers, politicians and citizens assume the law as the schema of social relations, as common denominator to appreciate legal conducts. The law has therefore to be considered as a schema of the scrupulous conducts, respecting both the norms and the facts that can be formulated in varied forms of *locutionary*, *illocutionary* and *perlocutionary* speech-acts, about how right conduct can be acted[9]. Perhaps, there is no the full-fledged example of this ideal type legal community, but it must be modelled in a duly allocation of power between the

[5] See Ernest Gellner 'The Coming of Nationalism and its Interpretation: The Myths of Nation and Class' in *Mapping the Nation* ed. Gopal Balakrishnan (London: Verso 1996), pp. 99–111.

[6] Cf. Roberto Mangabeira Unger 'The Critical Legal Studies Movement' *Harvard Law Review* 96 (1983), pp. 561–675.

[7] Niklas Luhmann *Law as a Social System* trans. Klaus A. Ziegert (Oxford: Oxford University Press 2004).

[8] Neil MacCormick 'Law as Institutional Fact' in Neil MacCormick & Ota Weinberger *An Institutional Theory of Law* [1986] (Dordrecht: D. Riedel Publishing Co. 1992), pp.48–76.

[9] J. L. Austin *How to Do Things with Words* [1962] 2nd ed. (Oxford: Oxford University Press 1975), pp. 109–120.

legal agencies and citizens. Although the imperial political bodies fulfilled disparate social control through considerably higher-degree paternalistic political enforcement and patriarchal authority of the religious officials in a status (i.e., feudal) society, the rule of law assumes equality before law for every public official and layperson, even where actual class differences and social inequality remain.

Main themes of the rule of law argumentation focus on the legal means that can give remedies to the parties who tackled in an actual conflict whether or not the grievance belongs to public or private spheres. Therefore, the procedural means occupy a predominant role in the rule of law so that they presuppose the existence of pre-given substantive rules before conflict, as promulgated by the legislator or by means of precedent. In this context, the rule of law is comprehensive governance through law that requires legal institutions, constitutionally authorized political organs and administrative personnel. While the earliest practice of the rule of law, which dates back to the early decades of modernity and matured during the last quarter of nineteenth century, it exclusively established the procedural means in order to protect individual liberties. Initially, the natural law theories systematically articulated the procedural rule of law governance to ensure the individual freedoms from fierce political interference of the sovereign. Despite the mainstream contemporary politico-legal language that utilises the rule of law principle in every bothersome issue, the rule of law is not a limitless storage of simple remedies. Moreover, it respects and guarantees individual freedom to the degree to which present political equilibrium demarcates the bonds of its viability.

Insofar as the rule of law is a broad legal provision for the rights of individual, it obliges equal footing to the citizens in the public sphere, respecting to their virtues in political and legal domains. A liberal political system, whether democratic or undemocratic, is congenial to the rule of law, within which the executive power exerts minimal interference with the citizens. John Locke, the famous liberal philosopher, defined the legitimate political society as being built by way of social compact (through a taken-for-granted social contract) aiming to establish judicature and civil laws.[10] According to Locke, the social compact and, subsequently, civil society are not trimming the natural liberties which encompass life, liberty and property, on the contrary, they safeguard the individuals against tyranny by way of division of powers, as executive, legislative and judiciary powers under a constitution. There is an established convergence between the political power system and the procedural remedies, applicable to the grievances of individuals. Lockean point of view was very suitable for miscellaneous liberal discourses on individual liberties, which encompass equality before law to the greater extent, but not a comprehensive egalitarianism. Moreover, the liberal discourse was furnished with a peculiar political regime that revealed itself more likely to a joint stock company where the participant individuals resembled shareholders.[11] As Macpherson pointed,[12] while Locke was a member of the Trade Commission in 1697, he considered that the working class people have no capacity of rationality and moral virtue. Clearly, Locke obliquely remarked how working

[10] John Locke *Two Treatises of Civil Government* introd. William S. Carpenter (London: Everyman's Library 1966), pp. 154–164.

[11] R. H. Tawney *Religion and the Rise of Capitalism* [1926] (London: John Murray 1936), p. 184.

[12] C. B. Macpherson 'The Social Bearings of Locke's Political Theory' in *Locke and Berkeley* ed. D. M. Armstrong & C. B. Martin (London: Macmillan 1968), pp. 199–230.

class people have no merit to deserve equal footing with the propertied classes. The fact that working class people are *animal laborans* in Lockean liberalism, not political actors, and conversely subject to discipline and *panopticon*. Liberalism has a strong affinity procedural rule of law that only divests political sovereigns from arbitrary power due to the disadvantage of the propertied individuals.

Adam Smith, the famous physiocrat and liberal, defined the province of law to protect individual from injuries inflicted to his personality, his reputation and property, writing that law resembles a safeguarding mechanism of natural rights to the extent to which they were reduced to property rights[13]. Even though Adam Smith did not affiliate to the natural law tradition, he consented that natural rights, as postulates of his jurisprudence conception, were the guiding principles of justice in his "public jurisprudence". The procedural rule of law was prevalent in the free trade ideologies of the nineteenth century which were concerned to limit political discretion in any extent injurious to market relations by means of exorbitant taxes, tariffs, protectionism[14] and imminent social legislation. There was a strong parallelism between the liberal ideology and the procedural rule of law while they not only confined political and legal remedies to the commutative justice, but also shared a very deep silence on democratisation or any remedial action on behalf of the propertiless labourers. Therefore the procedural rule of law is complementary to the minimal public sphere that restricts state's action to minimal police regulation, defending the country from external assaults and commutative justice. As regards various liberal discourses, the ideal of the procedural rule of law is very identical with the core principles of the liberal ideology that they can be apprehended via fear of socialism and hesitant attitude to the extensive legislation. As has been stated by Dicey, the "legal spirit" connotes the primordial role of judicial law-making where legislative acts are of secondary importance. Herbert Spencer, the famous liberal and Social Darwinist, overtly expressed his inclination, towards the end of the nineteenth century, that the excessive legislation absolutely prevents accumulation of capital, and that all socialism means pauperism and slavery, imminently intertwined with universal suffrage[15]. As we witnessed in John Stuart Mill's ideas, although he was a very benevolent liberal for the poor or women whilst defending equal footing of all human beings before law, he did not see universal suffrage as feasible, because might cause class domination in the legislative assemblies,[16] condemning them with supposed ignorance, short-sightedness and incapacity for public affairs.

Apart from individual deviations, the procedural rule of law is ideal type of legal establishment of capitalist societies, which is a convenient model for society of property owners and dealers, but also reluctantly encompasses other working class people who were unintentionally freed from status relations, after subsequent dissolution of traditional society. As far as there was the lack of a comprehensive religious authority to gov-

[13] Adam Smith *Lectures on Jurisprudence* ed. R. L. Meek, D. D. Raphael & P. G. Stein (Oxford: Clarendon Press 1978), pp. 8, 13 and 401.

[14] Frederic Bastiat *The Law* trans. Dean Russell (New York: Foundation for Economic Education 1998) and Richard Cobden *The Political Writings* I (London: T. Fisher Unwin 1903), pp. 76–119.

[15] Herbert Spencer, *The Man versus the State* (London: Williams & Norgate 1885), pp. 18, 34, 44 & 48.

[16] Cf. John Stuart Mill *Considerations on Representative Government* (New York: H. Holt & Co. 1890), pp. 156, 160–164, 173–174, 197 & 228.

ern brethren in capitalist society or no probable autocratic government harmless to property owners, the liberal rule of law was the only choice for governance. The rule of law could emerge in a constricted space that converged with power allocation in favour of capital owners and propertied classes. Historical roots of the rule of law can be found in British realm; in this context Henry II's *Constitution of Clarendon* in 1164 and King John's Magna Charta in 1215 must be specifically mentioned. The two royal edicts established not only the king's sovereignty and partial abatement of feudalism through centralised judiciary, but also granted personal freedom, universal law, impartial courts and personal security, opposed to the Draconian rules, levying unfair taxes, abused hereditary rights and unjustifiable discretions for disseizing etc. In the United States, the Fourteenth Amendment of 1868 granted naturalisation of black skinned people and it frankly recognised their rights of life, liberty and property. Together with the amendment, the federal legislature promulgated the Civil Rights Act and established the Freedom Bureau Bill in order to solve some emerging problems that were brought forth by white skinned peoples' abstention to enter into contracts with black people, for dealings or employment[17]. By the way, there were a few lawsuits anterior to the Fourteenth Amendment where the judicial debate opened a twofold question if firstly to what extent was the regulatory curb of state legislatures unfavourable to the liberal credo and secondly what were the connotations of American citizenship. Especially, while a famous case arose between the enfranchised slaughterhouse company in the Louisiana state and the local butchers (who were unjustly hindered from trade), the lawsuit became the scene of judicial debate that the parties grounded their claims at stake on the liberal ideology and the national citizenship[18]. At the end, *the due process of law*, i.e., American wording of the procedural rule of law, was re-established by the Fourteenth Amendment that embraced legalised definition of life, liberty, privacy and property. Therefore, the rule of law is more than some number of statutes, bills or proceedings which are duly legislated by sovereign; moreover, it is a sum total of political and legal developments which should respectively be covenanted by ruler and ruled, which evolved in influx of *tour de force* legal experience of the society.

Despite inner relations between the procedural rule of law and the competitive capitalism, the fact that the procedural rule of law is product of a long-term development of decreasing absolute power of sovereign, as primarily developed in the Great Britain. Blandine Kriegel, the French author on the rule of law, alleges that the rule of law is not a bare product of capitalism; moreover she reduces it to the institutional development of the law in the milieu of decreasing absolutist centralism in politics all the way through empowerment of national court system.[19] Apart from Kriegel's sublime neoliberal partisanship, neo-liberalism eulogised the liberal (i.e., procedural) rule of law; in this context her point of view hypostatised the Judeo-Christian tradition imbued with her biased generalisations about the Marxian point of view on the interrelationship between law and capitalism, but she delved into crucial aspects of the question. Kriegel

[17] Edward Keynes *Life, Liberty and Privacy* Toward a Jurisprudence of Substantive Due Process (University Park: Pennsylvania State University 1996), pp. 31 et seq.

[18] Walton H. Hamilton 'The Path of Due Process of Law' in *The Constitution Reconsidered* ed. Conyers Read (New York: Columbia University Press 1938), pp. 167–190.

[19] Blandine Kriegel *The State and the Rule of Law* trans. Marc A. LePain & Jeffrey C. Cohen (Princeton, New Jersey: Princeton University Press 1995), pp. 67 et seq.

vehemently expressed that the rule of law was a conclusion of a fairly longer evolution or historical accumulation of the civilisational manners and the politico-legal customs. Therefore, Kriegel enunciated that the rule of law couldn't be established by solitary action of sovereign or otherwise by way of one-sided claims of the people. She appreciated merits of British institutionalisation of the rule of law as a marvellous example, in spite of inadequacies of French and German politico-legal development. In fact, the French kings momentarily tended to establish the rule of law that they were seemingly arduous to follow English experience, but they strove for governance through promulgated laws, instead of centralising judiciary. On the contrary, the English institutionalisation was in close connection with earliest elimination of serfdom, earliest national unification through judiciary and sustainable governance between the king and the nobility, whereas the French example was characterised by prolonged serfdom and delayed national unification, in which the quest for the rule of law was wielded through promulgation of laws instead of centralisation of judiciary, but caused a subsequent political wrecking, absolutism and revolutions.[20] Contrary to the liberal political and legal culture of England, the French experience paved the way for publicism, étatism and absolutism, in which, the quest for the rule of law solely emanated from absolutist sovereign as *droit administratif*. On the other hand, the German experience disclosed another trait, as the latest example of national unification in Europe where the modernist politicians and intelligentsia coped with the matter through the muddy role of intelligentsia and created popular approval to German nationalism. The German politico-legal experience can be considered as a third way that must be distinguished from English and French examples with its *anti-étatism* and anti-enlightenment features, but coerced Germany towards firstly romanticism (i.e., anti-rationalism), secondly *anti-juridism*, thirdly a secular theology and lastly the prevalent notion of society *versus* individualism.[21] I will mention below the substantive rule of law, which was progressed after the procedural rule of law in liberal societies, but demolished their liberal milieus. Apart from its preliminary *anti-étatism*, "the German rule of law" was exonerated from lack of liberal substance respecting to its national achievement at its very beginning, but it reached adoration of political discretion, in spite of objectivity of the law. Indeed, German political culture was very awkward from the procedural rule of law standpoint, with political feebleness of the liberal bourgeoisie, but Kriegel consciously neglected the indispensable role of Prussian government and the government-based monopoly capitalism.

However, the procedural rule of law matches with competitive market society to the extent that power relations arranged in a peculiar equilibrium through power allocation of individuals in the milieu of separation of powers. Prior to the power structure of liberalism in the competitive market society, the equilibrium between the British kings and barons had been proceeded in the political space of uneven conflicts in Britain during the Plantagenet and Angevin royal houses, since the very beginnings of the Norman invasion. In the historical era after Magna Carta, there was a gradual development where

[20] Cf., *Ibid.*, pp. 67 et seq.

[21] Cf., *Ibid.*, pp. 99 et seq. Despite my criticisms to Kreigel, she expressed very clearly the idea that her conception of "secular theology" pointed at Schmitt's "political theology" at its peak. As aforementioned by me, rule of law requires objectified or reified law, but German tradition developed to the objectified politics, instead. Cf. Carl Schmitt *Political Theology* trans. George Schwab (Cambridge, Mass.: MIT Press 1986).

political discretion and constitutional provisions were carefully diversified for the benefit of the latter. Despite prerogatives of the kings and their control upon noble class members who were stripped from traditional privileges, were assigned as courtiers or royal judges, when the law became a relatively autonomous domain, this concurrently limited political sovereignty. Although British kings, like Edward I, Henry III, Edward III, promulgated many of the ordinances and statutes, according to the absolutist principle of *quod principi placet, legis habet vigorem*, such statutes were avowedly considered either interpretation or ramification of the common law, into the form of *lex scripta* without unreserved discretion of the king.[22] Beyond promulgated laws, "the law" was considered as binding all parties in the country that was merged with legal customs, and even so it might be written or unwritten. The royal councils, the tribunals or the courts became law-speakers when they uttered taken for granted body of laws, which were invented from the corpus of custom or natural law. In this context, perhaps political uprisings did not cease, because pre-modern inclinations for absolutism or centrifugal interests remained, but a new equilibrium was invited via sealed legal instruments. As a conspicuous example, we may cite some ideas conferred by Sir John Fortescue, the famous royal lawyer who was incumbent of the Lancastrian House in fifteenth century. He used the concept of "*governance*" for the first time in his pamphlet on politics.[23] Perhaps he was a notorious man who was identified with Lancastrian "bastard feudalism"; however, he defended an original idea, i.e., governance via councils that encompassed cordially selected spiritual and secular lords by king, under the guidance of enacted laws. At the same time he published another essay, titled *De Laudibus Legium Angliae* (an earlier version was *De Natura Legis Naturae*), in which he expressed a ubiquitous legal conception which became binding for all human beings living in the kingdom.[24] Fortescue considered that royal sovereignty had to be limited by the law, which generated from natural law and custom, where imperial authority would not molest properties and private interests of subjects, or would not levy unfair taxes without consent of councils, which had to be summoned with the participation of temporal and spiritual lords. Perhaps, the point of view is not unique, for it was depending on an intellectual tradition which was planted by elucidation of the philosophers from Saint Thomas to Nicholas de Cusa, but he coupled the law with governance of the royal power, nobility and other magnates.

The procedural rule of law is congenial to liberalism because the law of realm is binding for the political sovereign, he does not have a special prerogative to rearrange rights and duties or to annihilate individual liberties. Regarding to the level of *polyarchy*, the political milieu of the liberal rule of law was not initially democratic, although liberalism may coexist with an undemocratic regime, but set forth individual liberties, immune from infringement of the political sovereign. Immanuel Kant, as a liberal philosopher on ethics and law, diversified obligation and right, whereas the former denoted ethics, the latter concerned with law, in which the law arranges external conditions of moral

[22] See Charles Howard McIlwain 'Magna Carta and Common Law' in *Magna Carta Commemoration Essays* ed. Henry Elliot Malden (London: Royal Historical Society 1917), pp. 122–179.

[23] John Fortescue *The Governance of England* ed. Charles Plummer, 2nd ed. (London: Oxford University Press 1926).

[24] For selections from both of the two books, see *Medieval Political Ideas* I, ed. Ewart Lewis (New York: Knopf 1954), pp. 85–87 and 259–330.

being (i.e., human being).[25] According to the KANTian point of view, legal domain is a constellation of rights of individuals who are subject to external legislation which aims to safeguard individual freedom, coexisting with freedom of others, whereas moral domain is the ground of internal legislation of the individual. It is not mistaken to say that this co-existence epitomizes civic life in liberal society in that it means public sphere maintained by the rule of law. The compartmentalisation of public and private spheres—which was elaborately diversified as law and ethics, as right and duty and as external legislation and internal legislation—entirely portrays the liberal society.

Let us conclude that the procedural rule of law is a legal machinery which endorses established societal relations of market society, as I mentioned above with regard to the LOCKEan point of view, and that it corresponded with competitive capitalism with zero or minimal degree of political interference in legal relations, moral impartiality and indifference to the distributive justice. Insofar as the procedural rule of law is very parallel to liberalism, all criticisms targeting the liberal politics consequently challenge the rule of law. We have to answer the crucial question if a legal order is a bulk of natural phenomena *vis-a-vis* to the physiocrat conception of *laissez faire* capitalism or otherwise is contrivance of lawyers. The procedural rule of law is agreeable to the competitive market society, or more clearly to the capitalist society that endorses allocation of political power among individuals, but *de facto* encompasses the bourgeoisie probably with other ruling class elites or peers from higher status. Although law does not create the power relationships in the liberal society, they are authorised, elaborately articulated, impersonalised, formalised and depoliticised as semi-autonomous sub-systems of society by elucidation of the lawyers. Toward the second half of the nineteenth century when capitalism was pictured as a severe surplus-value exploitation and colonialism and completely worsened economic and social conditions of the working classes, the rule of law consequently became the subject matter of criticisms. Many of the criticisms against liberalism were directed to the liberal politics and the procedural rule of law that arose because of indifference to the working class's poverty and the surplus-value exploitation in the legal and political domains. Among others, EVGENY PASHUKANIS, the pre-eminent Soviet jurist, must be specifically cited in this context; he criticised the bourgeois legal form in an article titled 'The Marxist Theory of State and Law'[26] in 1932. His criticism is like a reiteration of MARX's criticism on the capitalist mode of production in the *Capital*,[27] where MARX considered that the commodity form of products veiled the surplus-value exploitation, because market relations transfigured products as bearers of exchange value. Corollary to the market relations, the marketplace culture carry them into the exchange value of commodity form, cloaking their humane substance in production processes and use value, so that the labourer superficially reveals himself or herself as a seller in the market (i.e., labour market), instead of a human individual *per se*. Therefore, PASHUKANIS did not disagree with the liberal lawyers on formality, impartiality and universality of the law, but criticised it as successful veiling of the capitalist exploitation relations. In

[25] Cf. Immanuel Kant *The Philosophy of Law* An Exposition of the Fundamental Principles of Jurisprudence trans. W. Hastie (Edinburgh: Clark 1887), pp. 14, 20–23 and 46.

[26] See Evgeny Bronislavovich Pashukanis *Selected Writings on Marxism and Law* ed. Piers Beirne & Robert Sharlet, trans. Peter B. Maggs (London: Academic Press 1980), pp. 273–301.

[27] Cf. Karl Marx *Capital* I, trans. Samuel Moore & Edward Aveling (Chicago: Charles H. Kerr & Co. 1909).

fact, we cannot oppose those properties of law; however, we should not neglect its indifference to the humane questions, especially when we regard the deterioration of "the human condition" in the capitalist society.

3 Democratisation, Monopoly Capitalism, and the Substantive Rule of Law

Liberalism and the procedural rule of law availed a limited success in the United Kingdom and the United States in nineteenth century, except when emergency conditions were prevalent in the crises. Meanwhile the working class people became impoverished, but remained quiet in politics like a junkyard of society. Here, I cannot extensively narrate the social condition of the working class people in the earlier phase of capitalism which took place especially in Britain. There are many historical records about the condition of working classes, enclosure of lands, fencing the agricultural plots, poor laws,[28] prison-like workhouses, social conditions of journeymen, and so on. Therefore, they all disclosed the other side of the coin, another face of the capitalist development in spite of the official identity of the liberal society. In this context the overwhelming majority of urban population was forming a mass society, but they were inappropriate for the taken-for-granted schema of liberal society. Contrary to the theoretical consistency of the liberal ideology, liberalism and the procedural rule of law were structural components of capitalist society; however their social milieu unwillingly created inhuman consequences, as revealed in legal and criminal cases which arose from underclass misery.[29] At the end of the nineteenth century, Gustave Le Bon interpreted the overall fact of the mass society that masses are not aggregate of rational individuals; on the contrary they behave by way of sensations in *de facto* intermittent assemblies, very open to vagrancy and provocation.[30] Therefore, no one could expect that there was a taken-for-granted liberal individuality among propertiless and uneducated masses of people (namely, the contingent people), conversely to the so-called "free born Englishmen".[31] From the nineteenth century onwards, the British working class began to attend in political dispute with a different political language under the English ruling elite's deep-rooted fear of revolution where workers initially got moral intonation contrary to the moral indifference of liberal politics. Luddism, the very beginning of working class political action, guided the new social movement that depended on conservative ethical ideas to react against the poverty of the brethren.[32] Despite the obsolete nature of its communitarian bearings on pauperism, the Luddist movement commenced a novelty in politics that anchored on the masses of underclass people, instead of liberal individuals. In the early epoch of the in-

[28] A. L. Beier *The Problem of the Poor in Tudor and Early Stuart England* (New York: Routledge 1983).

[29] George I promulgated the famous statute, named *The Waltham Black Act* in 1723 that was very convenient for liberalism for it protected property rights and ordered duly criminal redress, but it became a Draconian law with respect to its severity. Cf. E. P. Thompson *Whigs and Hunters* [1975] (London: Penguin Books 1990).

[30] Gustave Le Bon *The Crowd* A Study of the Popular Mind (New York: The Macmillan Co. 1896).

[31] Mayhew conspicuously depicted social consequences of capitalism in metropolitan city life, in which, as "street nomads", there are not only working class members, but also all kinds of underclass people and mob. See Henry Mayhew *London Labour and London Poor* I (London: Griffin, Bohn & Co. 1861).

[32] E. P. Thompson *The Making of the English Working Class* [1963] (New York: Vintage Books 1966), pp. 521 et seq. Thompson's comprehensive essay contains excellent social history records that estimate the social configuration of working class through daily experience.

dustrial revolution after 1790, a working class individual reckoned himself in provisional conditions; therefore he meekly awaited prospective betterment with patient aspiration. Shortly after that, workers conceived real constraints imposed upon their lives, especially after they comprehended the Benthamite reform schemes (it accepted everlasting status of a salaried worker) in 1839.[33] Following the Peterloo massacre of 1819, English working class people felt a deep estrangement from the British citizenry. 1839 and the following radical reforms caused to stiffen their nebulous class-consciousness and made them embark on an unprecedented political involvement. Chartism, which commenced with People's Charter in 1832, was the first full-fledged working class movement and it primarily demanded universal suffrage in order to involve the working-class in the political debate. Probably, Chartism could be no longer at the fore as an independent political movement, but it played a decisive role in the New-Tories victory in the 1841 election.[34]

Let us remember again the "legal spirit", as pointed by Dicey, as the core idea of the rule of law. This idea embedded a presumption to the rule of law that it acknowledged preponderance of judicial law-making, instead of formally promulgated acts of legislative organ to the extent that it legalised popular claims through utility concerns. Judicial law-making and legislation, i.e., the two contradictory dynamics, might be in a delicate reconciliation; on the one hand judge-made law must be preponderant *per se,* and additionally it had a trump in judicial review in order to check the constitutionality of enacted statutes, on the other hand legislative function was open to the yoke of populist claims on legislative organ which might impair pre-given liberal limits of the rule of law. Similarly, Cotterrell points to the dilemma of the British legal system that reveals the contradictory nature of the relationship between the constitutional principle of parliamentary sovereignty and the rule of law.[35] Apart from liberal stakes in legal practice, as I have to mention with regard to Professor Csaba Varga's viewpoint, utility considerations are conditionally applicable in judicial discretion while the judge may omit or consciously forfeit liberal constraints of law. According to his comprehensive analysis, Varga remarked that law can develop a system to reconcile formal rationality, substantive norm content and evaluation content,[36] therefore the law can be potentially remoulded regardless of the liberal canon, by elected legislative organ. On the contrary, the procedural rule of law is closely connected to the liberal politics in that it connotes the ruling class's annoyance to extensive legislation. Except for the 1778 Act for naturalisation of the Jews, the British legal system engendered legislative quiescence until the Roman Catholic Relief Act, promulgated in 1829.[37] However, there were seldom acts in this period that aimed to prevent worker's combination, some police regulations and statutes for administration of justice.[38] Meanwhile, there were a few legal theorists, especially Bentham and his utilitarian disciples, who defended legislation policy, but a greater number of liberals, such

[33] E. J. Hobsbawm *Industry and Empire* (London: Penguin 1990), p. 126.

[34] Julius West *A History of the Chartist Movement* (Boston: Houghton Mifflin 1920), pp. 74 et seq.

[35] Roger Cotterrell *Law's Community* (Oxford: Clarendon Press 1995), p. 175.

[36] See Csaba Varga 'Law and its Approach as a System' in his *Law and Philosophy* Selected Papers in Legal Theory (Budapest: Eötvös Loránd University 1994), pp. 177–199.

[37] A. V. Dicey *Lectures on the Relation Between Law & Public Opinion in England* during the Nineteenth Century (London: MacMillan & Co. 1905), p. 11.

[38] *Ibid.*, pp. 100–104.

as Herbert Spencer, and conservatives opposed the idea that the proposed legislation policy might be dangerous, apropos of France's turmoil after Great Revolution. On the spur of the moment, the British political life dramatically shifted to the influence of public opinion in 1830s, instead of monopoly of influential individuals and peer groups, because the individualist basis of British politics dwindled away on behalf of the mass society and its essentials became remoulded with public opinion. In the meantime, Bentham and his disciples dominated British legal policy in 1832 and they cultivated parliamentary legislation policy when legitimisation of politics was coined by means of utilitarian discourse, without any cognisance about its long-term anti-liberal consequences[39].

The growing body of parliamentary legislation is the direct or indirect outcome of the democratisation process, which ubiquitously became endemic in every sector of the legal system especially in legislation, adverse to the legislative quiescence of liberal conservatism. Probably, political leaders might have alleged the merit or demerit of democratisation, but apart from the democratic life established to any extent, where social legislation claims became emergent phenomena. During the first quarter of the nineteenth century, there was a latent democracy claim in England, whose seeds were initially sown by Thomas Paine and his petty bourgeois followers. Insofar as I can conceive the Benthamite legislation policy, Bentham was not a democrat, but unintentionally encouraged democracy claims on social reform scheme through legislation.[40] The preliminary incentive for legislative policy was to eliminate some burdens on liberal economy under Benthamite influence when the two combination acts of 1824 and 1825 depended on the *laissez faire* principles in order to outlaw working class assemblies.[41] However, the legislative campaigns of Benthamite circles were not entirely successful whilst they aimed to remove some impediments on liberal market or to carry out delayed police regulations.[42] The Benthamite policy of Whig legislation aimed to facilitate capital accumulation, therefore the problem of poverty expanded together with outrageous working class opposition to the established order, after repealing the Poor Laws, the Speenhamland Act and the Corn Laws. For, there was soon an imminent danger in the social order as a consequence of the Whig radicalism that pushed the Tories to change their mind toward a way out of the emergent problem. Tories had relied on the conservative-liberal political capital theretofore, but the New-Tories accommodated themselves to the reform movement in favour of working classes that was eventually backed by them after the Chartist movement had declined.[43] In the meantime, there was a dramatic change in the legal and political domains where the situation slightly demolished the inner parallelism between political liberalism and the procedural rule of law. Initially, there had been a beforehand assumption on the correspondence between liberal credence and common sense (which was manifested as public opinion) since Lockean philosophy, while they

[39] *Ibid.*, p. 31.

[40] Cf., *Ibid.*, p. 33, 125 et seq. As Dicey demonstrated, Bentham was faithful to liberalism, but in a modernised manner. Despite the fact that common law system's requirements are dissimilar to continental civil law system, Bentham, as radical liberal, proposed civil code legislation for England. See Jeremy Bentham *Theory of Legislation* trans. Etienne Dumont (London: Trübner & Co. MDCCCLXIV), pp. 93 et seq.

[41] Dicey, *Lectures…*, p. 190.

[42] *Ibid.*, pp. 200–208.

[43] *Ibid.*, pp. 211 et seq.

had been cordially implementing political legitimacy. The BENTHAMite circles followed the same path,[44] but public opinion clung to social reforms schemes under lower class influence. Consequently, Tories changed their mind in spite of their aristocratic tradition and they aimed to channel and mitigate the grievance of the lower classes in order to reconcile them with the political system. Even though the philanthropic discourse of the New-Tories and the social legislation scheme aimed at the relaxation of absolute surplus value exploitation at home, England did not become the pioneer of a new humanitarian ideal, because she maintained unbridled policy of colonial plunder. Moreover it is apt to think that social reform through legislation did not depend on radical change of the dominant ideology, instead it was a bulk of provisional measures.

The New-Tories opened a new epoch in politics of law and they changed substantive content of the legal system, whilst their core idea ostensibly shifted from the individual freedom to the social welfare and the stable order. DICEY enunciated the new epoch with "collectivism" that he principally sorted its principles as "extension of the idea of protection", "the restriction on freedom of contract", "the preference for collective as contrasted with individual action, especially in the matter of bargaining" and "the equalisation of advantages among individuals possessed of unequal means for their attainment".[45] Additionally, New-Tories commenced the factory movement that aimed at the betterment of workers' living standards in the workplace and reimbursement of their collective loss through a series of welfare regulations. Subsequently, a lot of statutes and regulations were inserted into the British legal system after 1840[46] which focused on ten-hour working day (1847), preventing food adulteration (1860), regulating food and drug sales (1899), land law (1860 and 1881), free education (1891), housing for working class families (1851 and 1900), public health (1848 and 1875), subsidisation of the poorer people (1894), and so on. Apart from these statutes, the government agencies assumed to implement miscellaneous public utilities that directly aimed to better life quality in favour of the inferior social strata. As the litmus paper of the 19th century liberalism, the right for association of workers, collective bargaining and legal redress were totally changed after 1870. The Combination Act of 1875 was totally opposite of the 1825 statute that recognised collective bargaining; another statute of 1896 concerned with equalizing apprentice with factory worker and abolished the pre-capitalist mode of relationships between masters and apprentices. The 1880 and 1897 statutes abolished the "common employment" doctrine which had formerly been created by the judges in favour of employers who had not been liable to pay compensation to one of their workmen for the damage through the negligence of a fellow-workman in the course of their common employment.

The new legislation policy gradually altered the governmental system from liberalism to the regulatory state, but it overburdened the rule of law to the extent that it assumed to undertake new tasks and additional functions. Contrary to the procedural rule of law and its political twin *laissez faire* liberalism, which refined the law as *modus vivendi* of minimal state and elevated to paramount position in governance, the new development willy-nilly opened a way to government husbanding on society, acquiring entire control and regu-

[44] *Ibid.*, p. 168
[45] *Ibid.*, pp. 258 et seq.
[46] *Ibid.*, pp. 261 et seq.

lation on the economy and society. Apart from the problematic nature of the regulatory state, it was a consequence of multiple pressures, which dragged it, as an inevitable outcome. Even though the procedural rule of law already accomplished coherence between legal and political systems, claims and democratic opposition of the working classes could not be consoled only by coherent legal machinery. Naturally working classes expected affirmative action of the governmental organs, especially the legislative body; otherwise they might be inclined to revolutionary opposition. The other problem was generated from the world system in modernity condition where its main bearers were nation-states. England was the earliest example of a national unification that dissolved weak feudalism at the earliest date in Europe and opened a way to national unification by way of the subordination of the noble class, appointing its members as *courtiers* or *noblesse de robe* during the Tudor monarchy. In this context, the king occupied an impartial chair in home affairs; therefore he could dispassionately govern all disputes and violations among countrymen by way of empowerment of the centralised judiciary, i.e., the necessary condition for the procedural rule of law.[47] In this context, apart from the British kingdom, other modernizing countries rearranged centralised bureaucracy instead of judiciary, as recourse in order to accomplish capitalist accumulation by means of subsidies, privileges and tariff protection. Friedrich List, the German economist, proposed those policies to the Württemberg king for national unification in 1822 while his main objective was to promote competitiveness of the German capitalism in the world market.[48] Although the Württemberg king perplexingly refused the proposals and pushed him to exile to the United States, the United States, Germany and some other countries, which were in the lag of modernisation, consequently took his point of view into consideration. Contrary to the well-known American liberal creed, we can observe the earliest example of government intervention for capitalist development in the United States where industrialisation was hardly ever implemented or the country was in the condition of agricultural and commercial capitalism, which carried on by considerably petit-size entrepreneurs. Andrew Jackson, the American president between 1829 and 1837, relied on four main devices in his economic policy[49] although his mind was very confused in economic policy matters and he was lacking an understanding for industrialisation. These four devices were: 1) subsidies by means of land distribution to farmers until westward migration closed the frontier, and of tax policy; 2) conferring special privileges on a particular group to strengthen it among others by way of statutes; 3) supervision of administrative agencies for the conduct of business; and 4) public measures through general laws, like Social Security Act or Minimum Wage law in favour of personal welfare of propertiless individuals. As far as I understand from his tariff policy and the mode of interventionism, Jackson achieved to set the United States to the position of monopoly of agricultural products and raw material exportation in the world economy whilst he availed support from petit-bourgeois egalitarianism and republicanism.

[47] Kriegel, p. 67.

[48] See Friedrich List *The National System of Political Economy* trans. Sampson S. Lloyd (New York: Longman, Greens & Co. 1909), pp. xxix–xxxvii and 87–107.

[49] See Blair Bolles '150 Years of Welfare State' in *The Welfare State* ed. Herbert L. Marx (New York: Wilson 1950), pp. 11–19 at 12–13.

The United States was acknowledged as a forerunner country of liberalism, but fluctuated between liberalism and different modes of state interventionism, with the myriad effects of national interest concerns, influence of the monopoly capitalism and achieving to obtain political support of inferior strata or farmers. Apart from Jacksonian agricultural policy-driven interventionism, a very different interventionist policy was imposed along with monopoly or oligopoly interests of the Northern bourgeoisie during and after the civil war. The government supported nationwide investments of capital in railway transportation or telegram installation and there was a hitherto unassailable monopoly position to be maintained in whatsoever manner.[50] On the one hand, the United States Government encouraged free trade by means of interstate regulations; on the other hand the monopolies represented the economic power of the country to the extent that they were exonerated for their weight in the gross national production and finance. Northern victory in the American civil war unleashed the corrupted interests of carpetbagger bourgeoisie thereof in ex-confederate states, moreover, the capitalist mode of production naturally inclined to expand capitalist relations, taking place as a fundamental and natural-like form of capitalist accumulation by intensification and centralisation of capital.[51] The modes of the capital accumulation spontaneously accomplished the mature stage of capitalist development, wherefore smaller number of capital investors governed the national economy (consequently the world economy). As an inevitable stage, the monopoly capitalism metamorphosed the functioning of the politics and the law; therefore all transmutations were very unfamiliar to the liberal neutrality of government in economics and the procedural rule of law. Contrary to the political ideal of the liberalism that the shareholder-like bourgeoisie exalted it with political *modus vivendi* and the procedural rule of law, the American magnates of business and politics were inconvenient to their proclaimed ideal. The big business and the monopoly capitalism undermined the liberal and democratic basement of the American political life after the civil war, whereas their monopoly positions were not only the result of the inevitable development, but also the consequence of American assessment, because they were encouraged with their linking with the economic furtherance of the nation in the milieu of the world system. Although the radical and anti-capitalist oppositions came from Marxism or populism, the decisive political debate took place between the two rival parties; monopoly development and centralism were generally incumbent on the Republicans, whereas the Democrats were mostly enthusiastic about anti-monopoly and centrifugal policies.[52] The American legislature infrequently promulgated some statutes in order to establish checks and control mechanism on monopoly business through federal legislation, like the Interstate Commerce Act in 1887 and Sherman Act in 1890 or state-level legislative instruments, but did not accomplish decisive success in tranquillising the frustration of small business or farmers. With regard to the principles of liberalism, no one can insinuate unscrupulousness of the monopoly business in its ordinary dealings, except their liability from the

[50] Emerson David Fite *Social and Industrial Conditions in the North during the Civil War* (Williamstown, Massachusetts: Corner House 1976), pp. 15–182.

[51] Marx, pp. 671 et seq.

[52] Ernst von Halle *Industrial Combinations and Coalitions in the United States* (New York: The MacMillan 1900), pp. 111–122.

corrupted conducts or unfair schemes.[53] Theodore Roosevelt, as a liberal, complained in his memoirs that some *laissez faire* economists had postulated unlimited competition in the market, but this had caused unbridled selfishness and tyranny of plutocracy very similar to that of the medieval barons.[54] Albeit, monopoly business undermined the very bases of competitive capitalism, but Roosevelt's criticism was also a superfluous opinion from the liberal point of view, because there was no room for free competition. In sum, monopoly capitalism was the inevitable metamorphose of competitive liberalism that impinged the established power allocation in the liberal society both in economics and politics. To the extent that monopoly development triggered resentment of the farmers and the small businessmen who were yearning for the liberal nostalgia of olden times, the situation pushed the government to regulate business and redistribute incomes by way of governmental action in order to reimburse losers of monopoly competition, although there was no restitution mechanism in the pure liberal policy.[55]

The regulatory and authoritarian control of government is an inconsistent policy from the liberal point of view, for all affiliations of liberalism had already detested them. Regarding the cameralist and mercantilist fiscal policies of post-renaissance absolutist kingdoms, such as the one put into force by the Tudor, Stuart or Bourbon royal houses, they granted state monopolies in order to strengthen the economic capacity of the country, in order to advance their military achievement. Therefore, such policies were subject to criticisms because they established very serious burdens on the competitive interests of average merchants and artisans. For example, apart from the anterior trade monopolies in local character, Elizabeth I, James I and Charles I granted new national monopolies on commerce and the industries. Naturally, the greater majority of tradesmen who were annoyed by monopolist policy, they pushed Charles I to promulgate a statute (in effect, it was a misleading act) to abolish monopolies (namely, the Anti Monopoly Act of 1624).[56] The government-mandated monopolies were partially abolished by the Long Parliament in Britain, but monopolisation in economy was not totally rescinded, moreover it became prevalent in the last quarter of nineteenth century. Incidentally, German modernisation reveals the archaic forms of monopolies which re-emerged during the unification of Germany. Thorstein Veblen, as a liberal, pointed that the German modernisation in the nineteenth century was very similar to the Tudor economic policy, in which cameralism and mercantilism were fundamental policies in its economic outlook, even though such policies were generally considered as obsolete or injurious measures to the natural economy.[57] The government husbanding on economy was a matter-of-fact choice of Germany that aimed to combine national unification and economic development, as driven by inevitable compulsions after Napoleonic wars. The preliminary initiation for common economic policy and unification aimed to establish a custom union [*Zollverein*]

[53] Cf. *Ibid.*, p. 111.

[54] Cited by Harold Howland *Theodore Roosevelt and His Time* A Chronicle of the Progressive Movement (New Haven: Yale University Press 1921), pp. 88–90.

[55] Richard Hofstadter 'What Happened to the Antitrust Movement' and George G. Stigler 'The Origin of Sherman Act' in *The Political Economy of the Sherman Act* The First One Hundred Years, ed. Thomas Sullivan (New York: Oxford University Press 1991), pp. 20–31 and 32–39, respectively.

[56] Hermann Levy *Monopoly and Competition* [1911] (Kitchener, Ontario: Batoche Books 2001), pp. 9 & 17.

[57] Thorstein Veblen *Imperial Germany and Industrial Revolution* [1915] (Kitchener: Batoche Books 2003), pp. 40–41 & 83.

when at the beginning it would have encompassed smaller principalities and city-states of Germany against Prussia, relatively mighty military figure among others.[58] Towards the 1848 Revolution the German bourgeoisie was so weak and the German soil was so fragmented between rival principalities that they could not achieve national unification with an overall economic outlook that was friendly to liberalism, like the failed liberal politics of the Frankfurt Assembly.[59] When the political action of Prussian monarchy was resumed, von Bismarck, who was a former Junker, the Prussian prime minister between 1862 and 1890 and the first chancellor of the German Empire after 1871, accomplished the German unification and commenced a new process to establish the state-mandated capitalism from top (the bureaucracy) to bottom (the capitalist mode of production).

Contrary to contemporaneous England, the German modernisation manifested itself as unprecedented relations between state and society or law and culture, as an awkward invention for capitalist societies. On the one hand, the Prussian government initiated the progression of the military capacity of the kingdom where industrial development was a purposive means of military achievement and elaborately envisioned all aspects of social planning as if in a wartime. However, von Bismarck was not a zealous war-lover, but astutely carried out the Franco-Prussian War in order to accomplish the annexation of the southern German states and to expand the German territory against French influence. Moreover he resorted to the military outlook for husbanding the economic development through planning all constituents of society, by which Imperial Germany coped with the emergent problems under guidance of science, technology, culture and the regulatory state.[60] Although initially there was hardly ever a powerful bourgeoisie who would have been influential on economics, politics and the rule of law, the German government not only guided them for industrialisation and development, but also levied extra (but not exorbitant) taxes on them to relieve the poor and provide them with social security.[61] Consequently, the politics of von Bismarck reshaped Germany on the model of corporate society that any of its divisions thereof performed assigned tasks, but his policy paved the road to National Socialism anyway. Regarding the English legal development amidst the world system, the liberal substance of the law, as commented by Dicey or others, dwindled away in favour of public opinion-driven democratisation and avowed collectivism and substantive alteration, whereas Von Bismarck virtually chose capitalist establishment by way of government initiation and working class support, i.e., consequently similar to willy-nilly utilitarianism of the British New-Tories.

Albeit the disputes on the German model of capitalist development, a phenomenon was common in all capitalist countries in the last decade of the nineteenth century and the twentieth century onwards when monopolised market relations characterised their being. When the liberal market relations increasingly faded away following the subsequent

[58] See 'Zollverein' in *Cyclopaedia of Political Science* ed. John Lalor, III (New York: Merill & Co. 1899), pp. 1135–1136.

[59] Cf. Friedrich Engels *Revolution and Counter-Revolution in Germany* [1896] (London: Lawrence and Wishart 1969); Paul M. Sweezy *The Present as History* Essays and Reviews on Capitalism and Socialism (New York: Monthly Review Press 1953), pp. 223–233.

[60] See George Steinmetz *Regulating the Social* The Welfare State and Local Politics in Imperial Germany (Princeton, New Jersey: Princeton University Press 1993), pp. 41–55.

[61] Cf., Steinmetz, pp. 98 & 120–123; Veblen, p. 85.

centralisation of capital, England, which was the first liberal society, overtly deserted free trade policy on the spur of the moment on behalf of protectionism in the *fin de siècle*. John A. Hobson, who was an infamous author who favoured British imperialism, remarked in 1904 that the free trade policy instigated bad distribution of income, which might be possibly repaired by the publicist policy of protectionism for the exertion to the "well-ordered society".[62] However, Hobson was not overtly repugnant to the *laissez faire* liberalism, moreover he resorted to a point of view that "bad times" eventually necessitated extraordinary measures in order to mitigate bad distribution of income, unemployment and to maintain the vested rights of working classes under the constraints of their democratic claims. The problem was not of temporary nature; on the contrary, it was coercive consequence of the monopoly capitalism. After the 1870s' economic depression, economic liberalism was overtly driven toward its apocalypse; especially the monopolisation had already impinged its social bases. The era of German modernisation coincided with the instigation of monopoly capitalism that unreservedly compelled the politicians to adjust the country to new conditions. Therefore, the German government deliberately enlarged the cartel model either to support cartelisation in basic industries, especially iron-ore, steel and potash or by means of mandatory cartels for the production and distribution of all strategic goods in wartime, as an emergency measure.[63] Although the British or the United States judiciary were responsive to the liberal ideology with the annoyance of the lawyers to monopolisation, German courts obediently accepted cartel regulations by way of legislation or government discretion, moreover they even decided some rulings in order to expand the government-made *Kartelgesetz*.[64] In this situation, trade unions and socialist opposition parties in national politics no longer criticised cartel regulations and state control on economy in Germany or in other metropolitan countries, whatever the development eventually fused with some betterment in the rights of working-class people, such as universal suffrage, minimum wage, subsidies and government control on prices, except for V. I. Lenin and his Bolshevik disciples.[65]

Nonetheless, benevolent politicians offered a series of measures that aimed to better the workplace and standards of living, and the regulatory state was constrained to make peace with working classes under certain conditions after the liberal world market hampered. We can naively enumerate those vested rights of working class people in a comprehensive list, which may contain certain measures for the improvement of living standards of common people from providing better food, minimum wage, pensions, other remunerations, housing, health and social services,[66] and so on, but they are serious policy matters, rather than substantive alterations in the capitalist mode of production. Some social constraints must be summed: 1) As mentioned above, capitalism produced

[62] John A. Hobson *International Trade* An Application of Economic Theory [1904] (Kitchener: Batoche Books 2003), pp. 58–68.

[63] Hermann Levy *Industrial Germany* A Study of its Monopoly Organisations and their Control by the State [1935] (Kitchener, Ontario: Batoche Books 2001), pp.53, 133 & 147.

[64] *Ibid.*, pp., 132, 134–139 & 147.

[65] Levy, p. 155; Guenther Roth *The Social Democrats in Imperial Germany* A Study in Working-Class Isolation and National Integration (Totowa, New Jersey: Bedminster Press 1963), pp. 35–36, 79–80 & 139–150. Cf. Vladimir Ilich Lenin *Imperialism* The Highest Stage of Capitalism: A Popular Outline (New York: International Publishers 1939).

[66] Cf. Stuart Chase 'A Journey through the Welfare State' in *The Welfare State* [note 49], pp. 19–26.

mass society, in which democratisation raised up more or less socialist political opposition of working classes to any extent, which is an inadvertent fact from the liberal point of view. 2) Change in government structure was a concomitant fact with political mobilisation of subaltern people that it transmuted political decision-making in favour of the new oligarchy after monopoly capitalism, which was composed by the plutocracy of big business, political mandates, bureaucracy and military upper rank personnel, who became exclusively influential in the political decision-making process.[67] In this milieu, working classes were normally kept out of the inner circles of the governmental system, in spite of the fact that there was ostensible political participation through democratised elections where masses might be tranquillised by way of procurement of consumptive goods and living standards. 3) As Galbraith remarked, problems of poverty inflicted on the era of monopoly capitalism where shortage of demand was prevalent, instead of the fading away of the truism of the Malthusian theory, i.e., shortage of food. The fact is that the eventual choice was to become affiliated with the Keynesian measures which strove for gradual improvement in purchasing force of wages.[68] In sum, the welfare state was neither a humane solution of any generous government, nor the irreversible vested rights of individuals in the mass society but it was the decisive outcome of social conflict that converged on compulsions of the unavoidable monopoly competition.

The welfare state was not only encompassing grants of governments at the outset of its life, but also such grants occurred under political impulses of the mass society that compelled the government to furnish them with legal form by way of parliamentary legislation. Therefore, legal domain was gradually modified via redefining rights and freedoms of individuals where working class individuals could acquire legal recognition for their new right-claims. Hence, legal domain hybridised with politics by means of newly inserted legal provisions into legal system, even so such provisions originated from legalised popular claims and political discretion. Consequently, the legal system assumed to empower the new-born substantive rights and freedoms in favour of inferior social categories, additional to the individual liberties. To a greater extent, the procedural rule of law found its ideal soil in the motherland of *common law,* but the substantive rule of law ascended to the zenith in Germany, as *Sozialrechtsstaat*.[69] The substantive rule of law imposed on some tasks on the legal system which diverged from the scope and purpose of the liberal legacy. In the context of German modernisation, Germany initially belonged to the periphery of the capitalist world system; it could not compete with the central country of capitalism, i.e., the Great Britain, but deliberately followed a different path of modernisation through politics and functions of law. Normally, the procedural rule of law maintained capitalist mode of production, but the German *Rechtsstaat* was a dynamic system to mount new society and capitalist mode of production. As Veblen remarked, there was no differentiation between state and commonwealth in Imperial Germany, both of which were concurrently reshaped, contrary to Britain.[70] Moreover, the Hohenzollern imperial sovereignty fulfilled miscellaneous tasks by means of legal domination, such as

[67] See C. Wright Mills *The Power Elite* [1956] (Oxford: Oxford University Press 2000).

[68] John Kenneth Galbraith *The Affluent Society* 4th ed. (Middlesex: Penguin Books 1987), pp. 37 & 226–230.

[69] Otto Kirchheimer 'The Rechtsstaat as Magic Wall' in *The Critical Spirit* Essays in Honor of Herbert Marcuse, ed. Kurt H. Wolff & Barrington Moore (Boston: Beacon Press 1967), pp. 287–312 on 288–289.

[70] Veblen, p. 64.

unification of the country, modernisation through capitalist establishment, restructuring society and reforming the legal system through legislation. Moreover, a novel task, which was assigned to the law, was the alleviation of social inequality at home, and a new adoption remoulded it as "the German *Sozialrechtsstaat*".[71]

Let us rethink the procedural rule of law under the headlight of the substantive law development. In general, the procedural essentials of law did not completely divorce from the rule of law after substantive considerations became prevalent; on the contrary, they remained as the backbone of politico-legal legitimisation even where the liberal principles were partially maimed. Hobhouse, who was a well-known political thinker in the early era of monopoly capitalism, preferred to articulate a hermeneutic discourse on the welfare state; his consideration (i.e., his "socialism") was based on a complicated interpretation of liberalism by way of deconstructing the *laissez faire* doctrine. With regard to his consideration on socialism, his "socialist" proposal depended on the redistribution of income and on charging progressive taxes, without any criticism on property ownership or monopoly capitalism.[72] In effect there was an eclipse: whilst the procedural rule of law was transformed into the substantive rule of law, it could not overtly divorce from liberalism, as typically seen in Hobhouses's "liberal" socialism. Hugo Preuss, a so-called liberal politician and lawyer in the Weimar Republic who drafted the Weimar constitution, could not relinquish income redistribution policy and political husbanding of German mandates in the main themes of his political discourse, all of which were entirely perplexing ideas with respect to the liberal constitutionalism.[73] Therefore we can say that the welfare state policies prompted very influential modifications in the legal system which inaugurated the substantive rule of law, but did not disentangle its liberal core. Moreover they aimed to prolong the lifespan of the capitalist society by way of some additional measures aiming to alleviate the troubles of the mass society, without any radical modification in the capitalist mode of production. Meanwhile, there was a counterbalancing action with which the welfare state subdued squarely working classes and masses with its disciplinary capacity in order to domesticate them.

At the outset of the monopoly capitalism, Frederick Winslow Taylor delineated a new conception on scientific management in the workplace and he analytically divided production processes in order to raise productivity and effectivity. Therefore, he primarily divided intellectual and manual labour so that the former would be incumbent on managerial functions according to principles for viability of resources, fecundity and prospective requirements of yielding products.[74] Contrary to overall supposition, Taylor was not an original thinker when he submitted his scheme to the American engineers. More than

[71] Kirchheimer 'The Rechtsstaat…', pp. 293–294; Ernst Rudolf Huber 'Modern Endustri Toplumunda Hukuk Devleti ve Sosyal Devlet' trans. Tugrul Ansay in his *Hukuk Devleti* ed. Hayrettin Okcesiz (Istanbul: Afa 1998), pp. 57–81.

[72] Leonard Trelawny Hobhouse 'Liberalism' [1911] in *The Liberal Tradition* From Fox to Keynes, ed. Alan Bullock & Maurice Shock (New York: New York University Press 1957), pp. 192–195, 203–205, 213–216 & 227–230; for the entire text see<http://www.fordham.edu/halsall/mod/1911hobhouse.html>.

[73] Hugo Preuss 'The Significance of the Democratic Republic for the Idea of Social Justice' [1925] in *Weimar* A Jurisprudence of Crisis, ed. Arthur J. Jacobson & Bernhard Schlink (Berkeley & Los Angeles: University of California Press 2000), pp. 116–127.

[74] Frederick Winslow Taylor *The Principles of Scientific Management* [1911] (New York: Harper & Brothers 1917).

twenty years ago before Taylor, Marx had written on the "relative surplus value" that pointed to the nature of cooperation and division of labour in order to assign the technical and manual specifications in the workplace, as the necessary feature of the relative surplus value production.[75] Both writers, Marx and Taylor curiously pointed that cooperation in factory system was by and large a hierarchical and disciplinary process that instigated specification and adjustment functions in the relations of production. In this context factory became the principal fetter to workers to the degree to which there was a symbiosis between employer and employee. Regarding to the volume and density of the industrial work in total population, monopoly capitalism domesticates a greater number of workers in workplace, except the inevitable unemployment during economic crash or recession times. As has been separately pointed out by John Lea and Dario Melossi, capitalist society surrounds the mass society by means of two main disciplinary powers, firstly in factory, secondly in society where legal and non-legal instruments work together "to correct" human individuals.[76]

Michel Foucault, in his essays on discipline and political technology, pointed out some historical facts about the construction of individuals during the sixteenth and eighteenth centuries in Europe, when the "police" emerged as the constructive force of society.[77] We may or may not confine ourselves in the Foucaultian paradigm, but we can benefit from his marvellous interpretation of J. P. Frank, Louis Turquet de Mayenne and N. Delamare's essays on "police" where the conception comprised morals, health, safety, public works, factories, workers, religion affairs and poor relief. They were all concerned with political society and were not only connected with the one-sided capacity of the power centres, but also assigned certain responsibilities on the bearers of power. Hence, following the words of Foucault, "the discussion from the end of the eighteenth century till now about liberalism, *Polizeistaat, Rechtsstaat* of law, and so on, originates in this problem of the positive and the negative tasks of the state, in the possibility that the state may have only negative tasks and not positive ones and may have no power of intervention in the behaviour of people".[78] Whereas politics and the law curiously diversified in the liberal society, the welfare state made the law a ubiquitous system that furnished with limitless social tasks, assigned to the government on economy and society and which incrementally demolished the liberal equilibrium between politics and the law.

We must point out that both the legal order and politics have a common element under the normal course of events, i.e., the dominant ideology similar to bridge the two domains. However, legal remedies might not be reduced to political discretion in a liberal society, for judiciary is neither a political agency nor a kind of administrative functionary. Normally, some legal traditions depended on judge-made law that they are entrenched systems in the manner in which resisted to new right claims, especially concerned to the

[75] Cf. Marx, pp. 364 et seq.

[76] John Lea 'Discipline and Capitalist Development' and Dario Melossi 'Institutions of Social Control and Capitalist Organization of Work' in *Capitalism and the Rule of Law* ed. Bob Fine et al. (London: Hutchinson & Co. 1979), pp. 76–89 and 90–99, respectively.

[77] Michel Foucault 'The Political Technology of Individuals' in his *Technologies of the Self* A Seminar with Michel Foucault, ed. Luther H. Martin, Huck Gutman & Patrick H. Hutton (Amherst, Massachusetts: University of Massachusetts Press 1988), pp. 145–162.

[78] *Ibid.*, pp. 159–160.

welfare state measures. At least the English and the American judiciaries, which are two prominent examples of liberalism, had been resisting to working class claims concerning trade unions and collective bargaining in a conservative outlook, therefore such claims were eventually installed to the law by way of parliamentary legislation.[79] As a rule, the welfare state and the substantive rule of law did not emanate from the internal dynamics of the legal machinery, because their substantive content was composed of sequentially legalised claims to the extent that the legislature conceded new political claims. In this context, we must point to the expanding role of will theory in the late nineteenth and early twentieth centuries when the law was increasingly considered as assumed commands of the sovereign, as expressed by John Austin in his first lecture.[80]

Contrary to the procedural rule of law that only matched with liberal politics, the substantive rule of law was a kind of liaison between tripartite facts and processes that encompassed prerequisites of political liberalism, uprising claims of working classes and political objectives of government. In this context it re-established legal practice as a domain of rationalised policy concerns, more vividly, depoliticised politics that required a supplementary extension to the domain of administrative discretion via legalising it, very likely to the *droit administratif* which might be interpreted by the Weberian theory of rationality,[81] especially with the enlargement of bureaucracy. Since the substantive rule of law had been put into force by fear of proletarian revolution, it had to reserve liberal politics and indispensable principles of liberalism, but seriously undermined them with social welfare provisions. As regards to criticisms of Franz Neumann and Otto Kirchheimer, we reveal important remarks useful to understand the avowed liberalism of the Weimar Constitution, the welfare state [*Sozialrechtsstaat*] and the Nazi experience. Carl Schmitt, who was a very insightful scientist, but a notorious person as politician and lawyer, pointed out crucial aspects of the mass society and the welfare state, among which are de-politicised politics and the internal contradiction between the liberal rule of law and democracy. He wrote an article on the liberal rule of law in 1928 in which he pointed out the contradictory nature of the liberal content of the Weimar constitution and the substantive aspects of the rule of law.[82] Probably, like me, the greater majority of readers consider that legalism is not a viable point of view in order to appreciate the social system of modern society, regarding to its capability to meet miscellaneous purposive political ends and taken for granted legal equilibrium, but the contradictory nature

[79] Cf. Dicey, *Lectures…*,; J. A. G. Griffith *The Politics of Judiciary* [1977] (London: Fontana 1991), pp. 269 et seq.; Alfred W. Blumrosen 'Legal Process and Labor Law: Some Observations on the Relation between Law and Sociology' in *Law and Sociology* ed. William M. Evan (New York: The Free Press of Glencoe 1962), pp. 185–225.

[80] See John Austin *Lectures on Jurisprudence* I, ed. Robert Campbell (London: John Murray 1873), pp. 88 et seq. The will theory and legal positivism found its very roots in Hegelian tradition. Comparing with transcendental nature of Kantian point of view, Puchta partially followed same itinerary in coupling right and freedom in the sphere of individual, but it advanced into skilful affiliation to the people that became source of rights, especially through legislation. It is not only to settle politics into law, but also alienates pre-given definiteness between law and politics. Cf. G. F. Puchta 'Outlines of Jurisprudence, as the Science of Right: A Juristic Enyclopedia' in his *Outlines of the Science of Jurisprudence* ed. & trans W. Hastie (Edinburgh: T. & T. Clark 1887), pp. 1–134 on 29 et seq.

[81] Max Weber *On Law in Economy and Society* ed. Max Rheinstein (New York: Simon and Schuster 1954), pp. 156 et seq.

[82] See Carl Schmitt 'The Liberal Rule of Law' in *Weimar* A Jurisprudence of Crisis, ed. Arthur J. Jacobson & Bernhard Schlink, trans. Belinda Cooper et al. (Berkeley: University of California Press 2000), pp. 294–300.

of the Weimar legal system *per se* revealed to us inherent problems of the substantive rule of law and its structural defects.

The welfare state was a bulk of utilitarian measures that were neither depending on an ideological orbit obviously disentangled from the liberal paradigm, nor an irretrievable progress, but it protected the liberal creed when it was established as a hodgepodge of uneven measures via legislation and administrative discretion. Regarding to the British liberalism, the core of the system was the separation of powers that was eventually established in the milieu of multilateral political wills, wherewith developed in a series of political convulsions where the initial system was pushed to proceed with new acquisitions. In the welfare state, new-born rights and liberties, especially substantive rules on behalf of disadvantageous groups, were inserted to the system as incremental annexes, but did not entirely restructure the constitutional machinery. Schmitt sensibly criticises the internal contradiction of the Weimar constitution because it granted unlimited freedoms to individuals, but government is limited to the means of the separation of powers. Again, he added that all freedoms of individuals were legalised and depoliticised by legal elucidation, whereas individuals, the decisive element of political participation, were in lack of reason (i.e., their reason was unfamiliar to the *raison d'état*).[83] Rather, the democratisation expanded the material base of political participation, but the democratic experience did not operate together with a proportional public sphere under monopoly capitalism, especially after the disciplinary devices of government consciously demolished the weak public sphere of the working classes and consequently sensitive mass behaviour accompanied it. New substantive rules on social welfare inserted into legal system as outputs of depoliticised politics that continuously contradicted with liberal constraints of the established legal system, provisionally reconciled anyway, but were not entrenched.

The political constraints of the welfare state changed the function and purpose of the procedural rule of law, but its morphological constituents could not adjust. Franz Neumann criticised the legal practice of the Weimar Republic between 1918 and 1932 because it was "characterised by the almost universal doctrine of 'free law' school, by the destruction of the rationality and the calculability of law, by the restriction of the system of contracts, by the triumph of the idea of command over that contract, and by the prevalence of 'general principles' over genuine legal norms".[84] Neumann analysed the problem with his astute view that the jurisprudence of general principles operates in favour of the monopoly capitalism, in irrational form detrimental to the universal characteristics of law. Contrary to the liberal stake in the overall legal machinery of capitalist society, the German judiciary grasped "the theory of concrete order" and the peculiar German institutionalism (which was inspired by Carl Schmitt), in which the matter-of-fact logic was augmented at the expense of the vested rights of the liberal individual. The Weimar jurisprudence, therefore, undermined the established separation between the political and legal domains of state (i.e., the diversity between *Staatsperson* and sovereignty) in which the law was equated with the discretionary power of the government or any administra-

[83] Cf. *Ibid.*, p. 296. Also see Carl Schmitt *The Crisis of Parliamentary Democracy* trans. Ellen Kennedy (Cambridge Mass.: MIT Press 1986), pp. 9, 25 & 42–44.

[84] Franz L. Neumann 'The Change in the Function of Law in Modern Society' [1937] in his *The Rule of Law under Siege* ed. William E. Scheuerman, trans. Anke Grosskopf & William E. Schuerman (Berkeley: University of California 1996), pp. 101–141 at p. 128.

tive agency. However, Schmitt criticised the depoliticisation of politics, as democracy's inherent trouble in the heterogeneous mass society, but acknowledged its most horrible form in his *Political Theology*.[85] In this context, emergency regime was an unavoidable outcome of the plebiscitary democracy; therefore under the Weimar constitution the German people easily and unreservedly surrendered its sovereignty to an unleashed dictator, i.e., Adolf Hitler without any constitutional hindrance, where administrative practices and discretions were equated with legal provisions.[86] Especially under the strong pressure of embittered labour relations, the government and the judiciary willy-nilly entangled in the regulatory role of state, i.e., the embarrassing policy of monopoly capitalism. In this milieu, protectionism relocated factory, as the sphere of "social work" of fake socialism, subsequently labour contracts, which initially depended on contractual reciprocity but then became faith-contracts, similar to the old Germanic relationship between lord and his vassals. The German *Sozialrechtsstaat* was a hypostatic form of welfare state that it was empowered by German romanticism and Nazi millenarianism, with concealing and mystifying power of the monopoly capitalists under a communitarian veil.

4 Some Cursory Remarks on the Emerging Neo-Liberalism

Liberalism is the backbone of legal ideologies in the capitalist society that unwittingly ratifies necessary conditions of the capitalist mode of production, even though some social measures or a full-fledged welfare state were established. No one can imagine capitalism as devoid of property rights, the right of contract, absolute power of individual capitalists in the process of production and exclusive decision-making power. Although the welfare state had been living for nearly one century, when the vociferous tone of liberal enunciation willy-nilly declined, the speakers of capitalism kept liberalism in reserve as a dormant substance. For example, Ludwig von Mises, Austrian economist and libertarian, was eagerly defending unadulterated liberalism in 1927 (i.e., in the early epoch of the welfare state era) overtly expressing it as the only viable political ideology of capitalism[87] whilst the capitalist world system dramatically galloped to the great crash. While the welfare state was fully matured, especially after the well-known "Beveridge Report" issued in 1942, Hayek radically raised his objections to all social justice considerations and economic planning that established a short-cut similarity between the welfare state and slavery.[88] He considered that the rule of law could only be established in a liberal society, and he frankly expressed his annoyance at the limitless legislation detrimental to the liberal substance of the law, contrary to the mainstream democratic ideal.[89] Due to their fear of socialism, the liberals of the age of monopoly capitalism consumed their effort to portray a chimera which resembled partially to socialism and partially to fascism that represented their reproach to the planned society. Hayek was the same; he bifurcated normative order into the two substantial groups; on the one hand, the bulk of

[85] See, Schmitt, *Political Theology*.

[86] Otto Kirchheimer 'Legality and Legitimacy' in *The Rule of Law under Siege*, pp. 44–63 at 47–50.

[87] Ludwig von Mises *Liberalism in the Classical Tradition* trans. Ralph Raico (New York: The Foundation for Economic Education & Cobden Press 1985), pp. 7–17.

[88] F. A. Hayek *The Road to Serfdom* (London: Routledge 2001), pp 75–90.

[89] *Ibid.*, p. 87.

legal principles and judicial rulings that do not need to be promulgated by legislature; on the other hand the organisation rules which were promulgated by legislature.[90] Hayek overtly favoured the former and named it *nomos* that was postulated under the name of "the law of liberty". Hayek's liberal bias accentuated the miscellaneous essentials of politics that mainly included the reduction of levied taxes, less governmental control and favouring the night watchman state, with strenuous disregard of the inappropriate social conditions of labourers under monopoly capitalism.

We must cursorily glance at bureaucracy in the welfare state which was tremendously expanded in *vis-à-vis* parallelism with increasing sorts and quantities of the social services. The social services therefore enlarged public administration and consolidated a new type of public expert differing from the general rest of bureaucracy that entailed new training or university curricula. Richard M. Titmuss, a pre-eminent scholar on social work, who delivered an inaugural lecture at the London School of Economics and Political Science in 1951, proclaimed the establishment of a chair on "social administration" and its academic programme.[91] It is evident that the new bureaucracy entailed supplementary budget, increasing taxes proportional to the volume of government subsidies, additional to the minimum wage regulations and price control policy for consumer goods which entirely annoyed capital owners and landlords. Milton Friedman, the eminent liberal economist, wrote in the 1960s that freedom and capitalism were perfectly fused to a greater extent where it needed minimal and decentralized government, according to "the American ideal". Friedman, very much like Hayek, frankly put forward, reawakening of the nineteenth century liberalism, that political and economic spheres of society would be diversified according to the physiocrat ideal, whilst he entirely merited monopolies with only a small exception for minimum control to the technical monopolies.[92] Henry Hazlitt, a libertarian economist, wrote a book entitled *Man vs. The Welfare State* in 1969 with strong inspiration from Spencer's aforementioned essay where he made the welfare state the scapegoat of all economic troubles, inflation, growing interest rates, idleness of workers, limitless government, etc.[93] Contrary to Keynes and Galbraith, Friedman considered that the welfare regulations and benevolence of governments are injurious to the economy,[94] disregarding of their counter effect in alleviating economic recession. Nowadays, nearly all of the liberal thinkers are very suspicious about democracy, because of its inner relationship with popular right-claims, whereas both democratisation and welfare measures had been the economic cost of working class naturalisation. Like Friedman who affirmed he only assented to a certain type of democracy (namely, liberal democracy) with reference to its positive attitude to the capital ownership, the liberals are hesitant about democracy and other electoral institutions in the constitutional system. Therefore, Hayek expressed that legislation must be limited with police regulations, and must not favour working classes by means of welfare regulations.[95]

[90] See F. A. Hayek *Law, Legislation and Liberty* I [1973] (London: Routledge & Kegan Paul 1977), pp. 52 & 72 et seq.

[91] Richard M. Titmuss *Essays on »The Welfare State«* (London: George Allen & Unwin 1958), pp. 13–33.

[92] Milton Friedman *Capitalism and Freedom* [1962] (Chicago: University of Chicago Press 1982), pp. 27–33.

[93] Henry Hazlitt *Man vs. The Welfare State* 3th imp. (New Rochelle, N.Y.: Arlington House 1970).

[94] Friedman, pp. 177 et seq.

[95] Cf. *Ibid.*, pp. viii & 38 and Hayek *Law, Legislation and Liberty*, pp. 124 et seq.

With regard to the partisans of capitalism, they all enchanted public opinion with freedom-laden discourse of liberalism and philosophical elucidation of the liberal creed, but governments unavoidably conceded to promulgate welfare regulations under the deep-seated fear of unmanageable social unrest and proletarian revolution. Therefore, the dominant elite of capitalist society kept liberalism in the reserve while they entangled the welfare state policies, which might eventually be remedied in the prospective era after the welfare state. Let us remind the political pressures for the establishment of the welfare state which were at the peak after the October Revolution in Russia and the anti-imperialist campaigns of the twentieth century. It is obvious that they were radical foes of monopoly capitalism through either internal opposition or militant uprisings against colonial plunder. The United States government concluded its victory on the capitalist world system at the end of the Second World War; it might have resumed an unbridled imperial policy, but failed because the fears of capitalism were multiplied. Albeit the myriad effects of American victory in the world system and the strong fear of Soviet expansion at the end of the Second World War, the United States summoned a conference in Breton Woods under the influence of Keynes, where the representatives of 44 national governments decided about world currency system and to establish the International Monetary Fund.[96] The conference privileged the United States currency with gold standard ($35 will be equalled with an ounce of gold) and decided that other currencies would adjust to the USD under supervision of the International Monetary Fund and national central banks. The system might be considered as "the Keynesian world monetary system" that consolidated as global monetary policy, more or less reconciling with national welfare policies. In the same year The General Agreement on Tariffs and Trade (GATT) was concluded, in which world trade was regulated with preventing protectionism, trade barriers and anti-dumping (the related code was enacted on 1967). The system concealed the control of the United States on the world economy,[97] but Keynesian limitations remained under the abovementioned fear. Eventually, the Breton Woods system became unfeasible for the United States economy, because its by-product was recession, especially under the emergent deterioration, caused by increasing oil prices. In the end, the United States relinquished the Bretton Woods system at the beginning of 1970s, but the accompanying organisations and organisational tenets remained. When pivotal countries of capitalism could hardly breathe by inflation and recession as incremental consequence of the Keynesian policy and the welfare state, Milton Friedman, the famous liberal economist, began to propagate nineteenth-century liberalism. Meanwhile, it was obvious that the United States government was seeking out an exodus to disentangle itself from welfare measures in order to revisit the unadulterated liberalism. The Bretton Woods opened a new era, in which monopoly regulation policy covered global economy not only by way of initial network of organisations like as IMF, GATT or World Bank but also with subsequent regional integrations as Benelux Custom Union on 1948 and the most important one was the European Coal and Steel Community after the Treaty of

[96] Hazlitt, p. 158

[97] John H. Jackson & Alan O. Sykes 'Introduction and Overview' *Implementing the Uruguay Round* ed. John H. Jackson & Alan O. Sykes (Oxford: Oxford University Press 1997), pp. 2–3.

Paris in 1951. As known, the latter evolved through a series of stages to the contemporary European Union after the Treaty of Maastricht on 1992.[98]

As soon as the decay of the Soviet system became obvious in the early eighties, the central countries began to harness the nineteenth-century liberalism although they were in the midst of excessively monopolised capitalism which was coined as neo-liberalism. Meanwhile, there was a great convulsion of world capitalism in the 1970s and even the 1980s, but the leftist political opposition and the working class politicians could not properly identify the problem on the demerit of their political incapacity.[99] In this context, the United States government was obviously searching a way to steer liberal policy, especially in its area of influence by political manoeuvres and sponsored *coup d'état*'s, such as in Chile and Turkey or in other undemocratic countries. As it was before, it is not inappropriate to ask whether the newly engendered liberal (i.e., neo-liberal) democracy is an oxymoron,[100] we must fairly express affirmative response because it aimed to destroy the established space of the working class (i.e., the greater majority of the total voters) claims. The neo-liberal inscriptions, whose most radical version was revealed from Austrian School, were authoritatively put into force by the governments of two pivotal countries, i.e., the United Kingdom and the United States. Apart from national level alterations in economic policies, the greatest issue was the world economy whose deregulation was negotiated by governments and multinational corporate bodies under the insuperable impact of multinational companies in the Uruguay Round, which was summoned between 1986 and 1993, as the last step in a series of roundtables.[101] The primary aim of the Uruguay round was to deregulate world economy which proceeded with the establishment of the WTO (World Trade Organization) in 1995, i.e., the regulatory board for international trade after government regulations lacked. The Uruguay Round was an ultimate step to give an order to the capitalist world system, after the ones among which we can point out early roundtables to regulate world trade, such as the Kennedy Round between 1963 and 1967 and the Tokyo Round between 1974 and 1979. The Uruguay Round concluded miscellaneous issues of world trade, such as goods sectors, services, intellectual property, tariff or non-tariff barriers, restraints on trade, sweeping every kind of dumping agreements, thorny issues of textile and agriculture sectors, reorganisation of the GATT system and sweeping away of government subsidies. In this context, the WTO became the representative organ of the GATT that was furnished with a consensus rules and centralised dispute resolution board and backed with viable sanctions. Additionally, member states of the WTO and the GATT proclaimed their commitment to adjust their national legal systems and that they would undertake to implement the agreements in their domestic legal systems. According to this, a series of guidelines were concluded either in the negotiations or together with the final act by the member states of the WTO and multinational participants (like the EU) such as the Final Act of Uruguay Round that encompassed establishment of the WTO, the reformed GATT sys-

[98] See Guglielmo Carchedi *For Another Europe* A Class Analysis of European Integration (London: Verso 2001), pp. 10 et seq. & 178 et seq.

[99] Andrew Gamble 'Neo-Liberalism' *Capital & Class* 75 (2001), pp. 127–136 at 127–128.

[100] Cf. Lepoldo Rodriguez Boetsch 'Neoliberalism and Democracy' *Privredna Izgradnja* 48 (2005), pp. 17–30 at 23–27.

[101] Carchedi, pp. 161 et seq. and Jackson & Sykes, *op. cit*.

tem of 1994, the Agreement on Agriculture, the Agreement on Sanitary and Phytosanitary Measures, the Agreement on Textiles and Clothing, the Agreement on Technical Barriers to Trade, the Agreement on Trade-Related Investment Measures, the Agreement on Implementation of Article VI (Anti-Dumping), the Agreement on Rules of Origin, the Agreement on Subsidies and Countervailing Measures, the Agreement on Safeguards, the General Agreement on Trade in Services, the Agreement on Trade-Related Aspects of Intellectual Property Rights (including Trade in Counterfeit Goods) and lastly the Understanding on Rules and Procedures Governing the Settlement of Disputes. In addition, the Uruguay Round yielded a draft agreement, named the Multilateral Agreement on Investment (MAI) which ultimately mandated deregulation and privatisation in national economies and which must be considered as the elimination of all national regulations, which was inherited from the Keynesian economic policy and the welfare state.[102]

The WTO system is not unique in removing commercial barriers between nation states, aiming to establish uniform custom tariffs and privatisation, but also there is a great number of Bilateral Investment Treaties (BITs) between individual countries or between asymmetrically developed party states that aimed the denationalisation of economies and the safeguarding foreign investments. There are also some comprehensive, but regional agreements and treaties, which may be listed as BITs, such as the North American Free Trade Agreement (NAFTA), the Foreign Direct Investment (FDI) regulations, the European Energy Charter, Trade-Related Investment Measures, Asia Pacific Economic Cooperation or OECD. The Bilateral Investment Treaties contain a voluminous number of treaties and agreements that *in toto* encompassed almost 1700 acts and 174 countries at the end of the 1998.[103] Schneider points out that the MAI draft is a more lenient instrument than BITs. On the contrary, BITs are more terrible to the extent that they contain mandating rules with "most favoured nation" clauses. I do not intend to depict all international or multinational economic combinations, agreements and organisations which not only encompass surrounding rules and judicial or quasi-judicial dispute resolution mechanisms, but also display destructive effects on the rights of working classes in individual countries.

To the extent that such multinational agreements and organisations entirely changed the world system, they revealed firstly the *globalisation* of national economies and secondly a formidable liberal victory according to the purview of capitalism. Albeit partisan and credulous opinions on the globalisation, which are tempting to embark new expectations for prosperous life and recuperate capitalism from its notorious image, the current globalisation means localisation for the overwhelming majority of human individuals with shameful deterioration in the present unequal distribution of wealth. Bauman referred United Nation's *Human Development Report* and a newspaper article from *The Guardian,* issued on 1996 and 1998, which disclosed a terrific unequal distribution

[102] David Schneiderman 'Constitutional Approaches to Privatization: An Inquiry into the Magnitude of Neoliberal Constitutionalism' *Law and Contemporary Problems* 63 (2000), pp. 83–109 on p. 99. See, for MAI's role in the world economy, Claudia von Werlhof '»Globalization« and the »Permanent« Process of »Primitive Accumulation«: the Example of MAI, the Multilateral Agreement on Investment' *Journal of World-Systems Research* 6 (2000), pp. 728–747.

[103] *Ibid.*, pp. 99–101.

of wealth.[104] He persuasively argued that the total wealth of 358 global billionaires was equal to the combined incomes of 2.3 billion of people (45 per cent of the total world population), and that 85 per cent of the world's population unfairly shares only 15 per cent of its total income and *vice versa*. Regarding to the investments in the world economy, the MAI System represents a peak in unequal distribution of world capital that the 500 biggest companies of the world are controlling 80 per cent of the total investments in all over the world.[105] As von Werlhof pointed, the globalisation, namely the economy of the world system, meant that everywhere on the surface of the world is becoming a colony of multinational companies,[106] i.e., an unprecedented mapping of the world geography. The corollary of this picture, the multinational companies condemn nation-state based world politics of the welfare state era, because of their openness to popular claims and democratic means. As has been demonstrated by Bauman, we must comparatively criticise equality problems in globalisation and localisation,[107] where some nation-states, i.e., main levers of the welfare policies, were dismantled to subaltern ethnic entities in the underdeveloped or developing countries at the South, like Yugoslavia, Rwanda, Afghanistan or Iraq, whereas the wealthier nation-states of the North are invigorating their power concentration, which can overtly be observed in the USA after the *Patriot Act* of 2001 or the European Union's failure of the federation scheme, because its wealthier members preferred to maintain their sovereign states. Despite overall liberal discourses that disseminate the expectation about how the fair distribution of resources and investments will eventually take place, there are a lot of significant facts which reveal the extended inequality between centre and periphery or northern and southern hemisphere countries. As Samir Amin pointed, regarding a CIA report, which was issued in December 2004 and entitled "Mapping the Global Future", the United States Government expects to promote itself to hegemonic position in the world system in 2020, by way of monopoly power concentration in economy and politics[108] without any countervailing force. We can scrutinise the globalisation from different points of view, but it is absolutely a non-egalitarian convulsion that it will prospectively cause deterioration, instead of expanding equality.

I have no space for comprehensive criticism on miscellaneous aspects of neo-liberalism which comprises liberalism in economy, globalisation in the international sphere and neo-conservatism in politics, but it is useful to state some projections, which must be taken seriously, on what is to be said about the rule of law after the neo-liberal governance. Normally, the neo-liberals smoothly promised that the liberal (i.e., the procedural) rule of law would reappear in the wake of the neo-liberal economic policy. However, two main structural components of the rule of law dramatically changed, which certainly impaired the viability of nineteenth-century liberalism; firstly, centralisation of capital reached excessively distorted income distribution and capital allocation which embarks gigantic unequal consequences where there is no expectation for levelling, and secondly

[104] Zygmunt Bauman 'On Glocalization: or Globalization for Some, Localization for Some Others' *Thesis Eleven* (August 1998), No. 54, pp. 37–49 at 43–44.
[105] Von Werlhof, p. 736.
[106] *Ibid.*, pp. 738 et seq.
[107] Bauman, *op. cit.*
[108] Samir Amin 'Beyond Liberal Globalization: A Better or Worse World' *Monthly Review* 58 (December 2006) 7, pp. 30–49.

the emerging international agents of legislation and adjudication overtly disregard public concerns of individual countries so that they empower a hodgepodge of uneven norms, unprecedentedly in the history of the modern law. The former has to be taken seriously from a sociological point of view for it prolongs deterioration of the present unequal distribution of wealth and income which would probably cause more entropy and more anomie, and that the situation probably cannot be managed in a given social system, especially in the present condition of the shrinking government structures. The latter needs some explication.

The deregulatory policy of neo-liberalism almost intended to repel entire regulatory bodies in favour of capital owners, but the tremendous network of monopolised companies cannot be managed without normative framework, and furthermore all multinational companies are eager to promulgate their own rules for their internal normative order and environment. Many years ago, William M. Evan wrote an article on "public and private legal systems", in which he meant that the "private legal system" was the sum total of rules and procedures of any business organisation that were promulgated by its authorized organs and sanctioned by its own functionaries, and that private legal systems would hopefully work in a kind of governance with the "public legal system".[109] The article belonged to the era of the welfare state where peculiarity of the private legal system is therefore unproblematic because it subjected to control of the mandatory rules and jurisdiction of the country. On the contrary, contemporary regulations of private companies occur in the lack of checks and control function of state's jurisdiction so that there is no legal authority where the norm can be challenged or repudiated. We may glance at the realm of multinational companies: they all comprise approximately 37.000 multinational or global companies, and they all consider the world as a battlefield for the maximising of interest in devoid of mandatory rules of sovereign states. They promulgate their own rules, articulate their own culture and embark their own training policies that solidly ensue their own commitments without any assessment about public concerns.[110] They enjoy the *soft-law* instead of mandatory rules or the *hard-law* of sovereign states, and their staff personnel imagine themselves as knights, samurais or gurus of a new type of feudalism or otherwise Captain Kirk of the Star Trek science-fiction entertainment series.[111] Despite some academic rumination on business ethics, it is apt to think that ethical discourses on transaction between dealers may be consequently hypocritical locutions, because there has hardly ever been any concern to ethics instead of profit maximisation in the midst of that self-centredness of multinational companies that makes them unaware of any difference between legal and illegal. Again, ethics belongs to individuals in a liberal society which cannot be regulated by any legal document, judicature or legislator. Probably some people may expect that the unpleasant costs of globalisation can be eventually minimised with adversary attitude of world population or humane values, but it is a mischievous idea

[109] William M. Evan 'Public and Private Legal Systems' in *Law and Sociology* [note 79], pp. 165–184.

[110] Barbara Emadi-Coffin *Rethinking International Organization* Deregulation and Global Governance (London: Routledge 2002) and Susan Roberts 'Global Strategic Vision Managing the World' in *Globalization under Construction* Governmentality, Law, and Identity, ed. Bill Maurer & Richard Warren Perry (Minneapolis: University of Minnesota Press 2003), pp. 1–37.

[111] Roberts, pp. 15 et seq.

that their role is negligible, because unequal economic power allocation determines the fate of all the world peoples, especially under the expanding impoverishment of masses.

So far, we mind a series of regulations after deregulation, which were promulgated by big business circles, whose total volume is gigantic, no less than the "notorious" government regulation. Firstly, we must consider primary legislation that emanated from multinational acts, treaties or agreements, like the Final Act of the Uruguay Round and its ramifications. Primary rules normally denote legislature-made statutes and judicial law-making of a sovereign state, but in the context of global capitalism they connote the supra-governmental rules and standards to the extent that governments of party-states of an international cooperation would implement in their national legal orders.[112] Normally, legal domain of the welfare state was considered very awkward with inflation in the rule making where many of the statutes, sub-rules and miscellaneous kinds of regulations might be sorted under different titles as primary, secondary and tertiary legislation. As Baldwin wrote, apart from parliamentary legislation, there are principally delegated legislation, sub-delegated legislation, quasi-legislation, administrative rules, and codes of practice, approved codes of practice, guidance, guidance notes, policy guidance, guidelines, circulars, framework documents, outline schemes and statements of advice.[113] Apart from statutes which are promulgated by legislative assemblies, the sub-rules are normally promulgated by administrative departments, public agencies and authorized technical experts that they are coherent acts, depending on power-conferring rules of government authorisation in favour of public officials or specifically privileged legal persons. When a sub-rule is promulgated by a public agency or by way of authorisation, we can call it "secondary legislation", or otherwise a regulation is promulgated by the same agency without an overt authorisation which is called the "tertiary legislation".[114] The secondary and tertiary legislation are not problematic issues within the purview of the national legal systems which are promulgated by public authorities, and that any citizen or interest group can challenge before the ordinary courts of the country according to their procedural rules. In the normal course of events, an extended regulative umbrella causes technical problems of legal coherence, where not only citizens, but also lawyers can hardly assess their location in the comprehensive system of legal rules. Since, constitutions or governments cope with the problem by means of some constitutional rules to determine hierarchical location and utility concerns of secondary or tertiary rules, such as the Statutory Instruments Acts of 1946 in the Great Britain set them down to a uniform procedure and classification in order to make them coherent,[115] but there are no similar arrangements for the *soft law*.

After the emergence of the neo-liberal legislative policy the problem was twofold that on the one hand governments have recognised regulatory powers to non-governmental organisations, on the other hand, the primary legislation in international law instruments has been entailing some duties on national or state legislatures, especially on facilitative measures for privatisation demolishing pre-established legal guarantees of the rule of law,

[112] See Robert Baldwin *Rules and Government* (Oxford: Clarendon Press 1995), pp. 4–6 & 59.
[113] *Ibid.*, p. 7.
[114] *Ibid.*, pp. 59–80.
[115] *Ibid.*, p. 61.

detrimental to the general public. The first problem is very well exampled in the deregulation scheme of the United States and the United Kingdom. The core idea of the deregulation was governance between governmental and non-governmental institutions, which was pompously declared to the world as successful governance, active participation by means of organised groups, flexibility, and anti-formalism and so on, but in strenuous silence on the interests of overall citizens. In this context, the value and purpose of the legislation policy dramatically altered; on the one hand the cost/benefit analyses became the main criteria for all regulation schemes, including statutes, instead of the principle of *pro bono publico*,[116] on the other hand an unresolved problem is remaining that the power of monopoly companies and the selfishness of the business sector worsened off income distribution and life expectancy, without any awareness of public responsibility.

The deregulatory policy of neo-liberalism reawakened the aspirations of the American business, which completed with the self-regulation schemes of the private companies. Their main pretext was decreasing volume and details of regulations, but it failed. Moreover, the only alteration is the direct influence of capital investors and lack of public concern for the scope of regulation. As in the aforementioned concept of the "private legal system", we plainly confront with *private law-making* as in American business circles where it is futile to dispute if there is legislative mandate of constitutionally authorised bodies of legislation. The privately made law is an exact classification that denotes legislative power of private persons, which are generally undertaken by a non-governmental organisation, on behalf of private companies or other corporate bodies, composing of business figures. In this context, we must cite the two non-governmental institutions in the United States: The American Law Institute (ALI) and The National Commissioners of Uniform State Laws (NCCUSL or shortly the Uniform Law Commissioners); the former was established in 1923, and the latter dates back to the Uniform Sales Act of 1906.[117] The New York Stock Exchange (NYSE) from 1900 and more recently the National Association of Securities Dealers (for abbreviation, it became NASDAQ) are also private law-making bodies that apparently aimed disclosure for investors and public, informing shareholders and safeguarding investors.[118] Not only those extensive corporate bodies, but also some business corporations are making laws, like Visa and MasterCard which promulgate all credit card regulation, or the executive of De Beers Group that promulgate the rules of the diamond market.[119] The abovementioned examples satisfactorily evince that private law-making is not entirely a novel institution. Moreover, whilst neo-liberalism was steered by the United States centred monopoly business and navigated to the global sphere, the other multinational or national business circles willy-nilly complied with this development as an insurmountable imposition. It is easy to conceive that private law-making is a self-regulatory system and may maximise expectations of business circles, probably with insightful experience in technicalities of commercial dealings, and that it repairs the commercial code by way of injecting into new commercial customs. Nevertheless it

[116] *Ibid.*, pp. 193 et seq.
[117] David V. Snyder 'Private Law-making' *Ohio State Law Journal* 64 (2003), pp. 371–448 at 374, 379 & 381.
[118] *Ibid.*, pp. 384–388.
[119] *Ibid.*, pp. 399–402.

is apparent that lack of public responsibility and shortcomings in legal precision are remaining.

Whilst the deregulation campaign was revisited in the United States early onwards 1980, the United Kingdom copied the deregulation policy with painstaking efforts of Lord YOUNG, the British minister in THATCHER's cabinet. Lord YOUNG converted the Department of Trade and Industry to the Enterprise and Deregulation Unit in order to open non-governmental participation of business and subsequently became proxy of business in Whitehall.[120] Let us set aside the details of the story; instead we have to point out peculiarities of the conversion. First of all, the overall criticisms of government regulation focused on the intricacies of voluminous regulations, but avowed deregulation did not alleviate the situation, on the contrary, it yielded tremendous bulk of regulations with perplexing constellation of regulatory boards. Even though the aggrieved parties theoretically might have challenged those regulations before judiciary, in practice, the new regulations ousted common people from the business matters concerned, although they needed indemnity for their damages, inflicted by obnoxious practices of brokers on securities or life insurances, that the whole problem was considered a kind of private matter of the leading capital investors.

The neo-liberal legal development reveals enormous pressure of the monopoly firms concerned with nothing more than their selfish interests, especially with regard to the labourers or other population categories of the mass society. As regards to the entire history of capitalism, commercial dealings always incline to globalise market as having been appropriate to the *ius mercatoria,* and neo-liberalism and contemporary globalisation correspond with extremely developed capitalist mode of production, but it is completely localisation or *glocalisation* for labourers.[121] While the neo-liberal policy makers squeeze the world business for deregulation and impinge the legally recognised rights of the working classes, they are ramifying self-regulation and governance to all business circles in the capitalist world system. In this context, the new business elite prefer the flexible s*oft-law* in international and national business transactions, whereas the mandatory *hard-law* remains for overall citizens to the degree to which are concerned legal and criminal cases.[122] It is worthwhile to dispute whether the *soft-law* is exactly the law by definition, regarding the constituents of the law, such as generality, formality, and accountability and so on. Nowadays, the law (i.e., *the hard-law*), in general, may seem old fashioned to some lawyers and cannot excite them anymore, but it safeguards all human individuals to the degree that it protects their being in a civic life. On the contrary, the *soft-law* is revisiting the political and managerial discretion, which means to retreat from the objective law with only one difference from older forms: now it emanates from corporate governance of the global companies, not from the nationwide sovereign and peers.

The neo-liberal era is coinciding with very adversarial effects on world society that its policy makers are unenthusiastic to take care of popular claims because of their shortsighted and selfish outlook on problems of humanity. Yet, the neo-liberal policy-makers

[120] Baldwin, p. 197.

[121] Cf. Bauman.

[122] Janet Koven Levit 'A Bottom-up Approach to International Law-making: The Tale of Three Trade Finance Instruments' *The Yale Journal of International Law* 30 (2005), pp. 125–209 on p. 141, with detailed information about secondary rules and private legislation.

are very successful in one point: that they undermined the vested rights of working classes or general public, but could not convince them. Above all, they do not have a proper vision to replace convenient legal apparatuses, instead of the devastated provisions of the rule of law. In the meantime we witness a tremendous cultural convulsion, affiliated with neo-liberalism which we can call the "post-modern condition".[123] In the prior stages of capitalist civilization, the dominant culture came to the fore as the high culture that its primary character was reconciliation between nationality and universality, in which subaltern cultures subordinated to and intermingled with. Nowadays, there are miscellaneous subaltern cultures, which depend on ethnicity, religion and gender, in a great exertion to equalise themselves with the high culture of nation, but they are sketchy and episodic from the humanitarian point of view. There are an enormous number of cultural networks in the global realm which have phoney involvements to politics, but they have no ability to assess human condition facing with formidable victories of the monopoly capitalism. There are ostensibly very splendid international mechanisms in order to protect human rights, among which we count the rights of individual, so called economic and social rights or protection of natural environment, but their very mechanisms are mutilated, except safeguarding to capital or property interests.[124] In this context, *the international soft law* works in everywhere, but that softness is a kind of hypocrisy that consciously omits the overwhelming majority of the human population. In this formidable greatness, laypersons sometimes shelter to the communitarian politics,[125] but they are fruitless for improvement of human beings. In the ordinary course of events, the communitarian ideologies are very apt to the mass society, likely to obsolete individualism of the neo-liberalism, but they are either a pseudo-republicanism which is incapable to promise any humane remedy except radicalising cultural identities, unconsciously submissive to *divide et impera* policy of the contemporary imperialism.

5 Conclusions

Despite the overall legalism, which exalts the role and function of the legal means, I am conscious that the rule of law is a very narrow remedy for greater society to legitimise politics through law in the modern society. Except some aspects of Athenian democracy in antiquity after Solon's legislation up to the Persian invasion, there was governing through legal rules where political foes and parties of grievances reciprocally adjusted secular rules,[126] named *isonomia* which encompassed both the equality before law and social equilibrium through legal rules. In this context Athenians welcomed the law as

[123] Cf. Frederic Jameson *Postmodernism* Or the Cultural Logic of Late Capitalism (Durham, North Carolina: Duke University Press 1991).

[124] Cf. Bernhard Zangl 'The Rule of Law: Internationalization and Privatization' *European Review* 13 (2005), Suppl. No. 1, pp. 73–91.

[125] See, for elementary cultural aspect of communitarian politics, Charles Taylor 'The Politics of Recognition' in *Multiculturalism* Examining the Politics of Recognition, ed. Amy Gutmann (Princeton, New Jersey: Princeton University Press 1994), pp. 25–73; Michael Walzer 'The Concept of Civil Society' in *Toward a Global Civil Society* ed. Michael Walzer (Providence, Rhode Island: Berghahn Books 1998), pp. 7–27.

[126] Cf. Charles W. Fornara & Loren J. Samons II *Athens from Cleisthenes to Pericles* (Berkeley: University of California Press 1991), pp. 38–47 & 166–167.

a centre of gravity for civic virtue which was shared by the prospective victims of civil or criminal wrongs or misdemeanours, as an expression of impartial and single order. *Isonomia* was even very akin to depoliticised politics that translated political claims to the legal language by way of litigation instead of retribution. The procedural rule of law protected the social environment of liberal individuals, real or presumed, in a legally limited scope where claims became legal issues that were compatible with the night watchman state under the strong inspiration of the liberal ideology. Even though there was an affinity between the procedural rule of law and the shrunk government, the procedural rule of law was an open system at any rate that could not entirely ban democracy claims of working classes, moreover it opened their way in order to naturalise them for availing their support as we have seen in the German example. Consequently, governments were obliged to grant recognition for working class claims, after that the rule of law evolved into the acquisition of new-born economic and political rights. Following the welfare state, a full-fledged depoliticised politics began where the state willy-nilly assumed the initial patriarchal responsibility, as the warden of the poor, the orphans and the old by means of the substantive legal provisions. But the substantive rule of law was cleaved with very serious antagonisms that on the one hand, monopoly capitalists were not eager to share political power and to mount income redistribution for working class relief, on the other hand, the world system worked unequally, favouring the developed countries of the Northern hemisphere by way of transferring burdens onto the underdeveloped countries. In this context, the welfare state could not abstain from danger of inflation and recession. Consequently, the monopoly business freed itself from working class pressure and socialist danger anyhow, it entangled in neo-liberalism as the only viable choice, but this time, there was no manifestation of social concern, in spite of deteriorated income redistribution and social rights. Meanwhile there was an excessive mass society, where the taken-for-granted liberalism cannot re-establish the procedural rule of law, instead there is governance of the capital networks in the global sphere. In sum, the rule of law means governance through law, in which politics anchor to law, but not *vice versa.* Contrary to the procedural rule of law and the welfare state which were fairly expanded objectivity of law as a structural constraint in society, today we can plainly say that the exact meaning of the rule of law in the contemporary world denotes an imaginary relationship, not a reality.[127]

FACULTY OF LAW
ISTANBUL UNIVERSITY, TURKEY
MTOZCAN@ISTANBUL.EDU.TR

[127] In acknowledgement, I am indebted to express my personal gratitude to Miss Senem Oner, who is very distinctive scholar and my friend from Bogazici University, who read the draft and granted her beneficial criticisms in order to better the form and content of the paper.

Biolaw and Ethical Pluralism

Laura Palazzani

1 From Bioethics to Biolaw

'Biolaw' is a neologism which, even though more recent than the expression bioethics, has spread rapidly both at a national and international level. The origin of the use of the term is not certain: however, it is evident how in literature this expression tends to appear more and more alongside the expression bioethics, if not substituting it completely. It is a widespread opinion that biolaw is the inevitable result of bioethics and that bioethics cannot avoid the reference to biolaw: this is mainly due to the ever growing need in present day society for juridical regulations on biomedical activity, resulting from scientific and technological progress. Just as the term bioethics does not coincide with its etymological meaning ("ethics of life"), so the expression biolaw is not equivalent to "law of life": law, like ethics, has always been concerned with life. The specificity of biolaw is to be found in the research oriented towards the drawing up of rules to discipline human behaviour at a social level, in the context of progress in scientific knowledge and technological applications in biology and medicine. Bioethics and biolaw do not overlap, even though they deal with analogous subjects; biolaw deals with bioethical problems with a specifically juridical approach and perspective. Biolaw doesn't propose axiological stances to the conscience for behaviour that realises (or gets as close as possible to) good (maximum); biolaw confines itself to prescribing behaviour in a binding way (also foreseeing administrative or penal sanctions for unlawful behaviour) so as to guarantee social life. Biolaw, therefore, born as an offshoot of bioethics, is becoming an autonomous discipline to a greater and greater extent.[1]

On the one hand, in the context of today's society we perceive an urgent need for biojuridical rules that make social life possible and resolve disagreements (which appear to be more and more heated and difficult to resolve because of ethical pluralism); on the other hand a juridical answer, or systematic reflection, is slow in being given to the social bioethics question at a legislative, doctrinal and jurisprudential level. Some even

[1] *Bioéthique* De l'éthique au droit, du droit à l'éthique (Zürich: Schulthess 1997); »Bioethik und Medizinrecht / Bioethics and Law« Jahrbuch für Medizinrecht *Jahrbuch für Recht und Ethik* (Berlin: Duncker & Humblot 1996); *De la bioéthique au bio-droit* ed. C. Neirinck (Paris: Librairie Générale de Droit et de Jurisprudence 1994); J. Menikoff *Law and Bioethics* An Introduction (Washington, D.C.: Georgetown University Press 2001).

claim that biolaw is absent, highlighting a "juridical emptiness" leading to the "far west" in collective practice.

One reason for the delay in biolaw can be traced back to the asynchrony between the rapidity and dynamism of the biomedical technical-scientific progress and the slowness of the law (in the political debate, the production of laws, the jurisprudential interpretation, the elaboration of doctrines) besides the rigidity (or little flexibility) of the rule making procedures. The different speed of techno-science with respect to biolaw is structural and often results in the difficulty of the law in intervening in bioethical issues, increasing the risk of obsolescence (biolaw tends to arrive too late when the problem is no longer felt, substantially transformed or perceived differently), but also the opposite risk of hurried interventionism (biolaw, aware of its own slowness, with problems giving rise to particular social alarm, tends to anticipate science and pronounce on it even before the actual applicability of new knowledge). The interdisciplinary nature of the subject slows down the time for biojuridical elaboration, requiring the continuous updating of the operators and the opportunity for debate with the experts of different disciplines, with heterogeneous languages and methodologies. The need sometimes arises to identify new juridical categories to define and classify phenomena that depart from the usual context of analysis (it is not rare for bioethical norms to leave some definitions vague or even to forgo a determination of the contents, giving only negative definitions); just as the need is felt to rethink the traditional concepts, which are inadequate with respect to the new reality (with the formulation of new laws or even imposing the configuration of new legal subjects). Another reason for the delay of biolaw is to be found in prudence (or precaution), in the fear that certain techno-scientific intervention on life may cause unforeseeable and irreversible effects.

The main reason for the slowness of the law to intervene in bioethical questions is one of an epistemological kind, owing to the plurality of biojuridical theories, or rather, of ways of understanding law and hence the function of the law in bioethics.

2 Models of Biolaw (without Ethics): Neutrality of Law and Ethical Pluralism

The most extreme model is that of a b s t e n t i o n i s m which, in the name of the affirmation of individual freedom, considers the absence of law (with respect to the presence of law) preferable in bioethical questions. According to this perspective, it is considered more opportune to exclude the public intervention of law, in so much that it is perceived as a kind of meddling that oppresses and unduly interferes with the subjective autonomy. This is a model of thought which on the libertarian horizon asks for, precisely in bioethics, a "space free from law" (supposing that all that is neither ordered nor forbidden by laws is allowed), manifesting the need that one can express, in the choices concerning life and death, health and sickness, the "private" freedom of the individual conscience, without any external coercive imposition. This is the movement of thought known as "Hil", or "*highly inappropriate legislation*", which considers that legislation in bioethics, in whatever way it may be formulated, can only be "highly inadequate" and "inappropriate" in so much that it is inevitably generic with respect to specific individual demands, incapable

of satisfying the extreme variability and irreconcilability of the multiple subjective needs. On this basis, the abstentionist model considers it opportune not to legislate in bioethics or anyway to decriminalise any possible existing laws, preferring the regulations of deontological codes or the decisions of ethical committees to laws, as indirect and flexible rules and regulations, making responsibility coincide with the self-control of a community or the self-discipline of single persons. This model proposes the removal of public law in bioethics, with the consequent privatisation of choices, reducing the biojuridical intervention to a minimum and extending the individual autonomous decision to a maximum.

A second biojuridical perspective is to be found in the l i b e r a l m o d e l[2] which asks for the intervention of the law in bioethics with the function of guaranteeing freedom, understood as autonomy or individual self-determination. According to this paradigm, "moral rights" pertain to the sphere of autonomy of the bioethical choices with respect to which the positive law ('positive' or created by the legislator) must not interfere: positive law protects the external conditions allowing freedom to be concretely manifested and abolishes the impediments (or negative freedom), procuring the means for the translation into behaviour (or positive freedom). This model asks biolaw to strengthen subjective freedom, broadening it with the multiplication of the possibilities of choice. Liberal biolaw recognises ethical pluralism (considered irreconcilable), acknowledges the new individual requests emerging in society, and institutionalises all the possible foreseeable alternatives, without taking sides in favour or against any modality, so that each single person is free to express his or her individual option. In this sense positive law, legislative codification and the force of the formal external coercion of the legal system would have a lesser role in bioethical issues, as human action would be entrusted to the private moral decisions of individuals rather than to the public intervention of the law. The flexible intervention of jurisprudence is considered preferable in this model.[3] Along this line of thought it is considered indispensable that morality be expressed in the context of the private sphere, acknowledging that others may do what they want (also in the case that their behaviour may be judged contemptible, unseemly or immoral). Only if there is a well-founded (but also only presumable) fear of possible risks of the unforeseeable consequences of certain choices, liberal biolaw introduces temporary rules, established from time to time if useful to buffer social emergencies and which can be reviewed and eliminated if not necessary.

The f o r m a l i s t i c m o d e l[4] belongs to a school of thought that tends to reduce the law to the normative translation of political will, making biolaw coincide with biopolitics. According to this perspective, the biojurist has the extrinsic function of recording the decisions expressed in a political context, limiting himself to translating them positively, determining their formal structure, verifying their conformity, coherence and normative compatibility, according to the parameters of certainty and technical correctness (codifying interpretative criteria to resolve possible antinomies, or principles to fill possible lacunas with self-integrating modalities). In this context biolaw assumes the role of the

[2] T. H. Engelhardt Jr. *Foundations of Bioethics* 2nd ed. (New York: Oxford University Press 1996).
[3] P. Singer *Practical Ethics* 2nd ed. (Cambridge: Cambridge University Press 1993).
[4] *Biopolitics and the Mainstream* (Greenwich, Connecticut: JAI Press 1994).

formalisation of political decisions (excluding every critical discussion on contents and values), limiting the task of the law to the verification of the validity of the norm (or of its belonging to the legal system and to the ascertainment of its validity or cogency), to its interpretation on the basis of formal established criteria (textual or extra-textual, but never anti-textual).

According to the procedural model biolaw has the function of defending conventional public ethics, which fix the procedures (publicly agreed upon) for everyone in the management and negotiation of social conflicts. These are procedures that have conventional (and not substantial) bases, but which, once agreed upon, are and remain binding for everyone (as they cannot be altered arbitrarily by individual persons): the procedures are chosen by means of political agreement originating from democratic debate. According to this model, the law in bioethics records the agreement among the parties, shown in the choices of the majority; the democratic criterion becomes a juridical-formal criterion for the procedure of bioethical rule-making. This model can be modified according to the emergence of new stances, shared by the majority or by majority political logic (the ethics of most people or majority procedure).

Then there is the contextual model which proposes reasoning by contexts in biolaw. In this perspective rules gather needs, demands and evaluations arising in an extra-juridical context. The task of law in bioethics is to found in the search for a reasoning that neither claims to orientate nor is limited to recording widespread choices: the biojurist must neither intervene "beforehand" in the ethical debates in bioethics, nor must he collect the fruits of the debates "afterwards", but is called upon to actively participate in the process of the search for consensus. The jurist's task is neither to produce new norms, nor to accept existing values, but to filter social demands with considerations of the feasibility and compatibility of the juridical rule, using juridical procedures or methodologies (among which the approach by contexts). The jurist can make use of the "relativity of qualifications" or the "partiality of stipulations" (without committing himself to absolute definitions, but rather limiting himself to indicating the different qualifications, adapting them to specific contexts). In this direction the law can promote a minimum pragmatic consensus at a contextual procedural level (without getting involved in the debate of the maximum premises of morals).

The sociological-factual model, in the perspective that reduces the law into facts and practice, considers that biolaw coincides with social action, with decisions taken by the courts or predictions about what the courts will in fact decide. In this perspective the law is the recording of practice, by means of the perception of repeated behaviour (in time) and widespread behaviour (in space) in a certain society and of the commonly felt needs of collective living. The law is identified with what is decided by the judges (in reference to concrete cases) or with what can be conjectured might be decided by the judges in the future. In this sense biolaw is limited either to passively acknowledging the behaviour of the majority of citizens or to recording judicial decisions (at the most attempting, probabilistically, to foresee them).

The biojuridical models here defined greatly differ both at a theoretical and an operative level; in certain aspects the models are superimposable, in others they are conflicting. The abstentionist model proposes a removal of the law in bioethics; the other models

(liberal, formalistic, procedural, contextual and sociological) are oriented towards a high production of laws in bioethics: on the one hand the refusal of the law, on the other a need for the intervention of the law. These represent opposite stances based on different reasoning in which a common theoretical origin is to be found: a non-cognitive vision at the ethical level and a vision of the law with a juspositivist-formalist origin (in the affirmation of the exclusiveness of positive law, or of the law established by the legislator, in the formal dimension) or sociological-historicist (in the recognition of the empirical dimension of law identified with effectiveness and reality, coming from the practice to be found in social behaviour or in judicial decisions). These are ways of understanding the law which do not go beyond the observation of "how" the rules are, uncritically, limiting themselves to expressing judgements of fact, gathering the existing laws (with reference both to positive law and jurisprudence), without ever giving judgements of value (this is the so called "law without truth", or neutral law). In this sense biolaw expects the substantial contents and ethical references to be emptied out: the law is reduced to being a mere recipient, which can be filled with any content or value, according to individual or political will, social or judicial behaviour. Biolaw takes on a polyvalent configuration not due to reasons of principle, but due to needs of will or immediate practical aims.

In the biojuridical models, ascribable to the juspositivist-legalist perspective, the affirmation of priority and exclusiveness of positive neutral law risks leaving unresolved the problem of the conflict between private autonomies expressing opposite and irreconcilable ethical visions (contextual and simultaneous), giving in to the dangers of public judgement (if one is limited to the formal vision of law), blindly entrusting oneself to extrinsic procedures without seeking substantial consensus. In such a context, besides the excess of juridical proliferation, the demands of formal certainty risk estranging the law from social life and intentionally alienating it from ethics, creating an abstract, static, closed system with respect to the dynamic evolution of bioethical problems. Even if the biojuridical models in the sociological-historicist perspective allow a greater flexibility and adaptability to concrete circumstances and social change, they are exposed to the risks of a lack of methodicalness, generality and abstractness in the identification of homogenous lines to be shared; these are perspectives that mean the function of biolaw in an open dynamic way, but at the same time are not able to guarantee stable points of reference.

These models opt for a "soft", "open", and "sober", or anyway "large-meshed" law in bioethics, or for a flexible, situational, contextual jurisprudence, in short, for a "weak" law, oriented towards a reduction of public law to the minimum and a maximum widening of private freedom: every legislative or jurisprudential intervention must avoid rigidity and be adaptable to the rapid social transformations (in diachronic sense) and to ethical pluralism (in synchronic sense). On the neutral horizon, the law, separated from nature and ethics, becomes the extrinsic technical instrument (formal or empirical), which on principle renounces substantiality and values. And yet, even those who appeal to the neutrality of law assume the recognition (inevitably evaluative) of a minimum ethical need of the law: the need for mediation, negotiation and the reconciliation of controversies. Postmodern thought has never totally accepted this conflict: that is, it has never been successful in its intent of neutralising the law, radically separating it from ethics. The ethical need

continues to resurface in law, consciously or unconsciously, at least the non-eliminable appeal, or the appeal for the search for elements of inter-subjective sharing which avoid violence. The post-modern perspective is not neutral therefore (as it explicitly claims to be) neither is it relativist (as it implicitly assumes on the non-cognitive horizon), but affirms a minimal, constitutive and inalienable value: the coexistence is better than conflict (assuming coexistence as a good thing, if nothing else because it is acknowledged that it is the condition for the existence of every human being). This is an ethical pronouncement however, a stance with respect to reality that contradicts the original intention of neutrality.

3 The Ethics of Biolaw

The philosophy of law can play an important, critical and at the same time constructive role within the context of the present biojuridical debate: a critical role in highlighting the contradictions of relativism, to be found in the false and ambiguous appeal to neutrality; a constructive role, in showing that the alternative to relativism (that is the sceptical negation of existence and the possibility to know the truth, entrusting every ethical evaluation to arbitrary individualism) is not dogmatism (or the definitive and absolute affirmation of the knowledge of truth, from which to infer rules which regulate all possible behaviour).[5] The law, or better the phenomenological-structural reflection on the constitutive sense of law, demonstrates the possibility of an intermediate way to be identified in the rational recognition of the constitutively human need for coexistence and inter-subjective relations, as a "minimum" (not minimalist) ethical recognition that can be shared by all human beings (on a plane of mere practical rationality, independently of the theoretical, ontological and ethical position assumed at "maximum" level).[6]

The reflection on law makes it possible to understand that the law can find ethics in it, inside it: it is not a question of making a choice between the ethics in the context of the plurality characterising the present debate (such a choice would inevitably determine the privilege of one set of ethics and the delegitimisation of another). The law is called upon to account for the internal meaning of the law itself, as an instrument for the defence of human coexistence and the dignity of each human being, as a presupposition and condition of structural possibility of that same existence and human coexistence.[7]

The philosophy of law brings back biolaw to the structural and specific meaning of law, stressing the danger of a law that radically alienates itself from ethics, the danger of an inhuman use of the law, the danger of using the law against human being. In law it is important to recover that awareness, which has progressively matured and which has consolidated after the atrocious historical experiences of totalitarianism: the awareness that the law cannot become a mere instrument, slave to the will of the strongest, and cannot be limited to the recording of practices (whatever they may be). The function of the

[5] B. Melkevik 'La philosophie du droit dans le tourbillon de la modernité' *Travaux et Jours* (2006–2007), No. 78, pp. 141–166.

[6] D. Folscheid, B. Feuillet-Le Minter & J. F. Mattéi *Philosophie et droit de l'éthique médicale* (Paris: Presses Universitaires de France 1997); G. Hottois *Essais de philosophie bioéthique et biopolitique* (Paris: Vrin 2000).

[7] F. D'Agostino *Parole di bioetica* (Torino: Giappichelli 2004).

law cannot only be formal and empirical: the jurist, however much he intends to be neutral in the context of the post-modern plural society, cannot be indifferent with respect to the substantial evaluation of the law, at least to a minimum substantial evaluation, which recognises the ethical value of the law in the defence of the objective dignity of the human being.

The law structures its own analysis in a specific way, starting with the thematisation of the criterion of justice, an intrinsic requirement of law, made concrete in the principle of equality, symmetry and reciprocity. The appeal of the law to justice shows the importance and necessity in the drafting, interpretation and application of a legal regulation of reference to the recognition of the objective concerns of every human being. To appeal to the principle of equality means to consider that each human being, for the simple fact of being human, cannot become the object of discrimination, but must be treated as a subject having a strong (intrinsic) dignity irrespective of other extrinsic considerations, relative to political, religious or cultural background, to sexual or chronological difference, and also relative to the stage of psycho-physical development reached. The principle of equality (first principle of the human rights doctrine) is rooted in human's being, independently of his action: the law recognises a special substantial dignity in human beings (not generic and accidental) on the strength of his belonging to mankind for the safeguard of his anthropological identity. Dignity is a natural fact to be recognised and not a qualification to be given or awarded. The structural-paradigmatic meaning of law coincides with the truth of man: the law is a condition of possibility to think about the universal relational nature, of the coexistence of freedoms. The biojurist is called upon to defend, by means of the law, the dignity of the human being as a right that cannot be disposed of (taken away from the will of the strongest), prohibiting any form of exploitation of the human body and violation of human life in the awareness that human life is deserving, since man is the only natural subject capable (ontologically) of identifying himself and of recognising others relationally.

The importance of an adjustment of the law to the sense of justice is expressed in a twofold dimension: at a first level the biojurist is called upon to go to the heart of the contents of the single existing regulations, for the purpose of giving a critical evaluation of the law in force, questioning its conformity (acts, sentences, rules) with respect to the objective concerns of human nature (emerging following techno-scientific progress), striving to achieve reform in the direction of the adaptation of positive law to the real sense of law, wherever incongruence or ambiguities are found; at a second level the biojurist has the task of searching for new ways to make human beings' objective concerns positive, at the time of the formulation and drawing up of juridical rules, in the continuous, dynamic and endless search for the expression of norms that already exist in nature, guaranteeing man the conditions to fully realise his own dignity, starting with the general protection of physical integrity.

Such a critical effort is particularly complex in bioethics, where the recognition of rights at the borders of life is at stake, with the rapid progress of biomedical science and technology. Biolaw is called upon to point out human juridical subjectivity, showing the need for all human beings (identified in biologically human organisms) to have equal juridical protection (according to symmetry and reciprocity), even those who due to acci-

dental or provisional reasons, or for non-ontological reasons (age, phase of development or conditions of illness, temporary or stable) are not able to carry out certain abilities or do so weakly, thus becoming particularly vulnerable and fragile when faced with the pressures of the progress made in biotechnology. In other words, it is a question of using and updating the human rights doctrine (with regard to which a universal consensus has been recorded) highlighting the biojuridical need for the protection of the biological body of the human being (from beginning to end) with respect to the new possibilities of manipulation and non-therapeutic experimentation.

In this sense the function of the law, and of biolaw, also has an educational importance: not only towards "legality", but also and above all towards "legitimacy", in the acquisition of the awareness that not all that is legal (created by legislators) or decided by judges is also legitimate. The jurist must be critically aware not only with respect to the law in force and social law, but also has the task of educating public opinion to critical awareness: of not being satisfied with knowing "how" the law is, but of demanding to understand the "whys and wherefores" of the law, the reasons for laws or sentences. And this is a decisive task in biolaw, in order to prevent the law operators and associates from passively limiting themselves to adopting what the law lays down or to upholding widespread behaviour (instead of critically evaluating the contents of what is laid down and the value of social behaviour), settling for the certainty and the uncritical, merely formal adaptation to legality or for the passive observance of rules of society. In bioethics an appeal is often made to legislative intervention in the conviction that once certain practices have been regulated, social peace may finally reign: in truth, the fundamental problem that the philosophy of law has to clarify is that legislating or regulation making do not necessarily resolve the problems and least of all do they placate social conflicts (and even less so consciences). We must not limit ourselves to appealing to a law, whatever that law may be, just because it is a law; to appealing to the judge's intervention, just to resolve problems and conflicts: but it is necessary to hope for and promote the issuing of fair legitimate laws, reasonable judicial decisions, corresponding to the sense of law.[8]

Faced with ethical pluralism, the task of biolaw is not that of fighting pluralism, or of dogmatically imposing an ethical vision, but rather of finding, in the context of the plurality of values, the common elements uniting men in the recognition of the defence and promotion of human dignity. Bioethics represents a real challenge for natural law, an opportunity for propulsive development towards the future: it is in bioethics that the need emerges to express and explicitly enumerate man's concerns in relation to scientific and technological progress, even in the awareness that the path can never be considered concluded and will need continuous hermeneutic reflections and dialectic debates. The important thing is to at least establish the insurmountable limits concerning the dangerous attempt to subjugate techno-science to arbitrary individual or political will or to the contingent novelty of extemporaneous social needs.

It is to be hoped that biolaw is able to find a correct law-making in bioethics, in the context of a European and international juridical integration. There is growing awareness that the drafting of biolaw, limited to a national or cultural context, tends increasingly

[8] A. Silvers *Disability, Difference, Discrimination* Perspectives on Justice in Bioethics and Public Policy (Lanham: Rowman and Littlefield 1999).

to increase the phenomenon of "bioethical tourism" (what is not allowed in one country, is or can be permitted in another); furthermore, the same drafting of biolaw within a particular juridical conception can be disclaimed or contradicted by a different conception. It is a question of identifying common juridical principles that can constitute a biolaw which, even though respecting political specificity, cultural diversity and ethical heterogeneity, can be universally extended at a transnational and intercultural level. This is a biolaw capable of identifying in the recognition of human rights (expressed in international declarations, conventions, pacts and documents) the inalienable principles of bioethical behaviour. It is inevitable that different interpretations of the meaning of the principles can produce contrasting biojuridical visions: but it is important the common effort to achieve an interdisciplinary and plural dialogue that can be recorded at an international level. It suffices to think of the now considerable amount of recommendations, resolutions, and European directives on bioethical issues (with the objective of orientating the legislations of the member states), the universal declarations of international organisations; it suffices to remember the Council of Europe's *Convention on the protection of human rights and the dignity of the human being with regard to the applications of biology and medicine* (1997) and UNESCO's *Universal declaration of bioethics and human rights* (2005) to emphasise the minimum common points that guarantee the conditions for a peaceful social coexistence. The progressive maturation is significant for the need to overcome the fragmentation, which right from the beginning has characterised bioethics in the search for minimum homogenous lines, making it possible to construct, at a theoretical level, a fruitful dialogue (in the disciplinary, political, cultural, ethical and juridical differences) so as to be able, at a practical level, to think of an efficient, global and common answer to the urgent problems of bioethics: it is a question of drafting a sort of meta-biolaw guaranteeing the progress of science and technology in the context of life sciences and social sciences in the respect of human dignity (without discriminations), of political-social justice (in the equal distribution of resources), of responsibility, solidarity and international cooperation.

The respect of human rights constitutes an essential way of guaranteeing the conditions for the realisation of human dignity: this is a path with structural limitations which, epistemologically, ethical thought can help us to overcome. The laws cannot but guarantee the external conditions necessary for coexistence that favour the way to bring about human dignity; but these conditions are not sufficient, as they do not produce real respect for human dignity with absolute certainty. The limitation of the law is "extrincisim": the law is limited to coordinating social actions in order to avoid conflicts and to overcome controversies, but it does not go into, nor can it constitutively go into, the sphere of interiority and interpersonal relations. The law is limited to drafting rules for co-existence, but does not lay down nor can it lay down the ways for the full realisation of human beings, for the improvement of moral conscience, for the complete respect for one's own dignity and for that of others; the law coldly establishes equality, symmetry, reciprocity. The task of the biojurist is to »translate h u m a n g o o d (subject of bioethics) into j u r i d i c a l g o o d , setting down suitable rules for translation-transformation«. In this sense biolaw and bioethics are two s y s t e m s supported by two different binary codes: bioethics the good/bad code, biolaw the fair/unfair code. The law is limited to the minimum ethics of

social-institutional relations, preventing an inhuman use of the law, a use of the law as an instrument of arbitrary force against man and his dignity; it is the necessary "minimum" ethics, the ethics of measure and limitation, which leaves to "maximum" morals the personal search "beyond" the measure, the active and continuous commitment of the individual before the complete and concrete realisation of respect of human dignity and responsibility with regard to others. In this sense the task of the bioethicist goes well beyond that of the biojurist.

There is no full identification, correspondence and overlapping between law and morals: the juridification of morals and the moralisation of law would be inappropriate, also in bioethics. The epistemological limitation of the two branches of knowledge must be understood and distinguished: not all bioethical evaluations can be translated into biojuridical regulations in the measure in which they have no social impact at an institutional level; not all biojuridical regulations (indispensable at a social level) have a bioethical value. The law cannot take upon itself the responsibility of the progress and realisation of good, but is limited to the laying down of associative, social and inter-individual morals (or rather it is limited to establishing what must be done to live together peacefully). The jurist has no choice but to refer this difficult task to a suitably moral or religious reflection (which sets down what one must be, not only what one must do). In this sense biolaw, although necessary for social living together, in some instances can only give way to bioethics and refer to moral consideration, in so much that, on the basis of its own categories, it is not able and cannot succeed in managing some situations. Bioethics and biolaw are moments for necessary reflection, but neither is completely autonomous and independent of the other: biolaw cannot do without bioethics, just as bioethics cannot be separated from biojuridics. »Biolaw without bioethics is blind« and »bioethics without biolaw is empty«: biolaw needs bioethics, the critical reflections and the ethical appeals to the material and substantial consideration of problems, otherwise it would risk being reduced to minimum terms, to a mere abstract, formal procedural or pragmatic regulation; but bioethics too would be empty without biolaw, risking being closed in speculative reflection, without the ability to resolve problems and social conflicts and to inform legislation, jurisprudence and doctrine.

FACULTY OF LAW
LUMSA UNIVERSITY, ROME, ITALY
PALAZZANI@LUMSA.IT

Jus, ratio *and* lex *in some Excerpts of Aquinas*

Enrico Pattaro

1 Jus *in the History of the Idea of What Is Right*

Like the terms *derecho*, *diritto*, *droit*, and *Recht*, the Latin term *jus* means both "what is right" and "law", so with regard to *jus*, when it comes to providing an English translation of it, we face an alternative between "what is right" and "law", or an ambiguity when *jus* carries both of these meanings.[1]

According to Émile Benveniste, *jus* comes from Indo-European *yous*, meaning "the state of regularity or normality required by ritual rules",[2] and it expresses

> "the Indo-European notion of conformity with a rule—of a requirement to be met—in order that an object (a thing or a person) be accepted, fulfil its office, and have all the effects pertaining to the latter."[3]

Moreover, *jus*—like *derecho*, *diritto*, *droit*, and *Recht*—means "what is right" in the sense of "what is *objectively* right" (corresponding to *derecho objectivo* in Spanish, *diritto oggettivo* in Italian, *droit objectif* in French, and *objektives Recht* in German) in expressions such as *jus naturale*, *jus civile*, and *jus gentium*; it means "what is right" in the sense of "what is s u b j e c t i v e l y right" (corresponding to *derecho subjectivo* in Spanish, *diritto soggettivo* in Italian, *droit subjectif* in French, and *subjektives Recht* in German) in expressions such as *jus libertatis*, *jus civitatis*, *jus sententiae dicendae*, and *jus retinendi*.[4]

[1] On the difficulties involved in offering an English translation for terms such as *derecho*, *diritto*, *droit*, and *Recht*, see Enrico Pattaro *The Law and the Right* A Reappraisal of the Reality that Ought to Be (Dordrecht: Springer 2005), pp. 5ff. [A Treatise of Legal Philosophy and General Jurisprudence 1], where I argue that the two expressions "what is objectively right" and "what is subjectively right" may be used to translate the German expressions *objektives Recht* and *subjektives Recht* (as well as its equivalents in Spanish, *derecho objectivo* and *derecho subjectivo*; Italian, *diritto oggettivo* and *diritto soggettivo*; and French, *droit objectif* and *droit subjectif*). The corresponding ancient Greek term, *dikē*, as it occurs in Homeric epic, can take either meaning, i.e., "what is objectively right" (*dikē*, in the singular) or "what is subjectively right" (*dikai*, in the plural), depending on context and inflection (pp. 279ff.).

[2] Émile Benveniste *Le vocabulaire des institutions indo-européennes* 2: Pouvoir, Droit, Religion (Paris: Les Editions de Minuit 1969), p. 113.

[3] The French original: „La notion indo-européenne de conformité à une règle, de conditions à remplir pour que l'objet (chose ou personne) soit agréé, qu'il remplisse son office et qu'il ait toute son efficace". Benveniste, p. 119.

[4] Michel Villey argues perspicuously that in Roman law *jus* signified what is right with reference to the sub-

Over the centuries, authoritative translations of terms that are crucial in legal philosophy and general jurisprudence, as is the case with the Latin *jus* and the Greek *dikē*, have become firmly lodged in the major European languages, and yet these translations are unfortunately sometimes misleading not only with regard to the distinction between "law" and "what is right" but also with regard to the distinction between "what is right" and "justice" (such is the case, in particular, with *dikē* in the HOMERic poems).[5]

To be sure, "right" and "just" are often used interchangeably, each to signify the other. Even so, the two concepts must be kept separate, and it will be necessary to decide, by looking at the context, the sense in which the two words are used. Of course they may find a use so ambiguous that it becomes impossible to give them a specific meaning, even taking context into account. In this paper, I attempt to settle the question of the distinction between "what is right" and "justice", making special reference to AQUINAS and to his way of characterising *jus* and *justitia*, and pointing out the role played in AQUINAS by the term *ratio*, in its different meanings, with regard to the connection between *jus, justitia*, and *lex*.

There are of course many reasons for choosing AQUINAS, one of them being his role as a liaison between ARISTOTELian and CHRISTian thought: in the 13th century, AQUINAS represented a crucial anchor point in the continuity of the renewed development and vigour of Western philosophy. There is in AQUINAS an interweaving of *ratio*, *lex*, *jus*, and *justitia*. Multiple strands are plied together in this interweaving, but its chief ones are three: (*a*) reason (*ratio*: synderesis and prudence), which makes right what is right; (*b*) normativeness (*virtus obligandi*, the virtue of being binding: the binding power or force proper to *leges*, or norms); and (*c*) virtuous action [*actus virtuosus*], meaning action that is voluntary, stable, and firm [*voluntarius, stabilis et firmus*].[6]

jects, whether they were duty-holders or right-holders in his 'Les origines de la notion de droit subjectif' *Archives de philosophie du droit* (1953–1954), pp. 163–187 at 170ff. 'L'idée du droit subjectif et les systèmes juridiques romains' *Revue historique de droit française et étranger* (1946–1947), pp. 201–228. See also the different positions of Giovanni Pugliese '»Res corporales«, »res incorporales« e il problema del diritto soggettivo' in *Studi in onore di Vincenzo Arangio-Ruiz nel XLV anno del suo insegnamento* 3 (Napoli: Jovene 1953), pp. 223–260.

[5] See Pattaro, pp. 5–12, 269ff. and 333ff. The deontological idea of rightness (of the right, what is right) is different from the axiological, teleologically oriented idea of justice (of the just, what is just). Indeed, it makes sense to say of a behaviour that it is right (correct) but not just (fair), and vice versa. The idea that if something is a norm it will be binding *per se* (duty for its own sake: KANT) determines the deontological idea of what is right, but not the axiological, teleologically oriented idea of what is just. John Finnis in his *Natural Law and Natural Rights* (Oxford: Clarendon Press 1980), p. 298 writes that "we must set aside as spurious the categorizations of a textbook tradition which divides all moral thought between »deontological ethics of obligation« and »teleological ethics of happiness or value«". His invitation is pertinent if intended to say that in AQUINAS the two aspects, the teleological and the deontological, interweave.

[6] It will be a good idea to note down right now two of the senses that *virtus* takes in AQUINAS: we have (*a*) a broad sense, under which *virtus* means "characteristic that comes through in a causal power" (thus, for example, the sun has the *virtus* of heating the bodies it sheds light on, and here *virtus* is a causal power); and then we have (*b*) a narrow sense (we might call it a technical sense), under which *virtus* means "attitude" (*habitus* in Latin, *hexis* in Greek), as is the case with the moral virtues, such as fortitude, temperance, and justice.

2 Three Senses of Quod est rectum *[What Is Right] in Aquinas*

We can construct out of the *Summa Theologiae* a distinction among three senses of *quod est rectum*, or "what is right." (The third of these senses is expressed by Aquinas with the Latin *jus*.) Let us look at them in turn.

(i) "Whatever can be rectified by reason [or made right by reason] is the matter of moral virtue, for this is defined in reference to right reason [*omnia quaecumque rectificari possunt per rationem, sunt materia virtutis moralis, quae definitur per rationem rectam*]" (Aquinas *Summa Theologiae* (b), 2.2, q. 58, a. 8).[7]

Here, what is right [*quod est rectum*] is determined solely by reason [*ratio*]: Reason makes right. All that can be made right by reason [*ratio*] is the subject matter [*materia*] of the moral virtues, and what is right [*quod est rectum*] is the objective [*objectum*] of the moral virtues. Still, no moral virtue is taken into account in determining this first, larger sense of "what is right" [*quod est rectum*]: only reason [*ratio*] enters into this determination.

(ii) The second sense of "what is right" (*quod est rectum* as made such by *ratio*) comes into play when making reference to one or another of the moral virtues and to its subject matter. It is irrelevant here which virtue we are making reference to: it might be the virtue of temperance, whose subject matter is desire, or the virtue of fortitude, whose subject matter is anger, or again the virtue of justice, whose subject matter is the will of the acting person in regard to his or her actions and insofar as these actions affect other people.

This second sense of "what is right" [*quod est rectum*] is narrower than the previous but is still a broad sense: its narrow, and proper, sense is that specified under the next paragraph.

(iii) This third sense of "what is right" (*quod est rectum* as made such by *ratio*)—its strict sense—comes into play when making specific reference to the moral virtue of justice [*justitia*], whose subject matter is the will of the acting person in regard to his or her actions and insofar as these actions affect other people: in this sense, *quod est rectum* means "what is right toward others." This strict sense of "what is right" [*quod est rectum*] is specifically expressed by the term *jus*.[8]

[7] Aquinas himself refers to Aristotle's *The Nicomachean Ethics*, and to this passage in particular: "Virtue [*aretē*] then is a settled disposition of the mind [an attitude: *hexis*] determining the choice of actions and emotions, consisting essentially in the observance of the mean relative to us [*mesotēti ousa tēi pros hēmas*], this being determined by principle [reason: *logōi*], that is, as the prudent man [*phronimos*] would determine it". See its trans. Harris Rackham (London: W. Heinemann 1968), 1106b–1107a [The Loeb Classical Library]. The Greek original: "ἔστιν ἄρα ἡ ἀρετὴ ἕξις προαιρετική, ἐν μεσότητι οὖσα τῇ πρὸς ἡμᾶς, ὡρισμένῃ λόγῳ καὶ ᾧ ἂν ὁ φρόνιμος ὁρίσειεν."

[8] On the concept of *jus* in Aquinas, see also Fred D. Miller Jr. [with C.-A. Biondi-Khan] *A History of the Philosophy of Law from the Ancient Greeks to the Scholastics* (Dordrecht: Springer 2007), pp. 305ff. [A Treatise of Legal Philosophy and General Jurisprudence 6].

3 Jus *[What Is Right toward Others] Is Made Right, in What Concerns its Essence [*essentialiter*], by the Type [*ratio*] Contained in a* lex *[Norm]*

Let us now take a look at the following passage from *Summa Theologiae* (a), 2.2, q. 58, a. 1:

> "Justice is rectitude, though not by essence [*essentialiter*], but only as a cause [*causaliter*], in that justice is an attitude according to which somebody acts and wills rightly [*recte*]. (Aquinas *Summa Theologiae* (a), 2.2, q. 58, a. 1; my translation)[9]

The Latin term *rectitudo* ["rectitude"]—from the adjective *rectus*, "right," and from *rectum*, past participle of *rego*, whence comes *regula* (plain old "ruler" or "rule," the instrument for drawing straight lines)—connects up with some geometric-philological considerations that may be made on the concept of "norm" and of "matrix of normativeness."[10]

Even in Aquinas *rego* means "to rule": it does so in an acceptation of this Latin verb that ascribes to it a particular density of meaning, an acceptation that forms the basis of the idea of *lex aeterna*—the *aeternum conceptum* of *divina ratio*, the divine plan that *non concipitur ex tempore*. Divine Providence sets out the rules [*regit*] of the universe according to a design of reason that is right [*rectum*]; at the same time, Divine Providence supports these rules with its just will [*justa voluntas*].

> "It is impossible that God should will anything but what is of the type [*ratio*] of His wisdom. And the type of His wisdom is like the norm of justice, a norm in accordance with which His will is right and just. Hence, what He does in accordance with His will He does justly, as we, too, do justly what we do in accordance with the norm." (Aquinas *Summa Theologiae* (a), 1, q. 21, a. 1; my translation)[11]

Here, the classic English translation of the *Summa Theologiae*, by the Fathers of the English Dominican Province (*Summa Theologiae* (b)), fails to grasp the sense that *ratio* takes in context. They therefore avoid translating *ratio* and resort rather to a circumlocution (italicised in footnote 11) that is vague and does little service to the reader.

It might be said that Aquinas's palatable distinction between *essentialiter* and *causaliter* (a typically Scholastic distinction, as formulated in 2.2, q. 58, a. 1, the passage quoted before the last) gives to each his own [*suum cuique tribuit*]: it gives to *jus* that which

[9] The Latin original: „Neque etiam justitia est essentialiter rectitudo, sed causaliter tantum, est enim habitus, secundum quem aliquis recte operatur, et vult" in Th. Aquinas *Divi Thomae Aquinatis Summa Theologica* Editio altera romana ad emendatiores editiones impressa et noviter accuratissime recognita (Rome: Forzani 1894), 2.2, q. 58, a. 1 [In the following: *Summa Theologiae* (a)]. In the translation of the Fathers of the English Dominican Province: "Justice is the same as rectitude, not essentially but causally; for it is a habit [an attitude: *habitus*] which rectifies the deed and the will" in Th. Aquinas *Summa Theologica* Literal trans. Fathers of the English Dominican Province [reprint of the 1947 edition issued by Benzinger] (Notre Dame: Christian Classics 1981), 2.2, q. 58, a. 1 [*Summa Theologiae* (b)].

[10] A conception of normativeness along these lines is developed in Pattaro, pp. 61ff.

[11] The Latin original: „Impossibile est Deum velle nisi quod ratio suae sapientiae habet. Quae quidem est sicut lex justitiae, secundum quam ejus voluntas recta, et justa est. Unde quod secundum suam voluntatem facit, juste facit; sicut et nos, quod secundum legem facimus, juste facimus" in Aquinas *Summa Theologiae* (a), 1, q. 21, a. 1). In the translation of the Fathers of the English Dominican Province: "*It is impossible for God to will anything but what His wisdom approves*. This is, as it were, His law of justice, in accordance with which His will is right and just. Hence, what He does according to His will He does justly: as we do justly what we do according to law" in Aquinas *Summa Theologiae* (b), 1, q. 21, a. 1 [italics added].

pertains to *jus*, to *justitia* that which pertains to *justitia*, and to both that which pertains to both.

That which pertains to both is what is right [*quod est rectum*] toward others: What is right toward others pertains *essentialiter* to *jus*; while it is *causaliter tantum* that it pertains to *justitia*. Let us enter into this question. Behind *jus* (inasmuch as *jus* is *essentialiter* what is right, or *rectitudo*, toward others) stands divine reason (and there also stands human reason, but only to the extent that there is in it a share of divine reason). Behind *justitia* (inasmuch as *justitia* is *causaliter tantum* what is right, or *rectitudo*, toward others) stands the virtuous will (rational will is the subject matter of justice), meaning a will [*voluntas*] that is conscious [*sciens*], stable [*stabilis*], and firm [*firmus*].[12]

As a cognitive power, practical reason [*ratio practica*] consists in (*i*) synderesis, with regard to the apprehension of the principles of action (*principia operabilium*, which synderesis entrusts, as ends, to the moral virtues) and (*ii*) prudence, with regard to the means to the ends entrusted to the moral virtues. Synderesis entrusts ends to the virtue of justice (as well as to the other moral virtues), and these ends will be attained through the means, i.e., the rules, provided and set forth by prudence. In such a way, practical reason arranges people's relations and ordains them to the attainment of the ends entrusted to the moral virtues.[13]

Aquinas lays out elegantly as follows the relation that holds among the moral virtues (among which is justice), the ends of action, synderesis, and prudence:

> "Now, just as, in the speculative reason [*in ratione speculativa*], there are certain things naturally known [*naturaliter nota*], about which is u n d e r s t a n d i n g (rational intuition: *intellectus*), and certain things of which we obtain knowledge

[12] For further considerations on the concept of "virtuous will" in Aquinas, see Pattaro, pp. 299ff.

[13] "Now, to a thing apprehended by the intellect, it is accidental whether it be directed [ordained: *ordinetur*] to operation or not, and according to this the speculative and practical intellects differ. For it is the speculative intellect which directs [ordains: *ordinat*] what it apprehends, not to operation, but to the consideration of truth; while the practical intellect is that which directs [ordains: *ordinat*] what it apprehends to operation. And this is what the Philosopher says (*De Anima* iii, […]); that *the speculative differs from the practical in its end*. Whence each is named from its end: the one speculative, the other practical—*i.e.*, operative" in Aquinas *Summa Theologiae* (b), 1, q. 79, a. 11. The Latin original: „Accidit autem alicui apprehenso per intellectum, quod ordinetur ad opus, vel non ordinetur. Secundum hoc autem differunt intellectus speculativus, et praticus; nam intellectus speculativus est, qui quod apprehendit, non ordinat ad opus, sed ad solam veritatis considerationem: practicus vero intellectus dicitur, qui hoc quod apprehendit, ordinat ad opus. Et hoc est, quod Philosophus dicit in 3. de Anima […], quod speculativus differt a practico fine; unde et a fine denominatur uterque, hic quidem *speculativus*, ille vero *practicus*, idest operativus" in Aquinas *Summa Theologiae* (a), 1, q. 79, a. 11.

"Now it is clear that, as the speculative reason argues about speculative things, so that practical reason argues about practical things. Therefore we must have, bestowed on us by nature, not only speculative principles, but also practical principles. Now the first speculative principles bestowed on us by nature do not belong to a special power [*potentiam*], but to a special habit [attitude: *habitum*], which is called *the understanding of principles*, as the Philosopher explains (*Ethic.* vi. 6). Wherefore the first practical principles, bestowed on us by nature, do not belong to a special power, but to a special natural habit [attitude: *habitum*], which we call *synderesis*" in Aquinas *Summa Theologiae* (b), 1, q. 79, a. 12. The Latin original: „Constat autem, quod, sicut ratio speculativa ratiocinatur de speculativis; ita ratio pratica ratiocinatur de operabilibus; oportet igitur naturaliter nobis esse indita, sicut principia speculabilium, ita et principia operabilium. Prima autem principia speculabilium nobis naturaliter indita non pertinent ad aliquam specialem potentiam, sed ad quemdam specialem habitum, qui dicitur intellectus principiorum, ut patet in 6. Ethic. (cap. 6.). Unde et principia operabilium nobis naturaliter indita non pertinent ad specialem potentiam, sed, ad specialem habitum naturalem, quem dicimus synderesim" in Aquinas *Summa Theologiae* (a), 1, q. 79, a. 12.

> through them [*quae per illa innotescunt*], viz., conclusions, about which is s c i e n c e [*conclusiones, quarum est scientia*], so in the practical reason [*in ratione practica*], certain things pre-exist, as naturally known principles [*principia naturaliter nota*], and such are the ends of the moral virtues [*fines virtutum moralium*], since the end [*finis*] is in practical matters what principles are (what the principle is: *principium*) in speculative matters." (Aquinas *Summa Theologiae* (b), 2.2, q. 47, a. 6)[14]

> "Natural reason [*ratio naturalis*] known by the name of synderesis appoints the end to moral virtues [*virtutibus moralibus praestituit finem*], […] but prudence does not do this […]. The end concerns the moral virtues, not as though they appointed the end, but because they tend to the end which is appointed by natural reason [*a ratione naturali praestitutum*]. In this they are helped by prudence, which prepares the way for them, by disposing the means [*ea quae sunt ad finem*]. Hence it follows that prudence is more excellent than the moral virtues, and moves them: yet synderesis moves prudence, just as the understanding of principles (the rational intuition of them: *intellectus*) moves science." (Aquinas *Summa Theologiae* (b), 2.2, q. 47, a.6)[15]

To clarify the nexus among *ratio*, *regula*, and *lex*, I quote here two passages by Aquinas (1.2, q. 90, a. 1 and q. 95, a. 2):[16]

The first passage is the following: „*Lex quaedam regula est, et mensura actuum*": "A norm is a kind of rule, and a measure for acts" (Aquinas *Summa Theologiae* (a), 1.2, q. 90, a. 1; my translation).[17] Here 'measure' designates a unit of measure, as for measuring the size, quantity, or degree of something. This is the second passage:

> "There is no norm [*lex*] that is not just; hence, insofar as a norm [*lex*] takes after justice, to that extent it will take on the power of a norm (the virtue of being binding or of having a binding power, or force: *de virtute legis*, and *legis virtus* is *virtus obligandi*): and in human things we say that something is just because of the fact that it is right [*rectum*] according to a rule of reason [*secundum regulam rationis*]; but the first rule of reason is the norm of nature [*rationis autem prima regula est lex naturae*] […]; hence, every human-posited norm [*omnis lex humanitus posita*] will be of the type norm [*habet de ratione legis*] to the extent that it derives from the norm of nature [*a lege naturae*]: Indeed, if in some respects the human-posited norm is at variance with

[14] The Latin original: „Sicut autem in ratione speculativa sunt quaedam ut naturaliter nota, quorum est intellectus, et quaedam, quae per illa innotescunt, scilicet conclusiones, quarum est scientia: ita in ratione practica praeexistunt quaedam, ut principia naturaliter nota: et hujusmodi sunt fines virtutum moralium: quia finis se habet in operabilibus, sicut principium in speculativis" in Aquinas *Summa Theologiae* (a), 2.2, q. 47, a. 6.

[15] The Latin original: „Virtutibus moralibus praestituit finem ratio naturalis, quae dicitur synderesis, […] non autem prudentia […]. […] finis non pertinet ad virtutes morales, tamquam ipsae praestituant finem; sed quia tendunt in finem a ratione naturali praestitutum: ad quod juvantur per prudentiam, quae eis viam parat, disponendo ea quae sunt ad finem; unde relinquitur, quod prudentia sit nobilior virtutibus moralibus, et moveat eas: sed synderesis movet prudentiam, sicut intellectus principiorum scientiam" in Aquinas *Summa Theologiae* (a), 2.2, q. 47, a. 6.

[16] For further considerations on these two passages of the *Summa Theologiae*, see Pattaro, pp. 61ff. and 303ff.

[17] The Latin original in its wider context: „»Lex quaedam regula est, et mensura actuum«, secundum quam inducitur aliquis ad agendum, vel ab agendo retrahitur: dicitur enim lex a ligando, quia obligat ad agendum" in Aquinas *Summa Theologiae* (a), 1.2, q. 90, a. 1. Following is the English translation by the Fathers of the English Dominican Province: "Law is a rule and measure of acts, whereby man is induced to act or is restrained from acting: for *lex* [in my translation, »the norm«] […] is derived from *ligare* [to bind], because it binds one to act" in Aquinas *Summa Theologiae* (b), 1.2, q. 90, a.1.

> the norm of nature, then it will not be a norm, but the forgery of a norm [*non erit lex, sed legis corruptio*]." (Aquinas *Summa Theologiae* (a), 1.2, q. 95, a. 2; my translation)[18]

Note how *ratio*, on its last occurrence in the foregoing passage—in the string *habet de ratione legis* (Aquinas *Summa Theologiae* (a), 1.2, q. 95, a. 2)—means "type", whereas on other occurrences in the same passage, it means "reason", understood as a cognitive power (cf. Aquinas *Summa Theologiae* (a), 2.2, q. 58, a. 4).[19]

When *ratio* stands for "type", it may be translated as well, depending on context, to "essence", "plan", "idea", "form", "concept", "design", and the like. There is one passage in this regard where Aquinas discusses *lex aeterna*. Let us look at this passage and see the various senses in which the term *ratio* figures in it.

> "Now it is evident, granted that the world is ruled [*regatur*] by Divine Providence, […] that the whole community of the universe is governed [*gubernatur*] by Divine Reason (by divine plans: *ratione divina*). Wherefore the very idea (*ratio*, meaning "design", "schema", "type", or "plan") of the government of things in God [*gubernationis rerum in Deo*] the Ruler of the universe, has the nature of a law (is of the type

[18] This is the Latin original in its wider context (enclosed within double angle quotation mark is the original corresponding specifically to the translation in the run of text): „Sicut August. dicit in 1. de Lib. Arb. […] »non videtur esse lex, quae justa non fuerit; unde inquantum habet de justitia, intantum habet de virtute legis: in rebus autem humanis dicitur esse aliquod justum ex eo quod est rectum secundum regulam rationis: rationis autem prima regula est lex naturae […]; unde omnis lex humanitus posita intantum habet de ratione legis, inquantum a lege naturae derivatur: si vero in aliquo a lege naturali discordet, jam non erit lex, sed legis corruptio«" in Aquinas *Summa Theologiae* (a), 1.2, q. 95, a. 2. The Fathers of the English Dominican Province provided this translation of the foregoing passage, which, too, is shown here in its wider context: "As Augustine says (*De Lib. Arb.* i. 5), *that which is not just seems to be no law at all*: Wherefore the force of a law depends on the extent of its justice. Now in human affairs a thing is said to be just, from being right, according to the rule of reason. But the first rule of reason is the law of nature, as is clear from what has been stated above (Q. 91, A. 2, *ad* 2). Consequently every human law has just so much of the nature of law, as it is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law" in Aquinas *Summa Theologiae* (b), 1.2, q. 95, a. 2. Note how, in the passage just quoted, Aquinas makes this point about *justum* and "straight": "In human things *justus* is said of that which is *rectus* (or »right«) according to a rule of reason. *Justus* derives from *jus*. Recall on *legis virtus* (in my translation, »the power of a norm«) that *legis virtus haec est imperare, vetare, permittere, punire*; »the force of a law« [the power of a norm, the way I understand *legis virtus*] is this: to command [*obligate*], to prohibit [*forbid*], to permit, or to punish" in Modestinus *The Digest of Justinian* ed. & trans. Alan Watson (Philadelphia: University of Pennsylvania Press 1998), I, 3, 7. On the different senses of *virtus* in Aquinas, comp. footnote 5 in this paper.

[19] In Aquinas, *ratio* as an intellectual faculty (meaning 'reason') may occur as intuitive reason—like that of God or like human *intellectus* and *synderesis* (Aquinas *Summa Theologiae* (b), 1, q. 14, a. 8)—or it may occur as human discoursive reason. On the second meaning of *ratio* in Aquinas (*ratio* as 'type'), see Pattaro, pp. 315ff. The reader should also refer in this regard to F. D. Miller Jr. *A History of the Philosophy of Law from the Ancient Greeks to the Scholastics*, ch. 12, especially at pp. 288–299. Here Lisska shows clearly how the theory of Platonic archetypes, or forms, as received in the Middle Ages by way of Plotinus and Augustine, bears importantly on Aquinas's conception of *lex aeterna*, and consequently on his conception of *lex naturalis*. Lisska speaks of a theory of natural kinds in Aquinas. I prefer to speak of types, this on account of the role that in *The Law and the Right* I have assigned to "type" and to the concept I want this term to express: On the relevance the concept of "type" bears to the concept of "validity," see Pattaro, pp. 13ff., where I use the term *type* (as distinct from *token* [see Charles Sanders Peirce *The Simplest Mathematics* {vol. 4 of *Collected Papers of Charles Sanders Peirce* ed. C. Hartshorne & P. Weiss (Harvard University Press 1933)} (Bristol: Thoemmes Press 1998), para. 537] to translate the German civil-law term *Tatbestand* (as distinct from *Tatsache*, or *Sachverhalt* [see Arthur Kaufmann *Analogie und »Natur der Sache«* Zugleich ein Beitrag zur Lehre vom Typus, 2. Aufl. (Heidelberg: Decker & C. F. Müller 1982).

> "norm": *legis habet rationem*). And since the Divine Reason's conception of things is not subject to time but is eternal […] therefore it is that this kind of law must be called eternal [*et quia divina ratio* (*ratio* meaning "rational intuitive cognitive power") *nihil concipit ex tempore, sed habet aeternum conceptum,* […] *inde est, quod hujusmodi legem oportet dicere aeternam*]." (Aquinas *Summa Theologiae* (b), 1.2, q. 91, a. 1)[20]

I do not agree with the way the Fathers of the English Dominican Province have translated the last lines of the foregoing excerpt. The Latin is *et quia divina ratio*, where *ratio* means "reason" understood as a cognitive power. And God's reason as cognitive power is intuitive reason, a concept akin to that expressed by the ancient Greek *nous*. God's reason as cognitive power *nihil concipit ex tempore, sed habet aeternum conceptum*, where *conceptum* means "concept", "design", "schema", "type", or "plan." The word *ratio* takes two meanings on its different occurrences in the excerpt just quoted: (*a*) "reason as rational cognitive power", which in God is intuitive rational power, and (*b*) reason as the "plan", "concept", "design", "schema", or "type" devised by reason in sense (*a*), or therein contained.

Also relevant to the meaning of *ratio* is the stimulating argument that Aquinas considers in Pars 2.2, Quaestio 57, Articulus 1, of *Summa Theologiae* (a). Aquinas attributes this argument to Isidore and so frames it that it seems to contrast his own thesis.

In this regard, a congruent reconstruction will require maintaining the distinction among three interpretations of the terms *jus* and *lex* according as they occur in (*i*) Isidore, (*ii*) Aquinas or (*iii*) Isidore as quoted and interpreted by Aquinas. In case (*i*), *jus* means "law" and *lex* "statutory written law"; in cases (*ii*) and (*iii*), *jus* means "what is right toward others" and *lex* "norm", whether written or unwritten.

Aquinas's thesis is that *jus* is the objective [*objectum*] of justice: It is so as a special case of what is right [*quod est rectum*], in the first of the senses mentioned above, that is, as the objective [*objectum*] of one of the moral virtues.[21] In Isidore's *Etymologiae*, says Aquinas, we find instead the view that *lex juris est species*; hence

> "a norm [*lex*] is the objective [*objectum*] not so much of justice as of prudence; indeed Aristotle, too, states that there is a legislative [*legispositiva*] part of prudence; therefore, what is right toward others [*jus*] is not the objective [*objectum*] of justice" (Aquinas *Summa Theologiae* (a), 2.2, q. 57, a. 1; my translation).[22]

[20] The Latin original: „Manifestum est autem, supposito quod mundus divina providentia regatur, […] quod tota communitas universi gubernatur ratione divina; et ideo ipsa ratio gubernationis rerum in Deo, sicut in principe universitatis existens, legis habet rationem; et quia divina ratio nihil concipit ex tempore, sed habet aeternum conceptum, […] inde est, quod hujusmodi legem oportet dicere aeternam" in Aquinas *Summa Theologiae* (a), 1.2, q. 91, a. 1.

[21] That *jus* is the objective [*objectum*] of the moral virtue of justice [*justitia*] is stated by Aquinas in the following passage: "A thing is said to be just [*justum*], as having the rectitude of justice [*rectitudinem justitiae*], when it is the term [*ad quod terminatur*] of an act of justice […]. […] justice has its own special proper object [objective: *objectum*] over and above the other virtues, and this object [objective: *objectum*] is called the just [*justum*], which is the same as *right* [*jus*, the strict sense of »what is right«]. Hence it is evident that right [*jus*, the strict sense of »what is right«] is the object [objective: *objectum*] of justice [*justitiae*]" in Aquinas *Summa Theologiae* (b), 2.2, q. 57, a. 1. The Latin original: „Justum dicitur aliquid, quasi habens rectitudinem justitiae, ad quod terminatur actio justitiae, […] specialiter justitiae prae aliis virtutibus determinatur […], secundum se objectum, quod vocatur justum: et hoc quidem est jus; unde manifestum est, quod jus est objectum justitiae" in Aquinas *Summa Theologiae* (a), 2.2, q. 57, a. 1. On this, see also Pattaro, pp. 299ff.

[22] The Latin original: „*Lex* [the norm], sicut Isid. dicit in lib. 5. Etymol. *(cap. 3.), juris est species*: lex [the norm]

As was observed in Section 1, *jus*—just like *derecho*, *droit*, *Recht*, and *diritto*—can mean either "law" or "what is right", depending on context; and as I have just pointed out, *jus* in Isidore means "law" and *lex* "statutory written law" or "statute."[23]

In answer to Isidore's argument, Aquinas gives us an interesting passage on the relation between *lex* and *ratio*. In truth Aquinas, in this rejoinder, speaks more broadly of the relationship among *ratio*, *regula*, *justitia*, *prudentia*, *lex*, and *jus*. Here is this rejoinder translated into English.

> "Just as there preexists in the craftsman's mind a type [*quaedam ratio*] for the things that become external by his craft, which type is called a rule of art [*regula artis*], so there preexists in the mind a type [*ratio*] for the just work [*illius operis justi*] that is determined by reason (here, reason as cognitive power: *ratio*). This type is almost a rule of prudence [*prudentiae regula*], and this rule, if formulated in writing, will be called a *lex.* For a *lex*, according to Isidore (*Etym*. v. 1), is a written statute (a *constitutio scripta*). Hence, *lex* is not, properly speaking, the same as *jus* [what is right toward others], but is rather a type for what is right [*aliqualis ratio juris*]." (Aquinas *Summa Theologiae* (a), 2.2, q. 57, a. 1; my translation)[24]

autem non est objectum justitiae [the objective of justice], sed magis prudentiae; unde et Philos. *legispositivam* partem prudentiae ponit *(lib. 6. Ethic. cap. 8.)*; ergo jus [what is right] non est objectum justitiae [the objective of justice]." This is the English translation by the Fathers of the English Dominican Province: "*Law* [*lex*], according to Isidore (*Etym*. v. 3), *is a kind of right* [*juris est species*]. Now law [*lex*] is the object not of justice but of prudence [*non est objectum justitiae* (the objective of justice) *sed magis prudentiae*], wherefore the Philosopher reckons *legislative* [in Greek, *nomothetikē*] as one of the parts of prudence [in Greek, *phronēsis*]. Therefore right [what is right: *jus*] is not the object of justice" in Aquinas *Summa Theologiae* (b), 2.2, q. 57, a. 1.

[23] Aquinas quotes Isidore's text with an addition designed to set up the argument that Aquinas wants to reply to; the addition consists in „lex autem non est objectum justitiae sed magis prudentiae" and in the conclusion „ergo jus non est objectum justitiae", neither of which appears in Isidore. Further, Isidore uses *jus* in the sense of 'law', and *lex* he uses not in the sense of 'norm' but in that of ''statutory written law' or 'statute'; in fact, Isidore sets *lex* against *mos*, which he understands as designating customary unwritten law. Isidore divides "law" into *lex* (statutory written law, such as a *constitutio*, meaning 'statute') and *mos* (customary unwritten law). If *jus* means 'law', *lex* 'statutory written law', and *mos* 'customary unwritten law', then it clearly follows that *lex*, on a par with *mos*, is *juris species*—a type, or species, of law. Following is Isidore's Latin original followed by my English translation: „Ius [the term »law«] generale nomen est, lex [statutory law] autem iuris est species. […] Omne autem ius [law] legibus [statutory laws] et moribus [customs] constat. Lex [statutory law] est constitutio scripta [a written statute]. Mos [custom] est vetustate probata consuetudo, sive lex non scripta [unwritten law]. Nam lex [statutory law] a legendo vocata, quia scripta est" in Isidore *Isidori Hispalensis Episcopi Etymologiarum sive Originum* ed. Wallace M. Lindsay (Oxford: Clarendon Press 1911), Book V, 3. "Law [*jus*] is the noun for a genus [*jus generale nomen est*: *generalis*, from *genus*], and a statutory law [*lex*] is a type of law. […] Indeed, all of law [*jus*] is made up of statutory laws [*legibus*] and customs [*moribus*]. A statutory law [*lex*] is a written statute [*constitutio scripta*]. A custom is a long-established practice: It is an unwritten statute [*lex non scripta*]. Indeed, *lex* [statutory law] is so called from *legendo* [reading], because a *lex* is written."

[24] The Latin original: „Sicut eorum, quae per artem exterius fiunt, quaedam ratio in mente artificis praeexistit, quae dicitur regula artis: ita etiam illius operis justi, quod ratio determinat, quaedam ratio praeexistit in mente, quasi quaedam prudentiae regula: et hoc si in scriptum redigatur, vocatur *lex*, est enim lex, secundum Isid. *(lib. 5. Etym. cap. 3.)*, *constitutio scripta*; et ideo lex [the norm] non est ipsum jus [what is right], proprie loquendo, sed aliqualis ratio juris" (Aquinas *Summa Theologiae* (a), 2.2, q. 57, a. 1). It is an established fact that Aquinas accepts that there exist not only written *leges*, or norms, but also unwritten ones. Indeed Aquinas treats, among several *leges*, of *lex aeterna* and *lex naturalis*, and these are not written. Isidore, in turn, qualifies custom, *mos*, as *lex non scripta*; and this, I believe, bears out the view that we need to maintain the distinction among meanings (*i*), (*ii*), and (*iii*) of *lex* (along with those of *jus*) as specified a moment ago in the run of text.

In translating this passage, the Fathers of the English Dominican Province have rendered *ratio* as "expression" when, again, they should have translated it as "type", "schema", "plan". See their English translation in this footnote.[25]

The connection between *ratio*, *regula*, *prudentia*, *lex*, and *jus* in Aquinas is a question of no small account.

In fact the argument by Isidore as Aquinas presents it in 2.2, q. 57, a. 1—with Aquinas's addition and conclusion as indicated in footnotes 21 and 22 of this paper—is in certain respects a grounded argument. *Lex juris est species* (this expression appears in Isidore's original as well as in Aquinas's text): *Lex autem non est objectum justitiae, sed magis prudentiae* (this expression appears in Aquinas but not in Isidore). If we translate Isidore's fragment according to meaning (*i*) of *lex* and *jus*, and Aquinas's fragment according to meaning (*ii*) of *lex* and *jus*, we will have the following translation: "Statutory written law [*lex*] is a species of law [*jus*]"; "now, the norm [*lex*] is more an objective of prudence than of justice."

Aquinas uses *objectum* here, a term that does not figure in the original passage by Isidore that Aquinas develops in his own words in *Summa Theologiae* (a), 2.2, q. 57, a. 1. In fact when Aquinas discusses the moral virtues, he uses *subjectum* to refer to their subject matter (as I would translate *subjectum*) and *objectum* to refer to their objective (as I translate *objectum* throughout this paper).[26] Thus *justitia* takes will as its subject matter [*subjectum*], and as its objective [*objectum*] it takes *jus*, meaning "what is right toward others".

As we have seen in Section 2, *jus*, in the sense just specified, is argued by Aquinas to be the *objectum justitiae*: the objective of justice. The burden is on him, in his rejoinder, and without letting go of the point that *jus* is the objective of *justitia*, to explain why and in what sense *jus* is not rather the *objectum prudentiae*: the objective of prudence. In other words, Aquinas will have to explain, in his rejoinder, how *jus* relates to *prudentia*, and relates to *prudentia* differently than it does to *justitia*.

Aquinas rejoins with analytical clarity.

Lex is not ipsum jus, *proprie loquendo, sed aliqualis ratio juris*. In my reading: *Lex* [the norm] is not, p r o p e r l y speaking, the same as *jus*, as what is right; it is rather a type (*aliqualis ratio*) for what is right. (I needed the emphasis on "properly" to put the accent on Aquinas's own qualification.)

I should want to explain this in my own words.[27] *Jus* is determined and made such —made right—by reason, that is, by *ratio* understood as a cognitive power. *Ratio* as cog-

[25] This is the English translation by the Fathers of the English Dominican Province: "Just as there pre-exists in the mind of the craftsman an expression [*ratio*] of the things to be made externally by his craft, which expression [*ratio*] is called the rule of his craft [*regula artis*: the pronoun specifying that this is *his* craft is absent from the Latin and best avoided in translation], so too there pre-exists in the mind an expression [*ratio*] of the particular just work [*illius operis justi*: "particular" cannot adequately translate *illius* here, because Aquinas is speaking of a type of just work, and "particular," which Aquinas does not use, conveys an idea of actualness, whereas types are abstract] which the reason determines, and which is a kind of rule of prudence. If this rule be expressed in writing, it is called a *law* [*lex*], which according to Isidore (*Etym*. v. 1) is *a written decree* [a written statute: *constitutio scripta*]: and so law [the norm: *lex*] is not the same as right [what is right: *jus*], but an expression of right [a type for what is right: *aliqualis ratio juris*]" (Aquinas *Summa Theologiae* (b), 2.2, q. 57, a. 1).

[26] On *subjectum* and *objectum* in Aquinas, see also Pattaro, pp. 297ff.

[27] The Latin in this paragraph is not literally Aquinas's.

nitive power provides *juris rationes*: it provides types for what is right toward others. And these types (these *rationes juris*) will make up the content of a *lex*. A *lex*, i.e., a norm—a rule having the *virtus obligandi* (the power to bind: footnotes 5 and 17 in this paper)—will include these types in its content. It will set them forth as its content. Against this conceptual background, Aquinas says, and is justified in saying, that *lex* is not *ipsum jus, proprie loquendo, sed aliqualis ratio juris*: The norm is not properly speaking the same as what is right, but is rather a type for what is right.

At the same time, *jus* [what is right toward others] is the objective [*objectum*] of justice insofar as it is willed with a virtuous will [*voluntas*], a will that is conscious, stable, and firm (*sciens*, *stabilis*, and *firmus*: cf. Aquinas *Summa Theologiae* (a), 2.2, q. 58, a. 1).

It is in this regard that we see revealed the full importance of one of the meanings of *ratio* brought earlier into relief in considering the passage by Aquinas on *lex aeterna* (footnote 19 in this paper). Against this meaning of *ratio*—a *ratio*, or type, that preexists in the mind of the craftsman: That *in mente artificis praeexistit*—we can, and indeed should, evaluate what Aquinas states in Pars 1.2, Quaestio 95, Articulus 2, where he discusses the derivation of *lex humana* from *lex naturalis per modum determinationis*.

In illustrating the operation of the *modus determinationis*, Aquinas says that this *modus*

> "is likened to that whereby, in the arts, general forms [*formae communes*] are particularized as to details [*determinantur ad aliquid speciale*]: thus the craftsman needs to determine the general form of a house (its *formam communem*) to some particular shape [*figuram*]." (Aquinas *Summa Theologiae* (b), 1.2, q. 95, a. 2)[28]

In this excerpt Aquinas speaks of *forma*, which I understand as "type".[29] But even in 2.2, q. 57, a. 1, in the penultimately quoted excerpt, in rejoinder to Isidore's argument, Aquinas refers to a type, or rather to two types: the type the craftsman needs to have in his mind to produce his craftwork and the type that those who act justly need to have in their minds to carry out just actions. Each of these two types Aquinas calls *ratio*.

As we saw, he refers to the first *ratio* as a "rule of art" [*regula artis*] and to the second as a "rule of prudence" [*prudentiae regula*].

In rejoinder to Isidore's argument, Aquinas makes a call for analysis: This is the call to distinguish among "form" (meaning "type": *ratio*), "rule" [*regula*], and "norm" [*lex*].

Perhaps the subtleties involved in this threefold distinction do not bother Aquinas: I believe we can hold in some way that, depending on context, he understands "type" to be interchangeable with "rule" [*regula*], or even with norm [*lex*], whether the concept in issue (type) is designated by the word *forma* or by the word *ratio*.[30]

The term *ratio* can take at least four meanings in Aquinas:

[28] The Latin original: „simile est, quod in artibus *formae communes* determinantur ad aliquid speciale: sicut artifex *formam communem* domus necesse est quod determinet ad hanc, vel illam domus figuram" (Aquinas *Summa Theologiae* (a), 1.2, q. 95, a. 2; italics added).

[29] On the concept expressed by the Latin term *forma* and its relation with the so-called typicality of law, see Pattaro, pp. 15ff.

[30] It might be worth noting that the ambiguity detected in Aquinas with regard to the concept of *ratio* finds a similar counterpart in Searle's contemporary work on so-called "constitutive rules". See John Rogers Searle *Speech Acts* An Essay in the Philosophy of Language (Cambridge: Cambridge University Press 1969), pp. 33ff. What seems particularly unclear in this regard is whether constitutiveness (the property of "being constitutive")

(*a*) Cognitive power understood as intuitive reason. Here, where practical human reason is involved, *ratio* consists in synderesis, the practical equivalent of what in the theoretical sphere is *intellectus*. Synderesis identifies the principles of action and entrusts them to the virtues as ends to be attained (through virtuous behaviour on the part of humans).

(*b*) Cognitive power understood as abstractive reason, meaning the faculty we use in the ascending path of the cognitive process whereby we come at forms or types.

(*c*) The forms or types arrived at through the powers listed under (*a*) and (*b*).

(*d*) Cognitive power understood as discursive reason. Here, in the practical sphere, reason [*ratio*] presents itself as the intellectual virtue of prudence. Prudence provides the means with which to attain the ends identified through synderesis, so it provides rules or types of behaviour.

4 The Redde Rationem *[the Day of Reckoning]:* Ratio *as Type in the Rendition of the Fathers of the English Dominican Province*

The English version of *Summa Theologiae* I used was by the Fathers of the English Dominican Province. It was first published in 1911 and was then revised in 1920 and reprinted in 1948; it was also reprinted in 1981 as part of the Christian Classics series. It is premissed by *De Philosophia Christiana ad mentem Sancti Thomae Aquinatis Doctoris Angelici in Scholis Catholicis instauranda* [On the restoration of Christian philosophy according to the mind of Saint Thomas Aquinas, the Angelic Doctor], an encyclical letter given by Pope Leo XIII in Rome, at Saint Peter's, on August 4, 1879, the second year of his pontificate.

The Dominican Fathers, well aware of how *transit gloria mundi*, leave us clueless as to the identity of the author or authors of their translation. So I cannot know from that source what kind of division of labour was set up to carry through this great endeavour. I can only guess that the translation was done by many hands: in quoting the passages discussed in this paper I have had to go back and forth between the Latin original and the corresponding translation provided by the Fathers, because I could not obtain from them a consistent and plausible English rendition of *ratio* according to the different senses in which this Latin term occurs in *Summa Theologiae*.

On some occasions, however, the Fathers do provide a translation of *ratio* that I judge plausible for one of the senses of this term. Abetted in my doggedness in wanting to know if the Fathers ever used "type" to render *ratio*, I eventually found 161 instances in which they do so.[31] Also, the Fathers, in translating Pars 1.2, q. 74, a. 7, offer a cautious and hardly

should properly be ascribed to rules or to the types set forth in these rules. This question is treated in greater detail in Pattaro, pp. 18ff.

[31] My thanks for the abetting go to Corrado Roversi. Here are the places where the 161 occurrences of 'type' appear as a rendition of *ratio* in the Fathers' translation of *Summa Theologiae* (I do not claim this list to be exhaustive): 1, q. 12, a. 8; 1, q. 14, a. 13; 1, q. 15, a. 2; 1, q. 15, a. 3; 1, q. 18, a. 4; 1, q. 22, a. 1; 1, q. 22, a. 2; 1, q. 22, a. 3; 1, q. 23, a. 1; 1, q. 23, a. 2; 1, q. 32, a. 1; 1, q. 44, a. 3; 1, q. 45, a. 6; 1, q. 45, a. 7; 1, q. 55, a. 2; 1, q. 55, a. 3; 1, q. 65, a. 4; 1, q. 84, a. 5; 1, q. 87, a. 1; 1, q. 89, a. 3; 1, q. 93, a. 2; 1, q. 93, a. 8; 1, q. 105, a. 3; 1, q. 106, a. 1; 1, q. 108, a. 1; 1, q. 108, a. 5; 1, q. 108, a. 6; 1, q. 108, a. 7; 1, q. 110, a. 1; 1.2., q. 74, a. 7; 1.2, q. 74, a. 8; 1.2, q. 74, a. 9; 1.2, q. 93, a. 1; 1.2, q. 93, a. 2; 1.2, q. 93, a. 3; 1.2, q. 93, a. 4; 1.2, q. 93, a. 5; 1.2, q. 102, a. 4; 1.2, q. 102, a. 5; 2.2, q. 2, a. 10; 2.2., q. 45, a. 3; 2.2, q. 173, a. 1; 3, q. 46, a. 7; 3 Suppl., q. 82, a. 3; 3 Suppl., q. 92, a. 3. There are

explicative footnote to account for their use of "type" for *ratio*. This explanatory note is appended to the seventh of the following eight excerpts from *Summa Theologiae* (b) that I have selected for analysis from those listed in footnote 30. The reader will find below the Fathers' translation of these eight excerpts, accompanied with a few brief comments on my part. As usual, the corresponding Latin original is provided in the footnotes.

(i) "Whether there are ideas? [*Utrum ideae sint*]"

> "It is necessary to suppose ideas [*ideas*] in the divine mind. For the Greek word Ἰδέα is in Latin *Forma*. Hence by ideas [*ideas*] are understood the forms [*formae*] of things, existing apart from the things themselves. Now the form [*forma*] of anything existing apart from the thing itself can be for one of two ends: either to be the type [*exemplar*] of that of which it is called the form [*forma*], or to be the principle of the knowledge [*principium cognitionis*] of that thing, inasmuch as the forms [*formae*] of things knowable are said to be in him who knows them. In either case we must suppose ideas [*ideas*], as is clear for the following reason: In all things not generated by chance, the form [*formam*] must be the end [*finem*] of any generation whatsoever. But an agent does not act on account of the form [*propter formam*], except in so far as the likeness [*similitudo*] of the form [*formae*] is in the agent, as may happen in two ways. For in some agents the form [*forma*] of the thing to be made [*rei fiendae*] preexists according to its natural being, as in those that act by their nature; as a man generates a man, or fire generates fire. Whereas in other agents (the form of the thing to be made preexists) according to intelligible being [*secundum esse intelligibile*], as in those that act by the intellect [*per intellectum*]; and thus the likeness [*similitudo*] of a house pre-exists in the mind of the builder. And this may be called the idea [*idea*] of the house, since the builder intends to build his house like to the form [*formae*] conceived in his mind. As then the world was not made by chance, but by God acting by His intellect [*per intellectum agente*], as will appear later (Q. 46, A. 1), there must exist in the divine mind a form [*forma*] to the likeness [*ad similitudinem*] of which the world was made. And in this the notion of an idea [*ideae*] consists [And in this consists the type (*ratio*) for an an idea (*ideae*)]." (Aquinas *Summa Theologiae* (b), 1, q. 15, a. 1)[32]

also places in which the Fathers use 'type' to translate terms other than *ratio*. Here are some of them: 1, q. 1, a. 10; 1, q. 15, a. 1; 1, q. 71; 2.2, q. 85, a. 1; 2.2, q. 173, a. 1; 3, q. 31, a. 3; 3, q. 33, a. 1; 3, q. 36, a. 3.

[32] The Latin original: „Necesse est ponere in mente divina ideas. Ἰδέα enim graece, latine forma dicitur. Unde per ideas intelliguntur formae aliarum rerum praeter ipsas res exsistentes. Forma autem alicujus rei praeter ipsam exsistens ad duo esse potest: vel ut sit exemplar ejus cujus dicitur forma, vel ut sit principium cognitionis ipsius, secundum quod formae cognoscibilium dicuntur esse in cognoscente.

Et quantum ad utrumque est necesse ponere ideas, quod sic patet. In omnibus enim, quae non a casu generantur, necesse est formam esse finem generationis cujuscumque. Agens autem non ageret propter formam, nisi inquantum similitudo formae est in ipso. Quod quidem contingit *dupliciter*. In *quibusdam* enim agentibus praeexsistit forma rei fiendae secundum esse naturale, sicut in his, quae agunt per naturam: sicut homo generat hominem, et ignis ignem. In *quibusdam* vero secundum esse intelligibile, ut in his, quae agunt per intellectum: sicut similitudo domus praeexsistit in mente aedificatoris. Et haec potest dici idea domus, quia artifex intendit domum assimilare formae, quam mente concepit. Quia igitur mundus non est casu factus, sed est factus a Deo per intellectum agente, ut infra patebit, *(q. 46. art. 1.)* necesse est, quod in mente divina sit forma, ad similitudinem cujus mundus est factus. Et in hoc consistit ratio ideae" (Aquinas *Summa Theologiae* (a), 1, q. 15, a. 1).

Notice that in this passage the Fathers use "type" for the Latin *exemplar* and "notion" for the Latin *ratio*. The Latin *idea* and *forma* are correctly and consistently rendered in English as "idea" and "form."

(ii) "Whether ideas are many? [*Utrum sint plures ideae*]"

> "Now there cannot be an idea of any whole (a type [*ratio*] for any whole), unless particular ideas (types: *propriae rationes*) are had of those parts of which the whole is made; just as a builder cannot conceive the idea of a house (its species: *speciem*) unless he has the idea of each of its parts (unless he has the type proper to each such part: *propria ratio*). So, then, it must needs be that in the divine mind there are the proper ideas of all things (the proper types [*rationes*] for all things). Hence Augustine says (*Octog. Tri. Quæst*; *qu.* xlvi), *that each thing was created by God according to the idea proper to it* (the type proper to it: *propriis rationibus*), from which it follows that in the divine mind ideas [*ideae*] are many. Now it can easily be seen how this is not repugnant to the simplicity of God, if we consider that the idea of a work [*ideam operati*] is in the mind of the operator as that which is understood [*quod intelligitur*], and not as the image whereby he understands, which is a form that makes the intellect in act [*forma faciens intellectum in actu*]. For the form [*forma*] of the house in the mind of the builder, is something understood by him, to the likeness of which he forms [*format*] the house in matter. Now, it is not repugnant to the simplicity of the divine mind that it understand many things; though it would be repugnant to its simplicity were His understanding to be formed by a plurality of images [a plurality of species: *plures species*]. Hence many ideas [*ideae*] exist in the divine mind, as things understood by it; as can be proved thus. Inasmuch as He knows His own essence [*essentiam*] perfectly, He knows it according to every mode in which it can be known. Now it can be known not only as it is in itself, but as it can be participated in by creatures according to some degree of likeness [according to some mode of similitude: *secundum aliquem modum similitudinis*]. But every creature has its own proper species [*speciem*], according to which it participates in some degree in likeness [*similitudinem*] to the divine essence [*divinae essentiae*]. So far, therefore, as God knows His essence [*essentiam*] as capable of such imitation [*imitabilem*] by any creature, He knows it as the particular type [*propriam rationem*] and idea [*ideam*] of that creature: and in like manner as regards other creatures. So it is clear that God understands many particular types [*plures rationes proprias*] of things, and these are many ideas [*plures ideas*]." (Aquinas *Summa Theologiae* (b), 1, q. 15, a. 2)[33]

[33] The Latin original: „Ratio autem alicujus totius haberi non potest, nisi habeantur propriae rationes eorum, ex quibus totum constituitur. Sicut aedificator speciem domus concipere non posset, nisi apud ipsum esset propria ratio cujuslibet partium ejus. Sic igitur oportet, quod in mente divina sint propriae rationes omnium rerum. Unde dicit Aug. in lib. 83. QQ. *(q. 46. post med.)* quod *singula propriis rationibus a Deo creata sunt*; unde sequitur, quod *in mente divina sint plures ideae*.

Hoc autem quomodo divinae simplicitati non repugnet, facile est videre, si quis consideret ideam operati esse in mente operantis, sicut quod intelligitur, non autem sicut species, qua intelligitur, quae est forma faciens intellectum in actu. Forma enim domus in mente aedificatoris est aliquid ab eo intellectum, ad cujus similitudinem domum in materia format. Non est autem contra simplicitatem divini intellectus, quod multa intelligat: sed contra simplicitatem ejus esset, si per plures species ejus intellectus formaretur.

Unde plures ideae sunt in mente divina, ut intellectae ab ipsa. Quod hoc modo potest videri. Ipse enim essentiam suam perfecte cognoscit: unde cognoscit eam secundum omnem modum, quo cognoscibilis est. Potest autem cognosci non solum secundum quod in se est, sed secundum quod est participabilis secundum aliquem

This translation by the Fathers of the English Dominican Province is inconsistent. Thus, *ratio* is rendered five times as "idea" and twice as "type." Further, *species* is rendered as "idea" on one occurrence and as "image" on another, and on a third occurrence it is correctly rendered as "species"; *idea* turns up five times and is correctly and consistently rendered as "idea"; *forma* turns up twice and is correctly and consistently rendered as "form."

> "For God by one understands [*intelligit*] many things, and that not only according to what they are in themselves, but also according as they are understood [*intellecta sunt*], and this is to understand the several types of things [*plures rationes rerum*]. In the same way, an architect is said to understand a house, when he understands the form [*formam*] of the house in matter. But if he understands the form of a house, as devised by himself, from the fact that he understands that he understands it, he thereby understands the type [*rationem*] or idea [*ideam*] of the house. Now not only does God understand many things by His essence [*per essentiam suam*], but He also understands that He understands many things by His essence [*per essentiam suam*]. And this means that He understands the several types of things [*plures rationes rerum*]; or that many ideas [*plures ideas*] are in His intellect as understood by Him. (Aquinas, *Summa Theologiae* (b), 1, q. 15, a. 2)[34]

Ratio turns up three times in the original of this passage and is correctly and consistently rendered as "type"; *forma* occurs once, correctly rendered as "form"; *idea* turns up twice, correctly and consistently rendered as "idea."

(iii) "Whether there are ideas of all things that God knows? [*Utrum omnium, quae cognoscit Deus, sint ideae*]"

> As ideas [*ideae*], according to Plato, are principles of the knowledge of things and of their generation [*principia cognitionis rerum et generationis*], an idea [*idea*] has this twofold office, as it exists in the mind of God. So far as the idea is the principle of the making [*principium factionis*] of things, it may be called an *exemplar* [*exemplar*], and belongs to practical knowledge [*practicam cognitionem*]. But so far as it is a principle of knowledge [*principium cognoscitivum*], it is properly called a *type* [*ratio*], and may belong to speculative knowledge [*scientiam speculativam*] also. As an exemplar [*exemplar*], therefore, it has respect to everything made by God in any period of time; whereas as a principle of knowledge [*principium cognoscitivum*] it has respect to all things known by God, even though they never come to be in time; and to all things

modum similitudinis a creaturis. Unaquaeque autem creatura habet propriam speciem, secundum quod aliquo modo participat divinae essentiae similitudinem. Sic igitur inquantum Deus cognoscit suam essentiam ut sic imitabilem a tali creatura, cognoscit eam ut propriam rationem, et ideam hujus creaturae: et similiter de aliis. Et sic patet, quod Deus intelligit plures rationes proprias plurium rerum, quae sunt plures ideae" (Aquinas *Summa Theologiae* (a), 1, q. 15, a. 2).

[34] The Latin original: „Deus autem uno intellectu intelligit multa, et non solum secundum quod in seipsis sunt, sed etiam secundum quod intellecta sunt: quod est intelligere plures rationes rerum. Sicut artifex, dum intelligit formam domus in materia, dicitur intelligere domum: dum autem intelligit formam domus ut a se speculatam, ex eo quod intelligit se intelligere eam, intelligit ideam, vel rationem domus. Deus autem non solum intelligit multas res per essentiam suam, sed etiam intelligit se intelligere multa per essentiam suam. Sed hoc est intelligere plures rationes rerum, vel plures ideas esse in intellectu ejus, ut intellectas" (Aquinas *Summa Theologiae* (a), 1, q. 15, a. 2).

> that He knows according to their proper type [*secundum propriam rationem*], in so far as they are known by Him in a speculative manner [*per modum speculationis*]. (Aquinas, *Summa Theologiae* (b), 1, q. 15, a. 3)[35]

Ratio occurs twice in the original of this passage and is correctly and consistently rendered as "type." *Exemplar* occurs twice, correctly and consistently rendered as "exemplar," whereas in a. 1 of the same *quaestio* it is rendered as "type." *Idea* occurs twice, correctly and consistently rendered as "idea."

(iv) "Whether providence can suitably be attributed to God? [*Utrum providentia Deo conveniat*]"

> Since, however, God is the cause of things by His intellect, and thus it behooves that the type [*rationem*] of every effect should pre-exist in Him, as is clear from what has gone before (Q. 19, A. 4), it is necessary that the type of the order of things towards their end [*ratio ordinis rerum in finem*] should pre-exist in the divine mind: and the type [*ratio*] of things ordered towards an end [*in finem*] is, properly speaking, providence. For it is the chief part of prudence, to which two other parts are directed [to which they are ordained: *ordinantur*]—namely, remembrance of the past, and understanding of the present; inasmuch as from the remembrance of what is past and the understanding of what is present, we gather how to provide for the future. Now it belongs to prudence, according to the Philosopher (*Ethic*. vi. 12), to direct other things towards an end [to ordain them (*ordinare*) towards an end (*in finem*)] whether in regard to oneself—as for instance, a man is said to be prudent, who orders well [who ordains well: *qui bene ordinat*] his acts towards the end [*ad finem*] of life—or in regard to others subject to him, in a family, city, or kingdom; in which sense it is said (Matth. xxiv. 45), *a faithful and wise servant, whom his lord hath appointed over his family*. In this way prudence or providence may suitably be attributed to God. For in God Himself there can be nothing ordered towards an end [there can be nothing ordained (*ordinabile*) towards an end (*in finem*)], since He is the last end [*finis ultimus*]. This type of the order in things [*ratio ordinis rerum*] towards an end [*finem*] is therefore in God called providence. Whence Boëthius says (*De Consol.* iv. 6) that *Providence is the divine type* [*divina ratio*] *itself, seated in the Supreme Ruler; which disposeth all things*: which disposition may refer either to the type of the order of things towards an end [*ratio ordinis rerum in finem*], or to the type of the order of parts in the whole [to the *ratio* of this order]. (Aquinas, *Summa Theologiae* (b), 1, q. 22, a. 1)[36]

[35] The Latin original: „Cum ideae a Platone ponerentur principia cognitionis rerum, et generationis ipsarum, *ad utrumque se habet idea, prout in mente divina ponitur*. Et secundum quod est principium factionis rerum, exemplar dici potest, et ad practicam cognitionem pertinet. Secundum autem quod principium cognoscitivum est, proprie dicitur ratio, et potest etiam ad scientiam speculativam pertinere. *Secundum ergo quod exemplar est, secundum hoc se habet ad omnia, quae a Deo fiunt secundum aliquod tempus. Secundum vero quod principium cognoscitivum est, se habet ad omnia, quae cognoscuntur a Deo, etiamsi nullo tempore fiant*, et ad omnia, quae a Deo cognoscuntur secundum propriam rationem, et secundum quod cognoscuntur ab ipso per modum speculationis" (Aquinas *Summa Theologiae* (a), 1, q. 15, a. 3).

[36] The Latin original: „Cum autem Deus sit causa rerum per suum intellectum, et sic cujuslibet sui effectus oportet rationem in ipso praeexsistere, ut ex superioribus patet *(q. 19. art. 4.)*, necesse est, quod ratio ordinis rerum in finem in mente divina praeexsistat; ratio autem ordinandorum in finem proprie providentia est. Est enim principalis pars prudentiae, ad quam aliae *duae* partes ordinantur, scilicet *memoria praeteritorum,*

Ratio turns up seven times in this passage and is correctly and consistently rendered as "type."

(v) "Whether God has immediate providence over everything? [*Utrum Deus immediate omnibus provideat*]"

> Two things belong to providence—namely, the type of the order of things [*ratio ordinis rerum*] foreordained towards an end [*provisarum in finem*]; and the execution of this order, which is called government. As regards the first of these, God has immediate providence [*providet*] over everything, because He has in His intellect the types of everything [*rationem omnium*], even the smallest; and whatsoever causes He assigns to certain effects, He gives them the power to produce those effects. Whence it must be that He has beforehand the type of those effects [*illorum effectuum in sua ratione*] in His mind. (Aquinas, *Summa Theologiae* (b), 1, q. 22, a. 3)[37]

Ratio occurs three times in the original of this passage and is consistently rendered as "type."

(vi) "Whether men are predestined by God? [*Utrum homines praedestinentur a Deo*]"

> Hence, properly speaking, a rational creature, capable of eternal life, is led towards it, directed [*trasmissa*], as it were, by God. The reason [type: *ratio*] of that direction pre-exists in God; as in Him is the type of the order of all things towards an end [*ratio ordinis omnium in finem*], which we proved above to be providence. Now the type [*ratio*] in the mind of the doer of something to be done, is a kind of pre-existence in him of the thing to be done. Hence the type [*ratio*] of the aforesaid direction [*transmissionis*] of a rational creature towards the end [*in finem*] of life eternal is called predestination. For to destine, is to direct or send. Thus it is clear that predestination, as regards its objects [its objectives: *objecta*], is a part of providence. (Aquinas, *Summa Theologiae* (b), 1, q. 23, a. 1)[38]

et *intelligentia praesentium*; prout ex praeteritis memoratis, et praesentibus intellectis conjectamus de futuris providendis; prudentiae autem proprium est, secundum Philos. in 6. Ethic. *(cap. 12. circa med.)*, ordinare alia in finem, sive respectu sui ipsius, sicut dicitur homo prudens, qui bene ordinat actus suos ad finem vitae suae; sive respectu aliorum sibi subjectorum in familia, vel civitate, vel regno; secundum quem modum dicitur Matth. 24.: *Fidelis servus, et prudens, quem constituit dominus super familiam suam*. Secundum quem modum prudentia, vel providentia Deo convenire potest […]. Nam in ipso Deo nihil est in finem ordinabile, cum ipse sit finis ultimus. Ipsa igitur ratio ordinis rerum in finem providentia in Deo nominatur. Unde Boet. 4. de Cons. *(pros. 6. paullo a princ.)* dicit, quod *providentia est ipsa divina ratio in summo omnium principe constituta, quae cuncta disponit*. Dispositio autem potest dici tam ratio ordinis rerum in finem, quam ratio ordinis partium in toto" (Aquinas *Summa Theologiae* (a), 1, q. 22, a. 1).

[37] The Latin original: „Ad providentiam *duo* pertinent, scilicet *ratio ordinis* rerum provisarum in finem, et *executio hujus ordinis*, quae gubernatio dicitur. *Quantum igitur ad primum horum, Deus immediate omnibus providet*, qui in suo intellectu habet rationem omnium etiam minimorum, et quascumque causas aliquibus effectibus praefecit, dedit eis virtutem ad illos effectus producendos. Unde oportet, quod ordinem illorum effectuum in sua ratione praehabuerit" (Aquinas *Summa Theologiae* (a), 1, q. 22, a. 3).

[38] The Latin original: „Unde, proprie loquendo, rationalis creatura, quae est capax vitae aeternae, perducitur in ipsam, quasi a Deo transmissa. Cujus quidem transmissionis ratio in Deo praeexsistit; sicut et in eo est ratio ordinis omnium in finem, quam diximus esse providentiam. Ratio autem alicujus fiendi in mente actoris existens est quaedam praeexistentia rei fiendae in eo. Unde ratio praedictae transmissionis creaturae rationalis in finem vitae aeternae praedestinatio nominatur. Nam destinare est mittere. Et sic patet, quod praedestinatio, quantum ad objecta, est quaedam pars providentiae" (Aquinas *Summa Theologiae* (a), 1, q. 23, a. 1).

Ratio occurs four times in the original of this passage and is correctly and consistently rendered as "type" on second, third, and fourth occurrence. On its first occurrence, instead, the Fathers render it, without justification, as "reason."

(vii) "Whether the sin of consent to the act is in the higher reason? [*Utrum peccatum consensus in actum sit in ratione superiori*]"

> *The higher reason* [*ratio superior*] *is intent on contemplating and consulting the eternal law* [the eternal types: *rationibus aeternis*],* as Augustine states (*De Trin*. xii. 7). But sometimes consent is given to an act, without consulting the eternal law [the eternal types: *rationibus aeternis*]: since man does not always think about Divine things, whenever he consents to an act. Therefore the sin of consent to the act is not always in the higher reason [*in ratione superiori*]. (Aquinas, *Summa Theologiae* (b), 1.2, q. 74, a. 7)[39]

Ratio occurs four times in the original of this passage: it is rendered as "reason" on two of these occurrences and as "law" on the other two.

Also, the asterisk after the first occurrence of "eternal law" refers to a footnote where (as mentioned at the beginning of this section) the Fathers of the English Dominican Province give a cautious and hardly explicative account of their use of "type" to render some occurrences of *ratio*. Here is the text of the footnote referred to by the asterisk (*Summa Theologiae* (b), Volume 2, page 923):

**Rationes æternæ*, *cf*. P. I, Q. 15, AA. 2, 3, where as in similar passages *ratio* has been rendered by the English *type*, because St. Thomas was speaking of the Divine *idea* as the archetype of the creature. Here the type or idea is a rule of conduct, and is identified with the eternal law (*cf*. A. 8, *Obj.* 1; A. 9).

(viii) "Whether the eternal law is a sovereign type existing in God? [*Utrum lex aeterna sit summa ratio in Deo existens*]"

> Just as in every artificer there pre-exists a type [*ratio*] of the things that are made by his art, so too in every governor there must pre-exist the type of the order [*ratio ordinis*] of those things that are to be done by those who are subject to his government. And just as the type [*ratio*] of the things yet to be made by an art is called the art [*ars*] or exemplar [*exemplar*] of the products of that art, so too the type [*ratio*] in him who governs the acts of his subjects, bears the character of a law [it bears the type specific to norms: *rationem legis obtinet*], provided the other conditions be present which we have mentioned above (Q. 90) [as being proper to the type "norm": *esse diximus de legis ratione*. (This fragment was omitted by the translators.)]. Now God, by His wisdom, is the Creator of all things in relation to which He stands as the artificer to the products of his art, as stated in the First Part (Q. 14, A. 8). Moreover He governs all the acts and movements that are to be found in each single creature, as was also stated in the First Part (Q. 103, A. 5). Wherefore as the type of the Divine Wisdom

[39] The Latin original: „Ratio superior intendit rationibus aeternis inspiciendis, et consulendis, ut August. dicit 12. de Trin. *(cap. 7. in fin.)*: sed quandoque consentitur in actum non consultis rationibus aeternis: non enim semper homo cogitat de rebus divinis, quando consentit in aliquem actum; ergo peccatum consensus in actum non semper est in ratione superiori" (Aquinas *Summa Theologiae* (a), 1.2, q. 74, a. 7).

> [*ratio divinae sapientiae*], inasmuch as by It all things are created, has the character of art [the type for art: *rationem artis*], exemplar [*exemplaris*] or idea [*ideae*]; so the type of Divine Wisdom [*ratio divinae sapientiae*], as moving all things to their due end [*ad debitum finem*], bears the character of law [it bears the type specific to norms: *rationem legis*]. Accordingly the eternal law is nothing else than the type of Divine Wisdom [*ratio divinae sapientiae*], as directing all actions and movements. […] And things, which are in themselves different, may be considered as one, according as they are ordained [*ordinantur*] to one common thing. Wherefore the eternal law is one since it is the type of this order [*ratio hujus ordinis*]. (Aquinas, *Summa Theologiae* (b), 1.2, q. 93, a. 1)[40]

Ratio occurs twelve times in the original of this passage and is rendered as "type" on the first through the fourth occurrence, as well as on seventh, ninth, eleventh, and twelfth occurrence; it is rendered, instead, as "characteristic" on fifth, eight, and tenth occurrence; the sixth occurrence of *ratio* is not translated at all. *Exemplar* occurs twice in this passage, correctly and consistently rendered as "exemplar." *Idea* occurs once, correctly rendered as "idea."[41]

CIRSFID (CENTRO INTERDIPARTIMENTALE DI RICERCA IN STORIA DEL DIRITTO, FILOSOFIA E SOCIOLOGIA DEL DIRITTO E INFORMATICA GIURIDICA)
UNIVERSITY OF BOLOGNA, ITALY
TREATPAT.CIRSFID@UNIBO.IT

[40] The Latin original: „Sicut in quolibet artifice praeexistit ratio eorum, quae constituuntur per artem: ita etiam in quolibet gubernante oportet quod praeexistat ratio ordinis eorum, quae agenda sunt per eos, qui gubernationi subduntur: et sicut ratio rerum fiendarum per artem vocatur ars, vel exemplar rerum artificiatarum, ita etiam ratio gubernantis actus subditorum rationem legis obtinet, servatis aliis, quod supra *(q. 90.)* esse diximus de legis ratione: Deus autem per suam sapientiam conditor est universarum rerum; ad quas comparatur sicut artifex ad artificiata, ut in 1. habitum est *(q. 14. art. 18.)*: est etiam gubernator omnium actuum, et motionum, quae inveniuntur in singulis creaturis; ut etiam in I. habitum est *(q. 103. art. 5.)*; unde sicut ratio divinae sapientiae, inquantum per eam cuncta sunt creata, rationem habet artis, vel exemplaris, vel ideae: ita ratio divinae sapientiae moventis omnia ad debitum finem obtinet rationem legis: et secundum hoc lex aeterna nihil aliud est, quam ratio divinae sapientiae, secundum quod est directiva omnium actuum, et motionum. […] ea autem, quae sunt in seipsis diversa, considerantur ut unum, secundum quod ordinantur ad aliquod commune; et ideo lex aeterna est una, quae est ratio hujus ordinis" (Aquinas *Summa Theologiae* (a), 1.2, q. 93, a. 1).

[41] I am thankful to Corrado Roversi for the help he provided in writing this paper.

Leon Petrazycki's Legal Theory and Contemporary Problems of Law

Andrey V. Polyakov & Mikhail Antonov

Several years ago, Russia, Hungary and other Eastern European countries lived the end of the Soviet regime. The collapse of the administrative and economic systems was matched by the crash of the ideological paradigm. This fact posed numerous problems in different fields of life, and also dramatically touched the sciences, especially those called social. In law the impact of this crash was experienced not only through the collapse of the legal systems, but also through the critical renouncement of the previous Marxist theoretical constructions upon which the Soviet law had been constructed and construed. Along with various social debacles, these life issues forced the renewal of critical theoretical queries into the very roots of law.

In this situation certain East-European legal scientists decided to look back into the history of their national science to find tools to explain the phenomenon of law. In Hungary it was particularly Csaba Varga who challenged the post-soviet Hungarian legal science by questioning it from the point of view of legal pluralism and of sociological approach.[1] He pertinently summed up the results of the development of Hungarian legal philosophy: "We have found long abandoned patterns again. We have discovered realisations of common recognition in those potentialities and directions in law which we believed to have been conceptually marked off once and for all".[2] In Russia this line of thinking led the researchers in the same direction, to questioning the history of legal thought, to the pluralist vision of law in the context of its social/communicative importance. In both countries an attempt was made to base the legal theoretical researches upon the ideas of the two legal thinkers who, apart from each other but almost in the same time, managed to formulate the outlines of legal pluralism. We are referring to George Lukács in Hungary[3] and Leon Petrazycki in Russia[4]—what the first meant by "mediation"[5] and the second by "imperative-attributive emotion" is basically the inter-subjective

[1] Cf. Csaba Varga 'Philosophysing on Law in the Turmoil of Communist Take-over in Hungary (Two Portraits, Interwar and Post-war)' in *The 2005 ALPSA Annual Publication* of the Australian Legal Philosophy Students Association, ed. Max Leszkiewicz (Brisbane 2005), pp. 82–94.

[2] Csaba Varga *Lectures on the Paradigms of Legal Thinking* (Budapest: Akadémiai Kiadó 1999), p. 20.

[3] Cf. Csaba Varga *The Place of Law in Lukács' World Concept* (Budapest: Akadémiai Kiadó 1985).

[4] Cf. Csaba Varga *The Place of Law in Lukács' World Concept* (Budapest: Akadémiai Kiadó 1985).

[5] See on mediation in Lukács' legal conception in Csaba Varga 'Towards a Sociological Concept of Law: An

communication that is the foundation of the legal conceptions of Lukács and Petrazycki. In this respect, apart from the two famous Hungarian philosophers of law, Barna Horváth and Georg Lukács, one can also think about similar points in the legal ideas of Petrazycki and of such Hungarian thinkers as Julius Moór with his conception of legal policy[6] or István Losonczy with his multi-level pluralist legal conception.[7]

In this paper we don't intend to assert the identity of the legal ideas by Petrazycki with those by the contemporary authors. If we could use here the theological term of consubstantiality, we should say that the ideas of this Russo-Polish thinker are consubstantial to the antistatist analyses that today are developed by such eminent theorists as Csaba Varga. This does not imply any direct credits that these conceptions had to Leon Petrazycki's legal philosophy: the same inspiration must not always indicate to the same sources (though we might have been inclined even to trace here certain indirect links through concepts of Georges Gurvitch or of Pitirim Sorokin). Another common point between Petrazycki's theory and contemporary legal thought is that during the rapid and crucial reforms in the East-European legal systems, we might have felt the reality of cardinal underlying shifts in law as it might have been felt by the Russo-Polish philosopher during the social cataclysms in imperial Russia. It is our conviction that the interest for legal pluralism owes greatly to life issues of the theorists who become much more inclined to this way of thinking after experiencing cardinal changes in law: it was the case of both Varga and Petrazycki.

Another goal of the present paper is to sustain the idea that the legal pluralism traditions were not completely interrupted by the communist experiments and that there is a direct inheritance of some trends in the contemporary Russian legal science from the theories formulated as early as the debut of the 20th century. This is to say that the Saint-Petersburg legal philosophy school, which dates back from Leon Petrazycki, continues to exist until now. The problems posed and still being discussed in the scope of Petrazycki's intellectual heritage in Russia are topical from the standpoint of the problems of modern legal science.

Not less importance had the ideas of Leon Petrazycki for the development of the legal thought in Russia. A thinker with a new theoretical background, he explained the independence of Law in the face of State authority. His ideas are opposed to the normative and statist theories of Law even more radically than the natural law conceptions.[8] Petrazycki's doctrine counterweighted the legal concept of Hans Kelsen that was being created in that epoch. The Russo-Polish thinker originated the non-classical theory of Law, the ideas of legal pluralism, of legal policy and of social importance of Law; thereby he formulated one of the deepest non-classical theory of law.[9] His critical arguments

Analysis of Lukács' Ontology' *International Journal of the Sociology of Law* 9 (1981) 2, pp. 157–176 in *Marxian Legal Theory* ed. Csaba Varga (New York: New York University Press 1993), pp. 361–378.

[6] Cf. Varga 'Philosophising on Law…', pp. 82–83.

[7] Ibid., pp. 90–93. Cf. also Varga *Lectures...* .

[8] Petrazycki anticipated many critiques that are presently developed by contemporary authors. Cf. Csaba Varga 'What is to come after Legal Positivisms are over?' in *Theorie des Rechts und der Gesellschaft* Festschrift fur Werner Krawietz zum 70 Geburtstag, hrsg. Manuel Atienza et al. (Berlin: Duncker & Humblot 2003), pp. 657–676.

[9] Reza Banakar sustained the idea that Eugen Ehrlich was under Petrazycki's influence and was absolutely aware of the legal conception of the Russo-Polish thinker. Reza Banakar & Michael Travers *An Introduc-*

against dogmatism in law have been essential until now. Along with the idea of legal politics, he was also author of a large number of other theoretical ideas of the first importance.

The intellectual heritage of Petrazycki is polyvalent. During his Russian years this Russo-Polish thinker created the St.-Petersburg Legal Philosophy School. Along with Petrazycki one can mention another great Russian legal thinker who contributed to the development of the psychological aspect of law – the Saint-Petersburg professor Nikolai Korkunov (1853–1904). It is quite possible to draw a net connection between these two theorists: Nikolai S. Timasheff was right in saying that "Petrazycki was in particular influenced by Korkunov who combined the sociological heritage of Comte and Spencer with the teaching of R. Ihering".[10] It is characteristic for the St.-Petersburg School to see in Law a pluralist, functional and existential phenomenon. In the opinion of Andrzej Walicki, the St.-Petersburg School was divided into two groups. The first developed the ideas of Petrazycki on Intuitive Law (Laserson), the second fashioned the Sociology of Law (Gurvitch, Sorokin, and Timasheff).[11] We think that this second group managed to select the best of the legal conception of Petrazycki. The most important is the theory of Gurvitch who originally interpreted such key-conceptions by Petrazycki as "normative fact" and "intuitive law".[12] This latter is understood as "intuitive positive law" and the former is close to the phenomenological conception of *Lebenswelt* (as developed by Habermas). It is in Gurvitch's legal theory that the ideas of Petrazycki were liberated from psychological subjectivism and gained synthetic and integral character. And it is here that one can find the point where the conceptions of Gurvitch, Habermas and Petrazycki converge.[13]

Already before the Bolshevik Revolution the conceptions of Petrazycki had been appreciated by Marxist-oriented scientists such as Mikhail Reisner who did not participate formally in Petrazycki's School. Afterwards, Petrazycki's theory was banned for ideological reasons. Under the Bolshevik rule nobody could openly profess sympathy for Petrazycki's psychological theory of law. Nevertheless, under the Soviet regime some legal thinkers at Leningrad University continued to use this theory implicitly. We can state Petrazycki's influence in the books of Jakob Magasiner who was a very

tion to Law and Social Theory (Oxford: Hart Publishing 2000), pp. 42–43. Referring to J. Licki, A. Podgórecki also has stated this circumstance. Adam Podgorecki 'Unrecognized Father of Sociology of Law: Leon Petrazycki; Reflections based on Jan Gorecki's Sociology and Jurisprudence of Leon Petrazycki' *Law and Society Review* 15 (1980–1981), p. 191. Cf. Andrzej Walicki *Legal Philosophies of Russian Liberalism* [1987] (Notre Dame: University of Notre Dame Press 1992), p. 290. Cf. also: M.B. Антонов [Mikhail Antonov] 'Интеграция знания о праве и обществе в творчестве Ойгена Эрлиха' [Intergration of Knowledge on Law and Society in the Work of Eugen Ehrlich] in Государство и право [State and Law] 2011 (1), pp. 79-87.

[10] Cf. Reza Banakar 'Sociological Jurisprudence' in *Encyclopedia of Law and Society* American and Global Perspectives, ed. David S. Clark (Los Angeles: Sage Publications 2007), p. 37.

[11] Walicki *Legal Philosophies*..., pp. 283–290.

[12] See especially two works of Georges Gurvitch—*L'idée du droit social* (Paris: Librairie de Recueil Sirey 1932) and *L'expérience juridique et la philosophie pluraliste du droit* (Paris: Pedone 1935)—where he apparently adheres to the ideas of Petrazycki. Cf. on the connection between Gurvitch and Petrazycki: Michael Antonov 'Les influences russes sur la formation intellectuelle de Georges Gurvitch: l'exemple de ses premiers ouvrages' in *Anamnèse* 2005 (1).

[13] Reza Banakar 'Integrating Reciprocal Perspectives: On Gurvitch's Theory of Immediate Jural Experience' *Canadian Journal of Law and Society* 16 (2001), p. 73.

important figure in the Legal Science of USSR in the 1920s and 1930s. In his book on the General theory of law on the basis of Soviet legislation[14] he forwarded some ideas of Petrazycki though without revealing the source of these ideas. Certain aspects are common between Petrazycki's theory and the conception of the great legal thinker of the 1970s and 1980s, Leon Javitch.[15]

The particularity of Petrazycki's legal doctrine is that he combined the principles of the classical scientific paradigm with those of the non-classical one.[16] First of all, the influence of the classical scientific rationality appeared in his attempt to build the theory of law on a monist basis, taking into consideration only the individual psychology and studying it only through introspection and formal logics. But trying to restrict his studies by a limit of monist approach, Petrazycki seriously simplified his vision of social and legal realities. He relied on the traditional scheme of simplification and ignored the exceptional cases by reducing them to the paradigmatic *Weltanschauung*. In this tradition one of the elements in the object becomes dominant thanks to the reduction and moves the other elements into the shadow.[17] It is in this way that the unilateral theories that study the different social objects, such as law, are created. We see these theories (normative, sociological, jusnatural, etc.) explain the different sides of law, each of them having its raison d'être but without grasping the totality of the object studied.[18]

Petrazycki's theory was not exempt of this rule. The genial legal thinker managed to find in law what had been neglected before – the internal, emotional, binding aspect of law that motivates the subjects in their conduct. Of course, there were other legal theorists who before Petrazycki had developed the psychological approach to law,[19] but his singularity was to work out the entire psychological methodology based on the emotion theory and extrapolated onto the law studies. He discovered the emotional side of law, though always staying bound by the narrow limits of his scientific paradigm. To be consistent, Petrazycki had to affirm that law embraces also subjective fantasies which are produced only via individual imagination moved by imperative-attributive emotions. It was a weak point of his theory, especially in the light of the contemporary legal theories that search to escape a unilateral vision of law.

What is the basic innovation that Petrazycki brought into the contemporary theory of Law? We think to find it in the idea to consider law as a system of communication.

[14] This book was first published only in 1997 in the Russian review *Pravovedenie* (also cf. his Oeuvres: Я.М. Магазинер [Jakob Magaziner] Избранные труды по общей теории права [The Selected Oeuvres on Theory of Law] (Санкт-Петербург [Saint-Petersburg]: Юридический Центр Пресс [Law Center Press] 2006), 352 p.

[15] Lev S. Javitch *On The Essence of Law* [in Russian: Л.С. Явич, О сущности права. Л., 1985] (Leningrad 1985), pp. 108–109. A similar conception he developed in his book on Socialism: [in Russian – Л.С. Явич [Lev Javitch] Право и социальный прогресс [Law and Social Progress] Москва [Moscow] 1990), pp. 25–27.

[16] By non-classical legal theories we mean those which do not accept reduction of law to any of its foundations (like reason, norm, relation, and psyche). The non-classical legal theories consider law as a phenomenon inevitably bound with the social agent and with the limits of intellectual activity of this subject.

[17] N. K. Denzin 'Interaction, Law, and Morality: The Contributions of Leon Petrazycki' in *Sociology and Jurisprudence of Leon Petrazycki* ed. Jan Gorecki (Urbana: University of Illinois Press 1975), p. 73.

[18] George Lukács has demonstrated that one cannot escape studying law as totality, even if this totality presumed to be partial. Cf. Csaba Varga 'Law as a Social Issue' in *Szkice z teorii prawa i szczegółowych nauk prawnych* Professorowi Zygmuntowi Ziembinskiemu, ed. Sławomira Wronkowska & Maciej Zieliński (Poznań: Wydawnictwo Naukowe Uniwersytetu im. Adama Mickiewicza w Poznaniu 1990), pp. 246–255.

[19] Cf. Walicki Legal Philosophies of Russian Liberalism, p. 238.

Law appears through communication as its immanent characteristic. This idea challenges the classical paradigms of jusnaturalism, statism and normativism that claim that law is something given, formed, "*prêt-a-porter*", and that the task of a legal thinker is only to pick up from the social reality the corresponding facts (either the norms established by public authority, or natural rights, or normative structures of formal logics) without taking into account the subjective apperception of these facts. Petrazycki was of another opinion. He starts the legal analysis with a study of the very subject, with this subject's apperception of reality through the imperative-attributive emotions. In other terms, law for Petrazycki exists in all the spheres where there is a specific way of apperception and of reacting to the external drives by the specific emotions and representations. From this point of view, law is not dependent upon State, upon any abstractions, upon natural laws.

In this regard we see two crucial points in Petrazycki's legal theory. Firstly, its division between normative fact (text of law) and law itself. Secondly, its unity of rights and duties that is the basic element of legal communication. Naturally, the term of communication has a broad sense and may seriously differ in scientific conceptions. In the theories of N. Luhmann and of J. Habermas we have the most popular conceptions of communication. For Habermas communication is consensus-oriented.[20] But before any consensus we need to establish the rational argumentation about validity of the ways people consent or just presume that these or those ways of consenting are valid a priori. In social relations we always deal with actions bound to meet a reciprocal response. If there is no reciprocal reaction, it means that the communication is failed. It has often been stressed that the idea of communication means much more than a simple transfer of information. Communication is a primary social process of co-creating, maintaining and transforming social realities. We cannot exist if we do not communicate given that it is a status of human condition, a human *modus vivendi*, in which we produce and reproduce our world.

From this point of view we can partly accept the critiques formulated by Luhmann. But we cannot agree with the too narrow understanding of communication that Luhmann proposes in excluding from communication even subjects and their rational behaviour.[21] He thinks that the notion of communication covers only the selection of information, of message and of understanding/misunderstanding.[22] Can we accept this theory of communication? It seems that this theory can be efficient only in what concerns the descriptive information (*Sein*), but not for the prescriptive information (*Sollen*). Let's presume that *A* prescribes to *B* to fulfil something. In this case, *A* implicitly or explicitly refers to the mutually recognized (by both *A* and *B*) groundwork of communication. Thence, the communication cannot be limited only by apperception, by understanding of information. We inevitably must add behaviour to understanding because they are in-

[20] Jurgen Habermas *Theorie des kommunikativen Handelns*. Bd. 1. Handlungsrationalität und gesellschaftliche Rationalisierung (Frankfurt am Main: Suhrkamp 1981), pp. 367–452.

[21] Niklas Luhmann 'Was ist Kommunikation?' in Soziologische Aufklärung 6: Die Soziologie und der Mensch, hrsg. Niklas Luhmann (Opladen: Westdeutscher Verlag 1995), pp. 113–124.

[22] It is characteristic that Luhmann writes that "Die Operationsweise, die das Gesellschaftssystem produziert und reproduziert, ist die sinnhafte Kommunikation […]. Das erlaubt es zu sagen, dass das Rechtssystem insofern ein Teilsystem der Gesellschaft ist, als es die Operationsweise der Kommunikation benutzt, also nichts anderes tun kann, als im Medium von Sinn mittels Kommunikation Formen (Sätze) zu bilden". Niklas Luhmann *Das Recht der Gesellschaft* (Frankfurt am Main: Suhrkamp 1993), p. 35.

dissolubly interlaced. That is why we cannot exclude human conduct from the concept of communication – conduct/action is inherent to knowledge and to understanding. In this sense, the ideas of Humberto Maturana and Francisco Varela seem to be more pertinent for sociological analysis, and we agree with them that every communication presupposes a text.[23] Law is a specific form of communication because its subjects assert their mutual rights and duties and construct their interaction on this base. Any action contradicting the asserted rights and duties shall be deemed as violation of law. It means violation of legal communication. So, communication constitutes an irreversible unity of its elements. Law is a kind of social communication (along with moral, economic, politic, cultural communications). This approach makes us accept the idea of legal pluralism and of collective (inter-subjective) psychological reality and values.[24]

Petrazycki's problem was, in our opinion, not to have combined these two principal points of communication (legal text and correlative rights), though it is in communication that legal texts (source of law, normative fact) and the subjective experience of rights and duties are united. The Russo-Polish theorist radically opposed law and the textual forms of legal argumentation (sources of law). He treated as source of law (preferring to avoid this term and to employ the term of source of legal knowledge) every phenomenon of the external world that initiates in us an imperative-attributive emotion. This phenomenon belongs to another reality than the law itself (solely psychological phenomenon). In this respect we see Petrazycki adhere to the non-classical paradigm of jurisprudence.[25]

For Petrazycki, law is not a kind of external reality, but is produced by the psychological processes. Even positive law is resulting from the intellectual and emotional interpretation of the objective signs, of the normative facts that produce law in the mind. Law in Petrazycki's theory is far from being understood as material phenomena outside of the psyche. These material phenomena are able only to promote the law already psychologically structured.

We cannot but agree with Petrazycki in this aspect: there is no law without subjects. Nevertheless, one may not limit law by the subjective consciousness because this would entail the simplification of legal reality. As the example of Gurvitch, Sorokin and Timasheff teaches us, it is quite possible to extrapolate the key ideas of Petrazycki to the totality of social/cultural reality and to largely understand law as the coordination of social interaction/communication. It is via communication that the legal text and the psychological apperception of law are united. Petrazycki sees law in imperative-attributive emotions that are born either intuitively or through perception of normative facts, provided that these emotions are possible only when one is aware of the real ex-

[23] Humberto R. Maturana & Francisco J. Varela *The Tree of Knowledge* A New Look at the Biological Roots of Human Understanding (Boston: New Science Library 1987).

[24] Cf. А. В. Поляков [Andrey V. Polyakov] *Общая теория права. Феноменолого-коммуникативный подход (Курс лекций)* [General theory of law: The problems of interpretation in the context of communicative approach (Cycle of lectures] (Санкт-Петербург [Saint-Petersburg]: Издательский Дом Санкт-Петербургского государственного университета 2004) 864 pp.

[25] Cf. А. В. Поляков & Е. В. Тимошина [Andrey V. Polyakov & Elena V. Timoshina] *Общая теория права* Учебник [General Theory of Law] (Санкт-Петербург [Saint-Petersburg]: Издательский Дом Санкт-Петербургского государственного университета [Publishing House of Saint-Petersburg State University] 2005) 472 pp. Cf. also Mikhail Antonov 'Unser schwerer Weg zum Recht' in Rechtstheorie 2007 (1), pp. 157-168.

istence of another person. What is important here is only the reality of the connection between this subject and this person, irrespectively of the possibility to perform any real acts. Imperative emotion is a feeling of obligation that is ascribed to or perceived by a subject. Inversely, attributive emotion means feeling of authority (= right) to demand someone to execute such or such act. From this supposition naturally follows that law emerges from concordance of the obligations of *A* with the rights of *B*. This concordance, in Petrazycki's opinion, is totally subjective, i.e., is defined only by the psychology of the subject that experiences imperative-attributive emotion. That is why Petrazycki insists that law is purely subjective – in his conception there is no legal reality except the psychological reality.

Though similar to phenomenological constructions,[26] Petrazycki's conception does not reach the level of a real phenomenological apperception. In the psychological conception of the Russo-Polish thinker law is excluded from real social communication, from interaction of agents and is therefore devoid of any power. Evidently that such image of law is completely different from what we understand as law—a system of coordinated behaviour that cannot be reduced only to subjective fantasies.

Petrazycki's position was that the attributive drive is responsible for the coordination of the social actions and thereby for the legal communication. The reason is that attribution always means an appeal to another person, considered to be the addressee of the appeal. In its turn, legal subjectivity suggests that the person is responsible and is able to respond to appeals, as long as the appeals are really executable through the acts of this appealed person. We can ascribe such appeals to our counteragents in the social relations only under condition that we recognize that these counteragents exist *in re* and that their appeals are real. That's why in the famous example by Petrazycki we can ascribe any rights to the devil only if we believe in his existence; the same is true about the rights that the primitive peoples ascribe to the dead. Petrazycki's position is that our imagination is a sufficient basis for establishing law, but he falls into contradiction because any attributive-imperative emotion can only arise when we feel the reality of others. Otherwise, if we deal only with subjective imagination, then there is no attribution from the other side—the imagined subjects, like witches or devils, cannot respond to our appeals. Understanding this theoretical obstacle, Petrazycki nevertheless wants to be coherent and claims that our belief is enough for us to logically construct the legal relation with the imagined subjects. But he does not continue and ignores the question about the foundations of this belief. Petrazycki's follower, Georges Gurvitch, saw this foundation in the phenomenological coordination between the emotions of one person *A* and the real conduct of the other person *B* whose actions respond to the emotions of *A*. The paradox was that Petrazycki couldn't escape recognizing this factual coordination and its social character – we see it in his ideas about the social adaptation of legal habits, about the progress of legal institutions, about the ulterior value of law (love). *De facto* he founds his conclusion on combined psycho-social coordination of emotions and counteractions, but *de jure* Petrazycki refuses to accept sociological elements into his monist paradigm so

[26] On similarities between the ideas of Petrazycki and the phenomenological analysis, see particularly Gurvitch *L'expérience juridique*..., pp. 349 et seq.

as not to break its coherence (the theorist saw in such coherence the necessary attribute of science).[27]

Petrazycki introduced in his conception two different models of Law. We say "different", and not "multi-level". In the scope of the first model law is constituted through individual, imperative-attributive emotions and intellectual representations. We can call it "virtual model of Law" (or "intuitive law" in terms of Petrazycki). Another model means a system of coordinated actions that is based on a unique understanding of legal texts—"actual model of law" (or "positive law"). Petrazycki (like Niklas Luhmann) insisted that law could not be reduced to symbols because these symbols must initiate imperative-attributive emotions: make an individual connect in his representations his rights and duties with those of another subject.

Which of Petrazycki's models is better from the point of view of legal sense? One can suggest that it is the second model. Petrazycki proposed to treat as law everything that implies individual imperative-attributive emotion. But he did not pay attention to the fact that this emotion, from a legal point of view, is the same thing as the "imagined *thalers*" that must be differentiated from the "real *thalers*" (to use I. Kant's hyperbole). The legal consciousness as possibility to have, to experience, to evaluate legal emotions should be considered as *conditio sine qua non* for the genesis of law. But this consciousness cannot be identified with law in its "focal meaning" (John Finnis). An individual imperative-attributive emotion can implement the real legal significance only under condition that it is seconded by the correlative imperative-attributive emotion of other subjects. In other terms, it becomes possible only when we have a unique understanding of the sense of our mutual rights and obligations and when this understanding is seconded by coordination of actions. To have rights and duties signifies to behave in an established manner towards the other subjects.

Law is not equal to the paper sheets on which the legal prescriptions are written. "These documents are but the witnesses of the previous facts, of the acts effectuated by kings or by other legislators".[28] The symbols used for the fixation of these documents are designed to initiate imperative-attributive emotions, i.e. to connect (in the consciousness) the rights of the subject with the obligations of the third parties. But, as we could see, Petrazycki met another problem here: he had to see that one cannot reduce positive law exclusively to the individual imperative-attributive emotions because in the very normative fact we already have the common understanding of the logos of the rights and

[27] Another follower of Petrazycki, Pitirim Sorokin, explained this paradox in his master's theory: "If one takes some of the statements of Petrazycki at their face value, and if one explores whether Petrazycki gave a well-developed »sociology of law and morality«, the critics are seemingly right. Petrazycki indeed repeatedly states that the reality of law and moral phenomena is psychological, that law and moral phenomena are real only in the described, specific mental experience of individuals, that without this psychological reality, law and moral phenomena do not exist as an empirical reality […]. Even more, when law and moral phenomena appear as trans-subjective, social forms of reality, it is only a phantasm, or projection of this psychological reality into the trans-subjective world of space and time. On the basis of this, the critics seem to have been right in accusing Petrazycki of a sort of a psychological solipsism and of being blind toward the objective, trans-subjective, and social forms of reality of law and moral phenomena". Pitirim A. Sorokin 'Law and Morality. By Leon Petrazycki' *Harvard Law Review* 69 (1956), pp. 1153–1154.

[28] Л.И. Петражицкий [Leon Petrazycki] Теория права и государства в связи с теорией нравственности [Theory of Law and of State in their Connection with Theory of Morality] (Saint-Petersburg 2000), p. 265.

obligations in question, as well as of the corresponding emotions.[29] If the legal emotions fail to coincide, we run the danger of awful legal and social disasters—"such mismatching of legal emotions can produce a real explosion of destruction, of vengeance and of hatred that would mean killing of millions who mutually disagree as to the scope of their rights and duties".[30]

Here law must be cardinally distinct from morality and must imply a kind of unification, i.e. of a common understanding of legal facts that are the unique source of knowing about legal norms, and that therefore produce a coordinated interaction on legal base.[31] The evolution of law can lead to a progressive adaptation of similar emotions that produce more and more similar legal acts, or in the words of Petrazycki: "produce a stable coordinated system of legally significant social behaviour, produce a stable and defined order that is to be taken into consideration by the individuals and can be a support in their activity".[32] In other terms, evolution of law leads to "exact predestination" of rights and duties, to exact description of their scope and objects, to an objective recognition of other facts that are relevant to law. This process invests materiality into law; Csaba Varga justly points out that law is always "characterized by externality and reification".[33] This distinguishes law from morality, the latter being incapable to coordinate behaviour. We can extend the way that Petrazycki treats this aspect of law and say that this adaptation means also more effective legal communication that minimizes legal conflicts. Such an adaptation or, as Csaba Varga says, legitimacy of law[34] is an indispensable element of every law.

Petrazycki describes law as a dynamic auto-constructing system that is formed through a network of interlaced communications. For the Russo-Polish thinker, law is a process of "psychosocial adaptation" to imperatives of "socially reasonable action". The central role is played here by "inter-human talks", which means psychological communication between members of social groups. Human communication is, according to Petrazycki, a kind of psychological contamination, in both intellectual and emotional aspects – an idea that was simultaneously pronounced at that epoch by G. Tarde in France. This vision of Society seems to be closer to the autopoietic theory developed by Luhmann than to the communicative action theory of Habermas. Here we could also draw parallels with the ideas of H. L. A. Hart on the third position in legal studies which permits

[29] That is why G. Gurvitch insisted that Petrazycki's idea of the bilateral (imperative-attributive) emotions implied the social basis of positive law, and that the idea of normative facts could be combined with Émile Durkheim's conception of social facts. Cf.: Michael Antonov 'Le raisonnement dialectique de Georges Gurvitch et la philosophie russe' in *Études sur la pensée russe: la raison*, Lesourd F. (ed.) Lyon 2009, pp. 337-360.

[30] Petrazycki *On Theory of Law*..., p. 148.

[31] We can better understand the topicality of these ideas by Petrazycki if we put "communication" instead of "unification"—this way of studying law is not far from the recent legal conceptions of Luhmann or of Habermas. This idea also reminds the theory of Csaba Varga who defines the judicial process as "purposeful and responsive human thinking undertaking definite values and justificatory paths through given referential channels". Csaba Varga *The Philosophy of Teaching Legal Philosophy in Hungary* [manuscript for IVR XXIIIrd World Congress in August, 2007], p. 17. Cf. Csaba Varga *Theory of the Judicial Process* The Establishment of Facts (Budapest: Akadémiai Kiadó 1995).

[32] Petrazycki *On Theory of Law*..., p. 157–158.

[33] Csaba Varga 'From Legal Customs to Legal Folkways' *Tidskrift for Rättssociologi* [Lund] 2 (1985), p. 45.

[34] Understanding under such a legitimacy "the minimum consensus in the law as the main agent of social ordering issuing in law and order", according to Csaba Varga 'From Legal Customs…', p. 46.

to take into account the subjective psychology without falling into psychologism in the jurisprudence.

This vision of law correlates with the conception of norms by Petrazycki. Denying that legal norm exists objectively, the thinker understands norm as representations that are intellectual signs of imperative and attributive emotions. If any text initiates an imperative-attributive emotion of possession of rights or of duties, then this text is a normative fact (= source of law). From this point of view, legal norm is psychological projection of experienced rights and duties. But in spite of the monism of Petrazycki's legal theory, we must claim that this vision cannot be limited by psychology solely – legal norm is a communicative link, a condition of legal communication. Legal norm indicates us that psychologically experienced rights and duties are shared by other subjects of law and therefore there is a real (not imagined, as Petrazycki suggested) attribution. This real attribution first becomes possible when we assert that law is something more than legal emotions and that it has a common base recognized at least by several subjects of law. Let us imagine a situation when a subject *A* cannot find any generally recognized base for his pretensions (normative fact, legal text)—then we have no law and his pretensions remain only in the imagination of *A*. Should *A* experience his pretensions as legal, he must be aware that the other subjects experience his pretensions in the same way. It means that there must be a common textual base for the pretensions in question. This can be any written or oral text mutually recognized by subjects.

We can express this idea otherwise: law is a communicative order that legitimates rights and duties through legitimating legal texts. Law doesn't exist outside legal texts, outside legal norms. If we try to define law irrespectively of this normative communication, then we deal only with the psychological projections of legal emotions. Petrazycki applied the term "intuitive law" to this legal-psychological imagination, but this term fails to express the real nature of this phenomenon that is far from what we call "law" in our everyday life. At the same time, we must not be hostages of the term "text"—it is not equal to the term "norm" that implies any acts to be imperatively accomplished.[35] The dialectics of norms and of texts is that the legal norm always arises as a result of experiencing of the legal text.[36] This experiencing takes place through acts of legal behaviour (acts of realization of rights and duties).

Petrazycki managed to establish the relations between law and the inner world of human psyche but he failed to relate law to the social reality. This goal can be achieved only after having renounced the vision of law as a phenomenon of human psychology

[35] The same thought we find in the conception of Enrico Pattaro: "Directives are Language. Norms are Behavior. A directive is a linguistic expression by which somebody is told to do something, and it is a directive whether it is effective or not. A norm is a pattern of behavior, which is performed, because it is conceived (felt, lived) as obligatory, and it is performed independently of any directive. This, of course, does not mean that there are no relevant factual connections between directives and norms. These connections need to be properly spelled out". Enrico Pattaro 'Language and Behavior. An Introduction to the Normative Dimension' in *The Reasonable as Rational?* On Legal Argumentation and Justification, ed. Werner Krawietz (Berlin: Duncker & Humblot 2000), p. 267.

[36] One shall not understand text only as language practice, for the text largely exceeds the limits of linguistics. Language and law constitutes a unique process of social reproduction. Cf. Varga 'Law as a Social Issue', pp. 239–255. Even legal facts, such as judicial facts, emerge via linguistic practices that first permit the facts to be institutionalized. Varga *Theory of the Judicial Process* .

solely. We shall promote a multifaceted vision of law where inter-subjective and textual realities will be combined.[37] In this respect we can refer to Petrazycki's legal ideas that prove to be efficient under condition of being developed further, towards a combined study of psychological emotions and their social background. Especially one can appreciate the terminology created by the Russo-Polish thinker—normative fact, intuitive law, imperative-attributive structure of law and other terms that are keeping their topicality until now. Petrazycki's conception proved to be too narrow because of its subjectivity, because of being oriented only toward individual experiences. This conception fails when compared with the reality where we have common legal emotions and representations, the common background (normative facts) for experiencing them uniformly. This makes us suppose that legal norms and law in general have an inter-subjective character. Such inter-subjectivity of law means that law has its rationale and significance that are uniformly and therefore objectively experienced. Inter-subjectivity and objectivity of legal norm coincide in this phenomenological understanding of legal communication. These norms exist irrespectively of our personal will, of our personal experience because norm gains its social significance as long as it is rooted in the collective consciousness.

We can compare the efficiency of law with the projection of movies. Sources of law (normative facts) appear on the screen of social life like frames of movies which in their continuity engender law that we watch as a lasting picture. The norms of law can be compared here with different scenes played throughout the picture and that have their sense only when incorporated in the whole of the movie. This signifies that the legal norm is an axiological, psychological and intellectual apperception/experiencing of the real rights and duties arising from the legal text and being fixed through the legal behaviour. Thence, the legal norms cannot be separated from the legal texts. So, in law we have unity of different aspects: norm implies rights and duties which, in their turn, always are normative; both norms and rights/duties are introduced by legal texts. Our conviction is that we can continue developing Petrazycki's legal theory in using his important findings in law, as well as his deep scientific terminology. At the same time, we shall overcome the unilateralism/monism of Petrazycki's theory and promote a pluralist vision of law as communicative phenomenon that incorporates the legal texts, their realization through the normative behaviour of the subjects that exercise thereby their rights and duties.[38]

FACULTY OF LAW
SAINT-PETERSBURG STATE
UNIVERSITY, RUSSIA
AVPOLYAKOV@JURFAK.SPB.RU

FACULTY OF LAW
HIGHER SCHOOL OF ECONOMICS
SAINT-PETERSBURG, RUSSIA
MICH_ANTONOV@VOILA.FR

[37] The similar ideas were expressed by Csaba Varga in the polemics around internal and external aspects of law. According to him, "la formation et le fonctionnement du droit se situent précisément au point d'intersection des domaines externe et interne du droit". Csaba Varga 'Domaine »externe« et domaine »interne« du droit' *Revue interdisciplinaire d'études juridiques* 14 (1985), p. 32. He claims elsewhere that "What we have discovered about law is that it has always been inside of us […]. We bear it and shape it". Varga *Lectures*..., p. 219.

[38] Cf. Polyakov [General theory of law].

Legal Culture: A Key Concept for Research on the European Integration of Law

Sofia Popescu

1

There is a concept which has been highly attractive to comparative sociology, and that concept is legal culture seen as a merger of pursuits between sociology of law and comparative law, a necessary merger since the main conceptual mechanisms of comparative law—as the specialty literature points out[1]—seem to be inadequate for the purposes of sociology of law, which needs a framework that would allow research of legal ideas and practices to be conducted in, rather than out of, their broader social context.

As a matter of fact, one of the difficulties of comparative law has been its inability to prove out, in convincing fashion, the theoretical value of doctrinal comparisons that leave out the comprehensive political, economic and social background of legal doctrine and procedures. It has even been stated that comparative law is obsessively influenced by minor tricks and contrivances of formal law, which are treasured up by law professors but not steadily linked with the real legal system. But, by adding the adjective *legal* to the noun *culture*, its meaning is that of a formative element of living law, not law books[2].

Indeed, comparative law has been unable to compare laws or legal systems as an intrinsic part of society.

The interaction between comparative law and sociology of law was emphasised by experts in both fields. So, for instance, while Gabriel Tarde included comparative law into the sociology of law, Raoul de Grasserie held that comparative law should start formulating general laws and develop into sociology of law.

The need for a sociological foundation in comparing law had its doctrinal supporters in inter-war Romania, too. Gheorghe Băileanu[3] considered a sociologically based comparison to be a comparison of causes, the strength of which lay in its predictability, the capacity to predict the future effects of a legal act; however, if a comparison of causes

[1] Roger Cotterrell 'The Concept of Legal Culture' in *Comparing Legal Cultures* ed. David Nelken (London: Ashgate 1997), p. 13.

[2] See Lawrence M. Friedman *The Legal System* A Social Science Perspective (New York: Russel Sage Foundation 1986), p. 20.

[3] Gheorghe Băileanu *Principii de drept comparat* [Principles of comparative law] (Iași 1926), pp. 25 and 125.

helps comparative law identify the evolutionary trends of particular legal institutions, show how a legal institution should be like, the sociology of law can only depict it as it is. Hence, the same author stressed, comparative law and sociology of law should check and supervise each other. Interestingly, Traian Ionaşcu[4] also noted that, as long as it was made at a definite point in space and time to identify the birth of legal institutions, the comparison involved value judgements, assessing the value of a legal institution by its effects and future consequences. Later, in the post-war years, the Czech professor Victor Knapp[5] said that, in his opinion, comparative law should definitely be sociological, rather than just logical-formal in character.

More recently, Csaba Varga[6] pointed out that it was not by accident that the comparative research of legal cultures differed from comparative law research. It is the line, the focus of research that makes the difference, which in the former case is cultural anthropology, with its focus on how culture can ensure survival of a community, bring human energies together and best meet community needs. Legal culture research is unlike the description of regulatory texts used as technical instruments by a community which, however, retain their status as symbols and embodiments of legal culture. Comparative sociology of law has pinned its hopes on the concept of legal culture which could include all the elements that need to be considered if we really aim the comparisons of legal systems to make sense sociologically. There is one thing—which we will elaborate upon—that needs to be made clear from the very beginning, namely that the optimism of comparative sociology of law seems to have dampened in the face of difficulties stemming from the somewhat hazy and vague character of the concept of legal culture.

In the closing years of the past century, the phrase 'legal culture' was coined to define a curricular subject taught in the faculties of law.[7] There are cases where this is conceived as a normative subject, including the specific values, concepts and doctrinal principles of a given legal system. However, there are cases where, from a non-law social science point of view, such a normative approach is unacceptable, and a descriptive approach is preferred instead, hence the difficulties in dealing with the definitions of culture—which may be either quite narrow, confined to spiritual issues (values, attitudes, conscience) alone, or very broad ones including institutions, too, and failing to distinguish between structure and culture.

Given the situation as described above and assuming the students of the faculties of law are familiar with the legal institutional framework as part of their academic training in various branches of law sciences (constitutional law, administrative law, adjective viz. procedural law), the idea was considered that, since the above-mentioned sciences cannot provide knowledge of how operators discharge their duties within that framework or how institutions and citizens interact, it is legal culture that should do it as an academic

[4] Traian Ionaşcu 'Curs de introducere în studiul dreptului' [Introductory course to the study of law] in *Enciclopedie juridică* (Iaşi 1929–1930), p. 318.

[5] Victor Knapp 'Quelques problèmes méthodologiques dans la science du droit comparé' in *Revue roumaine des sciences sociales* Série des sciences juridiques (1968) 1, p. 85.

[6] Csaba Varga 'European Integration and the Uniqueness of National Legal Culture' in *The Common Law of Europe and the Future of Legal Education* ed. Bruno de Witte & Caroline Forder (Deventer: Kluwer Law and Taxation Publishers 1992), pp. 725 and 727–728 [METRO].

[7] For more details, see Volkmar Gessner 'Teaching Legal Culture' in *Changing Legal Cultures* ed. Johannes Feest & Erhard Blakenburg (Oñati 1997), pp. 83–84 [Oñati Prepublications].

subject and depict the institutions that make up the structure by modelling the behaviour of the people working in, interacting with, or responding to the common elements of such institutions.

In this way, it would be taken into consideration an institutional legal culture—whether local, regional or national—seen as an aggregate of such behaviours subject to higher values, attitudes or constraints.

A good reason for dedicated legal culture research is that law, just like culture, is an inter-human communication tool, to the extent its rules regulate human behaviour as part of social relations viz. of an individual with other individuals. Moreover, there are further similarities and interactions between these two factors. In their historical development, cultural models leave their mark on inter-human relations, which are regulated by law.

But there also is a direct interaction, as the spiritual physiognomy of a society (its value system, just like its organizational and institutional system, not only political and legal, but also cultural) certainly amounts to a law configuration, as stated in what has become a reference work[8].

The parallel drawn by Malcolm M. Feeley[9] between comparative law research and comparative non-law social science research helps to better understand the comparative sociology of law and its limits.

The above-mentioned author states that, whereas in law the purpose of comparison is to explore the characteristics of foreign legal systems and identify valuable features to be taken over into one's own legal system, in social sciences the comparison helps investigate the existing diversity of social order and legal order in various countries. Whereas in law the comparative endeavour is norm-setting and politically-oriented, in social sciences it is explanation-oriented.

In the sociology of law, a merger of legal and social sciences, comparative law specialists bring their own understanding of the legal relationship, and social scientists do the same when they focus on law, which generates distortion and confusion. It is this research mix which—according to the same opinion—explains why the sociology of law has yet to make some tangible progress.

According to Feeley, the standard aims of comparative law include a) assessment of foreign legal systems and their distinctive characteristics in respect of the national legal system in order to broaden knowledge; b) help reform of national legislation and jurisprudence; c) fill the gaps in one's own legislation and jurisprudence; d) help the voluntary unification and harmonization of legislation.

As inferable from this list, the specific aims of comparative law are essentially practical and focus on identifying elements of other legal systems which, if adopted or adapted, would benefit one's own, and in this sense they could be referred to as "legal transplants".

The above-mentioned author blames comparative law studies for describing singular law systems or whole law families which are juxtaposed in disregard of any links that may exist among them, which actually amounts to parallel descriptions.

[8] Anita M. Naschitz *Teorie şi tehnică în procesul de creare a dreptului* [Theory and technique in the development of law] (Bucureşti: Ed. Academiei 1969), p. 72.

[9] Malcolm M. Feeley 'Comparative Criminal Law for Criminologist. Comparing for What Purpose?' in *Comparing Legal Cultures* [note 1], pp. 93–96 and 98–100.

Switching, as part of the same parallel, to the comparative analysis of law in social sciences, it is labelled as traditional, with longitudinal research (comparison of the same phenomenon over time), which is referred to as a characteristic form, being conducted simultaneously with trans-national research and both having the same purpose.

However, the comparative law research carried out by law sociologists as social scientists is not idealised, the afore-mentioned author being of the opinion that even though the aim is a more general and more sophisticated theoretical analysis, so far it has been just as descriptive and law reform-oriented as the comparative law research conducted by scholars. This is mainly due to the problems the comparative socio–legal studies are faced with. For one thing, there are few data that would allow a country, a legal system and a branch of law to form a research entity, especially in the absence of a theory to model and guide such comparative research. Adding to this is the persistent issue of the aim of research viz. what should its purpose be: law as put down in books, law in action (in the making), or a mix thereof?

A somewhat special aspect that Feeley focuses on is how the comparative investigation in the field of social sciences—the legal one included—is influenced by the systemic theory.

A systemic approach, which seeks to identify uniformity beyond apparent differences, is recommended as standing a good chance of success in the comparative sociology of law.

One may conclude that whenever comparative research is used in sociology of law research, its outcome is non-robust and limited in the absence of an appropriate theoretical framework, it remaining largely ad hoc, atheoretical and insufficiently explanatory in character.

Finally, in spite of the fact that in the past few years there were sociology of law scientists who, under the impact of ethnographic and post-modern methods, resorted to a comparative analysis of sorts to distinguish between two or more legal cultures—which is a valuable initiative by all means—important problems have yet to be solved, such as the comparability and the functional equivalence.

The possibility is raised in specialty literature[10] of a critical and ideological orientation of comparative law research, in the sense that such research scientists can identify governance solutions in the legal systems of other countries which are better, fairer and more effective than those existing in their own country. Observation of other legal cultures is also used to expose and bring to attention the flaws of the legal systems in their own countries.

Resuming the idea of the general system theory and its impact on comparative research, we would add that the autopoiesis theory, with its particular feature requiring that every social development be explained by the interference of closed information systems, is not accepted by comparative researchers or readers of their works, as it imposes on comparative research a limited number of formal categories, which comparative researchers had tried to get rid of.

[10] Michael King 'Comparing Legal Cultures and The Quest for Law's Identity' in *Comparing Legal Cultures* [1], p. 119.

Comparative research acknowledges other theoretical perspectives to be effective and points to the risk of the autopoiesis theory to turn into its own judge, enforcer and "purifier"[11].

2

The starting point for this paper, as belatedly acknowledged herein, is that the European integration of law is an integration of legal cultures in this part of the world: therefore it is only natural for *legal culture* to be the key concept of research on the above-mentioned issues. In this way, we join Volkmar Gessner[12], one of the pioneers of what is referred to as *comparative legal cultures*. By *legal culture* he means law-related values and attitudes, behaviour as governed by certain norms, in general, and legal ones in particular, the amount of legal knowledge by the public at large, social structure and the status of law professions.

According to the same author, legal culture is an embodiment of the basic ideas about the national legal order, all while being prone to other influences, with this specific interaction accounting for a fairly significant effectiveness of the law in a modern state. Proper orientation in the context of legal culture is a necessary condition for the work (performance) of a judge, a law professional pursuing an administrative career, and a lawyer, failing which the law may not be an instrument for integration.

Lawrence Friedman is credited with the development and use in the late Sixties of the concept of *legal culture* from his position as a sociologist of law. As he himself would note over time, the concept was extensively discussed, highly criticised but also very much used, and remained an essential concept linked to two main issues. One is how much of a condition legal culture is for the dynamics of law, for the change and development of any individual legal system. A second issue is the comparability of various legal systems, as whole or just parts thereof, for comparisons to make sense[13].

While it is true that Friedman's attempt was subject to criticism[14], he was also credited with the most steadfast effort to use the explicit concept of *legal culture* in the comparative sociology of law and theorise such use. Roger Cotterrell blamed him for having promoted and used in his work a concept which in some major respects seems to lack theoretical rigour and consistency. The point was made that, rather than the theoretical construct, it was the use of culture as an explanatory concept in the theoretical analysis of law that was prone to criticism. The possibility was questioned of developing a concept of legal culture that would be accurate enough to help define a major explanatory variable of law research.

Cotterrell thinks that Friedman was wrong when he defined legal culture by the ideas, attitudes, values, beliefs and expectations of a society about the existing legal system

[11] Ibid., pp. 120–123.

[12] Volkmar Gessner 'The Transformation of European Legal Cultures' in *European Legal Cultures* ed. Volkmar Gessner, Arthur Hoeland & Csaba Varga (Aldershot: Dartmouth 1996), p. 513.

[13] Lawrence M. Friedman 'More Comments' in *Changing Legal Cultures* [note 7], p. 201.

[14] For more details, see Cotterrell [note 1], pp. 14–15 and 18–22.

and various parts thereof, leaving legal behaviours out and in this way diminishing the explanatory capacity of the concept of legal culture.

The same critic also blames the researcher who coined the concept of *legal culture* for skipping the various meanings of the word *culture* and the need for rigour, which makes him regard legal culture as the ultimate cause factor of law, rather than the outcome of accidental modelling by a wide range of various, possibly unrelated, factors.

Cotterrell's opinion is that Friedman wrongly characterises legal culture as crucial for generating the social circumstances that legal systems work in, determining when, why and where law, legal institutions and the legal process are used by people.

Non-rigorous use of the phrase *legal culture* was also inferred from its being construed now as modern legal culture, now as western legal culture, and eventually as an emerging world legal culture, and from the emphasis placed on the plurality of legal cultures of late.

Cotterrell also states that Friedman is unclear when it comes to internal legal culture, viz. shared by the members of society who are trained in law and hold relevant positions, and external legal culture, which is shared by all the other members of society, and about the arguably major importance of internal legal culture for the legal system.

Cotterrell is critical of Friedman's construct also because he explains too much viz. all that happens and also what does not happen in the legal system. So, for instance, the starting point for the author of the concept of legal culture is that interests must transform into requirements, which must in turn put pressure and succeed in producing new laws, new legal acts.

It is precisely legal culture which, by encompassing attitudes, helps transform interests into requirements and also define the legal system's response to such requirements by modelling its structures. However, as Cotterrell notes, the concept of legal culture actually explains very little about the aims of sociology of law research, as long as it constitutes an unspecified set of elements, and fails to identify the factors that could be seen as determinants of the status of law in society.

Also criticised is the fact that Friedman himself sees legal culture as something abstract, a "slippery" concept, as is his implicit acknowledgement of it being closer to arts, rather than science.

The criticism referred to ends up in labelling legal culture as a concept that is handy, convenient and useful whenever relations within groups of phenomena or among such phenomena are unclear and uninteresting, it being a concept which makes only provisional reference to the prevailing conditions of law practices, traditions, perceptions and values. Given the reservations expressed, the importance of legal culture is acknowledged for the sociology of law only, it being similar to the significance the families of law have for comparative law.

It is the above inconveniences that are behind Cotterrell's proposal to replace the concept of legal culture with legal ideology seen not as an entity, but rather as surviving tendencies, ideas, beliefs, values and attitudes conveyed expressed, and modelled by legal doctrine.

Legal ideology as conceived by Cotterrell consists of axiological elements and cognitive ideas, expressed and modelled by legal practice following the development, interpretation and enforcement of legal doctrine within a legal system.

The benefit of legal ideology would lie in its being basically generated and supported by professional law practice, and institutionally disseminated across society. This means intellectual and institutional mechanisms used by legal doctrine to model the common perception of law, starting from knowledge and beliefs outside professional law practice. Transformed into legal ideology, legal doctrine would help us model a social perception, a social consciousness or awareness of law, legal structures, beliefs, attitudes and values which can be transposed into law regulatory practices[15].

To be more persuasive about the benefits of replacing the concept of legal culture with that of legal ideology, Cotterrell adds that while Friedman uses the former concept unconcerned about the power of professional legal practice and doctrine to influence the environment where such concept exists, legal ideology research looks at how professional practice in a state's legal system helps the revival of broader structures of legal values, beliefs and representations. Therefore, a theoretical approach centred on institutionalised and professionally managed legal doctrine would be preferable to the one focused on a potentially unlimited diversity of cultural resources in the research on the factors which influence law.

However, under certain, limited, circumstances, the concept of legal culture may be more useful, its critic admits, which means that there may be circumstances where rather than resort to mainly ideal constructs, it would be more appropriate and indeed preferable for the concept to be treated as an empirical category and comprehensively defined, in ethnographic terms, as a set of attitudes, values, customs and social action models, which amounts to what is referred to as small-scale external culture[16].

However, Cotterrell becomes more concessive in his stance to the concept of legal culture when he admits its usefulness by emphasising the sheer complexity and diversity of social matrices where law is included, and when assessing as necessary the reference to culture as a set of social events with interactions that are not accurately known, but the overall significance of which can be acknowledged. In this way, it is possible to characterise a comprehensive set of beliefs, values, theoretical and practical perceptions that can properly be described by sociological studies, but only—he stresses—as a prelude to more specific research on the ideological significance of legal doctrine and institutionalized practice.

In reply to such criticism, Lawrence M. Friedman[17] states that the concept of legal culture is not the only one that is vague, hard to define and delimit, for so are many other basic concepts used in social sciences, such as the concepts of *structure* or *institution*, which does not necessarily make them incoherent. Similarly, issues are raised in law by simple concepts, such as *judge, court, judicial system*; they being sharper when transnational comparison is involved. However, all this is no reason to "throw the baby with the bathwater" as he graphically puts it. There are concepts, legal culture included, that are very helpful in delimiting certain phenomena that are part of a very general category.

[15] Roger Cotterrell *Law's Community* Legal Theory in Sociological Perspective (Oxford: Oxford University Press 1997), pp. 7–14.

[16] Cotterrell [note 1], pp. 25–26.

[17] Lawrence M. Friedman 'The Concept of Legal Culture: A Reply' in *Comparing Legal Cultures* [note 1], pp. 33–35 and 38.

Legal culture—as defined by Friedman—refers to law-related ideas and values, to what all or part of the public expects from law and legal institutions. It is what he calls an "umbrella", which covers measurable phenomena, a variable which intervenes in creating a legal situation or a legal change.

The phrase *legal culture*—the author who introduced the phrase in the sociology of law explains—designates the frame of mind and ideas of a given public. They are affected by events and circumstances in a society which reacts, thus leading to actions that impact the legal system itself.

He admits that such frames of mind are not readily identifiable empirically, nor are attitudes and behaviours, some of them in particular, easily measurable.

Friedman's reply to Cotterrell's accusation, namely that the phrase *legal culture* as used by him is closer to arts than science, is that it conveys an idea of the tendencies in arts generally and as such is an incipient scientific definition.

As for Cotterrell's proposal to give up legal culture and use instead what he calls *legal ideology*, Friedman criticises in his turn the fact that this ideology is presented as being valid outside time, and points to its striking similarity with Max Weber's formal rationality.

However, if there is an empirical issue, it is the question of whether there is anyone who believes in legal ideology, and if so, who exactly that one is, and also how does the ideology impact on the public or operation of the legal system?

Friedman says he is intrigued by the fact that legal ideology is considered so attractive and legal culture so unattractive, even though both are as vague as they are general. What distinguishes them is their focus. While legal ideology pays great attention to doctrine, to research, theorising the nature of law and its ways of existing, legal culture research is centred on the thoughts, desires and ideas of those members of society who are the most enterprising, the richest, the most influential, or all of these taken together.

Legal ideology, in Friedman's opinion, would be an appropriate element of any study on common legal awareness, but common legal awareness is certainly an element of legal culture. In a given society, legal awareness can be modelled by legal ideology, but legal culture claims to be a broader concept than common legal awareness, if common, ordinary people are referred herein.

In his reply, he does not downright discard the usefulness of legal ideology and its research but notes, however, that researchers tend to focus on doctrine and theoretical constructs, and only seldom explain what such constructs and common legal consciousness have in common. What legal ideology lacks is any explanation of what makes the impact of legal ideology on society more plausible.

It is quite possible—he notes—for all or part of the public to actually subscribe to an ideology, to perceive certain arrangements, legal included, as necessary or unavoidable, in spite of their being questionable, occasional and temporary in character.

The temptation to prefer legal ideology to legal culture is explicable above all by the fact that academics are intellectuals in the first place, whose natural tendency is to overestimate the significance of purely intellectual, formal elements of culture.

Friedman winds up his reply by stating that he does not say that legal ideology is an irrelevant concept or one that is not worth studying; what he does say, however, is that

one of the flowers that experts in *law and society* should cultivate is the concept of *legal culture* which he hates giving up.

As to the question 'legal culture and/or legal ideology', an interesting alternative answer is, in our opinion, Gray Dorsey's use[18] of the word *jurisculture,* which includes legal ideology and mentality, and his emphasis on *homo sapiens*' capacity to create and change jurisculture with its harmonizing role in society.

The Japanese author Masaji Chiba[19] who refers to legal pluralism construed as a whole, an entity made up of various types of law existing in the world, or any combination thereof, as part of the debate on the structure-culture relationship, says that the entire operational structure of law in each socio-legal entity is a form of legal pluralism, which differs from entity to entity. The differences among various entities are quite simply expressions of the cultural features embodied in the law of different entities. Legal culture is defined by the cultural features of the legal pluralism of a social-legal entity, or of a whole area of social-legal entities.

To sum up, the definition of legal culture based on the key phrase of legal pluralism, which actually precedes it, is—in the afore-mentioned assessment—the condition for its universal validity, for such definition to be operational in the case of both western legal cultures and non-western legal cultures.

In a world where contacts and mutual influences are growing steadily, the requirement to understand "the other one" is seen to take precedence over the juxtaposition of descriptions of how the law operates and what the attitudes to law are in various countries.

With this as a prerequisite, David Nelken[20] considers that an attempt to analyse and compare legal cultures requires overcoming rival approaches and methodologies which threaten to oversimplify what is at stake. Some alternatives are just false dichotomies. Other, however, are true dilemmas, as is the case whenever the following questions are raised: 1) Should we concentrate on the world system and national cultures, or their specific institutions? 2) Should we understand by culture a set of behaviours and ideas of a given population, or should we take a post-modern approach to culture and view it as images in flux? 3) When dealing with legal culture, should we be interested in law as defined by politicians, legally trained civil workers and law theorists, or by common people? 4) What should we do as part of legal culture research? Pursue to learn as much as possible about other legal cultures, or about our own legal culture? 5) In dealing with legal culture, what is it that matters most—behaviours or words? What should we rely on more: what people say, or what people do, which reflects their outlook on the world?

David Nelken underscores both the strength and limits of a legal culture approach which tries to explain variability in terms of the measurable differences of legal structure. He identifies in specialty works certain measurable aspects involved in legal culture research, such as a) the rate of court cases as a useful measurable indicator; b) the institutional form of legal infrastructure apt to provide a better explanation.

Since, in the opinion of the above-mentioned author, there is no legal culture outside

[18] Gray Dorsey 'Les perspectives mondiales de la philosophie du droit et de la philosophie sociale' [a paper presented at the Ninth Congress of Philosophy of Law and Social Philosophy, Basel 1979], p. 4.

[19] Masaji Chiba 'An Operational Definition of Legal Culture' in *Changing Legal Cultures* [note 7], pp. 93 and 100.

[20] David Nelken 'Comparing Legal Cultures: An Introduction' in *Comparing Legal Cultures* [note 1], pp. 1–2.

legal institutions, the influence of "folk" mentalities or common cultural mentalities may certainly be overlooked.

Further on the legal culture research in the specialty literature, we would note Carlo Pennissi's[21] advice, namely that some middle ground be sought in the definition of such culture to reconcile the meaning of law according to law practitioners and the public, on the one hand, with the meaning of law as identified by sociologists, on the other hand.

He starts by noting that a comparison of the legal cultures of various law systems is a problem that cannot be solved unless the legal phenomenon is properly defined. The concept of legal culture should be so characterised as to match the meaning of law in the sociological discourse.

In the empirical use of the concept of legal culture in recent years, which leaves out the cases where such concept is identified with legal dogmatics and jurisprudence, the above-mentioned author distinguishes the following categories:
(a) reasoning models used by legal professionals to pass from abstract regulatory prerequisites to individual consequences through standard techniques for wording and justification of decisions;
(b) specialized language used to convey ideas; and
(c) values, ideologies, reasoning and legal policy models that help maintenance and development of legal experts as a professional group.

In his opinion, the uses as listed above are helpful in at least three explanatory approaches, as shown below.

First of all, the idea of legal culture depicts an historical fact very differently, as in each legal system the phrase may refer to either the tools/instruments, or the outcome of the process a well-defined social class comes from. This is a class which accepts that its structure may provide stability to relations with the social-political structure through specific legal models and own work models.

Second, the phrase *legal culture* refers to its normative character as a set of meanings that may be attached to abstracts norms and specific decisions of legislative activities and professions.

Third, the phrase suggests many functions of both the legal system, in terms of validity, flexibility and uniformity, and the social context, in terms of certainty, predictability, effectiveness, etc.

Pennissi emphasises that the aim of research on sociology of law is to explain legal phenomena characterised by their specific reference to the meaning of law.

Comparing legal systems may help improve the explanations only if legal phenomena can accurately be distinguished from social facts, and the concept of legal culture can play its part only if the sociologist is absolutely sure that he/she has the means to identify the legal character of the social fact he/she is dealing with. In Pennissi's opinion, the question of what we can consider to be within the scope of the law in a given cultural context cannot be answered unless the core issue of sociology is addressed, viz. the use of the adjective *legal* to define a particular category of social norms. To a sociologist, law can be a part of the social phenomenon only if it is included in the concept of action.

[21] Carlo Pennissi 'Sociological Uses of the Concept of Legal Culture' in *Comparing Legal Cultures* [note 1], pp. 109–112 and 114–115.

Such sociology of law—the said author adds—is always faced with a choice between theoretical strategies involving either an approach which assimilates law to another cultural domain, or an approach to law as a specific kind of norms which, together with some other kinds of norms may act in one way or another, or even an approach which gives law its natural role as a background to action.

To a sociologist interested in empirical testing, legal norms are more than just prescriptive sentences; they are the outcome of assigning a meaning, which amounts to specific, technical, interpretational, applied work.

This implies institutionalised work linked with what is referred to as *internal legal culture.* However, not always does the legal meaning which emerges from such institutionalised work imply a choice of legal phenomena, as construed by sociologists. For legal norms to become part of the action, they should convey a meaning not only to law operators, but to social operators as well. And the word norm has a broader meaning to the latter group as compared to the former.

A second question raised by Pennissi is this: How can we compare what is seen as legal in a given cultural context with what is seen as legal in a different cultural context? His answer to the question is that determining what is legal in different cultural contexts depends on more than just the various definitions of the word in various legal systems: we need to reconsider the definitions in respect of the cultural context and the institutional background against which legal meanings have developed.

Reminding that law may become the object of legal knowledge only if legal norms are seen as potential components of the meaning of social action, the same author takes the view that legal culture pre-selects the meanings of action.

At the same time, legal culture is defined as a goal-oriented social process. This goal is linked to actions of defining jurisprudence and administrative decisions, and of guiding and controlling such decisions, to law policies, to law enforcement and its effects, with legal culture becoming a sociologically qualified action process.

For legal professionals, Pennissi notes, the aims of knowing and defining law are institutional, to keep their professional monopoly. In contrast, sociologists pursue to define the role of law and the legal system in the broader framework of their social and cultural system and history.

In the final section of his comments, the author elaborates on several interesting issues. He explains first of all what a sociologist means by '*legal phenomena*' when the aim is to get comparable data. In this case, two are the legal phenomena to be followed: the course of action for which the legal meaning is an aim, on the one hand, and the events, facts, kinds of action implied by the legal meaning, on the other hand.

A sociologist would not be concerned with why certain norms produce certain effects, but focus instead on how could certain behaviours be explained, if the meaning assigned by law operators to such norms is what has been determined by tracing back the process referred to as '*legal culture*'. Such an outline of the concept of '*internal legal*' '*culture*' may be seen as a first step in the sociological research of law, a prerequisite for a sociological discourse on law, with legal culture being seen as action in progress pre-selecting possible meanings.

Legal norms, the meanings of which are seen as pre-selected by institutional actions,

are construed as some likely future action. As such, they provide potential sociological explanations of the law.

Given the pragmatic specifics of sociological knowledge, sociology cannot but construe specific legal meanings, define the meanings assigned by culture operators.

Therefore, Pennissi concludes, one needs to distinguish between cultural diversity, relevant to institutionalised social action and referred to as *internal culture*, and culture in a broad sense.

One of the sociologists of law who successfully focused on legal culture is Erhard Blankenburg.[22] He says that the traditional use of the concept of legal culture is based on its characteristic feature outlined by doctrine viz. its being shared by common people. However, he notes that an approach to legal culture based on public perception of law is apt to overlook the specificity of legal actions, a characteristic of sophisticated modern legal systems. In his opinion, professional knowledge of law is the key to what Friedman refers to as 'internal legal culture'.

In Blankenburg's opinion, the following are within the scope of legal culture: 1) The whole set of presentation and interpretation techniques used by law operators at both technical and theoretical level, and all ideologies on the role of law exercised by such techniques. 2) All public opinions and assessments on positive law. 3) The set of principles and ideologies on law and knowledge of the language of legal professions.

For Blankenburg, legal culture is a set of institutions, as law operators are always surrounded by institutions which they learn to use and occasionally understand even. Such institutions are constantly being re-built and transformed, and belong to a specific culture which law operators call legal.

According to the same author, legal culture integrates four levels: 1) the level of law operators and public legal consciousness, including legal ideas, attitudes and values as well as institutions; 2) the behaviour level which produces legal norms and legal institutions; 3) the level of characteristic features of legal institutions themselves; 4) the level of norms that form the body of the law.

Such an approach to legal culture overcomes the obstacle of the traditional need to anchor law in the rule of law, state system making possible to take into consideration super/national and international entities.

Blankenburg's view of legal culture is criticised by an author already referred to herein viz. Pennissi[23] for several reasons: a) the legal character of culture as specified by legal bureaucrats and practitioners cannot be underpinned by the law operators' self-definition; b) the aim of theoretical integration of sociological knowledge is not achieved by references to inter-relationships included in legal culture, as conceived by Blankenburg; c) it does not clearly distinguish among conceptual models as used by the public or law practitioners to build the legal system, show how legal systems use the norms and re-construct events to justify the course of action, on the one hand, and the 'behaviour of social institutions' as such, on the other hand. Pennissi reminds the fact that Blanken-

[22] Several of Eduard Blakenburg's works have been considered herein, cf. 'Culture juridique' in *Dictionnaire encyclopédique de Théorie et de Sociologie du Droit* dir. André-Jean Arnaud (Paris: Librairie Générale du Droit et de Jurisprudence & Bruxelles: E. Story–Scientia 1988) and 'Indicators for Studying Legal Cultures' [a paper presented at the Workshop on Comparing Legal Cultures, Macerata 1994], pp. 18–20.

[23] Pennissi [note 21], pp. 109–110.

BURG believed the relationships between legal culture levels had to be studied, which could mean to: 1) explore how the meanings prevailing at one level are used to construe a different meaning; 2) check if inter-related meanings lead to more or less convenient concept models; 3) examine relationships between behaviour and behavioural models.

Looking at inter-level relationships as identified by BLANKENBURG, his critic finds out that: while relations between Level 1 viz. legal consciousness of law practitioners and the public, and Level 4 viz. the norms that make up the body of the law, makes sense, which is true also for the relationship between Levels 4 and 3, the latter covering legal institutions; the opposite is the case of the relationship between Level 2 viz. behaviour as producer of legal norms and legal institutions along with the behaviour in respect of such norms, on the one hand, and Level 1 viz. legal consciousness of law operators and the public, including ideas, attitudes, legal values and legal institutions, on the other hand. Also in this last case, legal culture is assumed to be a relationship between meanings, but in a different way, namely legal culture shows what is understood at legal consciousness level, the latter depending on the former.

According to PENNISSI, BLANKENBURG's representations about culture not only point to heterogeneous phenomena, but also require that they be explained by resorting to theoretical approaches which are not always compatible.

A further question is raised by the same critic viz. can we consider as explanatory the relationships included by BLANKENBURG in the concept of legal culture in an attempt to assign legal culture the role of an explanatory variable?

PENNISSI takes the view that a definition of legal culture should imply choosing between interpretation and explanation, which cannot be done if institutional behavioural indicators or any other legal behavioural indicators for that matter are the starting point, as BLANKENBURG suggests.

A crucial question in the on-going discussions on the culture-structure relationship and the specific issues of legal culture has been this: can law be defined as part of such culture, or should it be defined as a potentially modified structure, accepted or rejected by cultural models?

In connection with this question it was assessed[24] that we cannot deny the structure status of law in modern society; which is precisely why law has been identified as a Janus with two opposite faces: while in terms of philosophical foundation and construction, law is a cultural phenomenon to both professionals and common people, it also is an external element which either limits or expands our views, and is too well established for it not to be treated as a social structure.

Also in connection with whether or not law is a constituent of legal culture, some interesting comments are made by CSABA VARGA.[25] At present, he writes, when legal positivism seems to have come to an end, its original substance and constituents are being reconsidered. The conclusion has gradually emerged that law is more than just a normative texture and cannot formally be defined by any one of its constituents determined by itself as priorities and used for self-control. According to theoretical findings of late, law is

[24] See Volkmar Gessner 'Teaching Legal Culture' in *Changing Legal Cultures* [note 7], pp. 83–84.

[25] See Csaba Varga 'European Intergration and the Uniqueness of National Legal Culture' in *The Common Law of Europe and the Future of Legal Education* [note 6], pp. 724–725 and 727–728.

conceived, in both theory and practice, as a complex cultural entity consisting of ways of thinking and procedures, as a special human activity implying a number of symbols and references, limits and touchstones. Law is one of the major entities that human culture is integrated in and organises a huge amount of traditions in some kind of instrument it both uses and embodies.

There are good reasons, the above-mentioned author points out, to believe that the spirit of laws—viz. the essence which may be characteristic for various individual legal cultures, the feature behind their unique flavour and key elements—lies in just one component which is legal tradition.

I cannot end this paper before noting that the idea of integrating legal norms and cultural norm-modelled behaviour was also advanced by Romanian specialists.

Dimitrie Gusti,[26] a world reputed sociologist of the inter-war era, included laws in culture, construed as a system of cultural assets defining the style of an age, and the state in culture, construed as an institution.

Subsequently, law was treated as one form of expression of the cultural level of a society, of the spiritual production of a people, with legal culture including legal thinking, legislative production itself, and lawfulness being an outcome of the attitude to law.[27]

As far as I am concerned,[28] I have chosen to integrate the law order, as an outcome of social relations in accordance with the law, into civilisation seen as culture *in actu*.

INSTITUTE OF JURIDICAL RESEARCH "ACAD. ANDREI RĂDULESCU"
ROMANIAN ACADEMY, BUCHAREST, ROMANIA
ICJ_JURIDIC@YAHOO.COM

[26] Dimitrie Gusti *Pagini alese* (Bucureşti: Editura Stiinţifică 1965), pp. 252 and 260.

[27] See I. Ceterchi & N. Popa 'Dreptul şi cultura' *Analele Universităţii Bucureşti* Seria Drept (1977), p. 6.

[28] The above-mentioned issue was dealt with at length in 'Quelques reflexions sur le rapport entre la vie juridique et la vie culturelle de la société' in *Memoria del X Congreso Mundial Ordinario de Filosofia del Derecho y Filosofia Social* VII, ed. José Luis Curiel (México: Universidad Nacional Autonoma de Mexico 1982), pp. 295–296.

A Classical View on Law and Information Technologies

Federico Puppo

1 Introduction

Numerous studies on legal computer science adopt the view that the law, and the application of information technology to the law, are based on certain fundamental assumptions which can be summarised thus:

> 1. the law is essentially the set of all juridical norms;
> 2. application of the law, or, more precisely, of a norm, consists in using the model known as the 'practical syllogism';
> 3. the use of computer systems in application of norms is an aid to judges, who may be replaced in their role by a computer capable of making decisions;
> 4. in this way (indeed, o n l y in this way) the exact application of legislative provisions is guaranteed, and hence the certainty of law.

According to some, "on this view, the automatic application of the law by computer would be nothing other than a reaffirmation of the ancient aspiration of humanity as 'scientificized' by the Enlightenment, a reaffirmation, therefore, of the rule of law that sprang from its philosophy".[1] Today this view has regained a certain currency, because in the civil-law countries (in Italy certainly) the incalculable number of valid norms, often written in opaque language, severely threatens the ideal of the guaranteed certainty of law. Substantially for these reasons, it is believed that judicial decisions not infrequently stem from an almost arbitrary interpretation of the norm largely conditioned by the subjective opinion of the interpreter, and for this reason difficult to control. In all these cases, an electronic information system applied to law would be able to "to reduce uncertainty and the rate of entropy"[2] through the computational capabilities offered by legal software. To explain these concepts, it's necessary to spend some words about computer's functions and its logical structure, in particular with attention to the computers' discourses.

[1] Renato Borruso *La legge, il giudice, il computer* Un tema fondamentale dell'informatica giuridica (Aggiornamento a »Computer e diritto«) II (Milano 1988) (Milano: Giuffrè 1997), p. 37.

[2] Giancarlo Taddei Elmi *Lezioni di informatica giuridica* (Milano: Pubblicazioni dell'I.S.U. & Università Cattolica 1997), p. 15.

2 The Algorithmic Model

A computer is a machine characterized, in its base architecture, by a relatively simple structure, even though the tasks which it is able to perform may be highly complex. One may say that it is essentially a calculating machine that possesses an "engine" driven exclusively by one or several "discourses" written by a human being, the programmer, with the specific goal of enabling the machine to perform particular tasks.

This entails that such discourses must be formulated in a language comprehensible to whoever—or rather whatever—it is addressed and which has its particular grammar, syntax and semantics. Its most distinctive, and in certain respects most valuable, feature is that it does not leave margins for interpretation. In fact, the discourse can have only one possible meaning and can lead in only one direction because it is couched in a formalized language. The direction is the one w a n t e d by the programmer and for which the machine has been activated. The result, if we can call it such, of the order imposed by means of the keyboard (or through other peripherals) has been anticipated from the outset, and with the certainty that it will be obtained m e c h a n i c a l l y.

More precisely, and to introduce terminology useful for my argument, c o m p u t e r i z e d d i s c o u r s e has the typical structure of the algorithm: a term which derives from a contraction of the name of the Arab mathematician who, in the mid-ninth century, wrote a work which also gave algebra its name.

In the West, one of the first to speak of the "algorithmization" of thought was Ramon Lull, who in 1274 proposed his *Ars Magna*, a logical method to form combinations of simple terms expressing truths graspable by the human intellect. Subsequently, the most notable theorists of a system of "linguistic calculus" were Hobbes and Leibniz. The latter described a *calculus ratiocinator* which would reduce the complexity of thought to the simplicity of the four operations.

> "If controversies were to arise, there would be no more need of disputation between two philosophers than between two accountants. For it would suffice for them to take pens in their hands, sit at a table, and say to each other (summoning, if they wished, a friend as witness): Let us calculate".[3]

Inquiry into the "laws of the thought" finally found decisive and paradigmatic development with George Boole, whom we may consider the father of modern binary algebra, the basis of computer operations. Boole had the merit of operationalizing Leibniz's conception (according to which it was necessary to seek an alliance between logic and mathematics, applying to the latter the formal rigour and the deductive method of the former). This connected with the algebraic tradition that flourished in seventeenth-

[3] Gottfried Wilhelm Leibniz *Scritti di logica* I (Roma & Bari: Laterza 1992), p. 172. Cf. also Csaba Varga 'Leibniz und die Frage der rechtlichen Systembildung' in *Materialismus und Idealismus im Rechtsdenken* Geschichte und Gegenwart, hrsg. Karl A. Mollnau (Stuttgart: Franz Steiner Verlag Wiesbaden 1987), pp. 114–127 [Archiv für Rechts- und Sozialphilosophie, Beiheft 31]. About Boole and Liebniz, see Agata C. Amato Mangiameli *Diritto e cyberspace* Appunti di informatica giuridica e filosofia del diritto (Torino: G. Giappichelli Editore 2000) 285 pp. On Leibniz and the problems for the formalization of legal knowledge referring to legal positivism, see Giovanni Sartor *Le applicazioni giuridiche dell'intelligenza artificiale* La rappresentazione della conoscenza (Milano: Giuffrè 1990) xi + 363 pp.

and eighteenth-century England and which likened calculus to a purely mechanical manipulation of symbols, according to certain rules and operations, making it analogous to a game, to combinatory activity, in principle distinct from the properly interpretative activity of the results obtained. In this way, the validity of reasoning was made to depend less on interpretation of the symbols employed than on the laws regulating their possible combinations. This was part of an inquiry conducted in (artificial) linguistic terms, characterized by a psychologistic dimension, and in which the logical-inferential process was strictly mathematical.

The exclusive aim of this project was to investigate and determine the laws of logic without any contamination by philosophy and metaphysics. In fact "Boole thought that his logic, which drew on mathematical methods of inquiry, was superior to Aristotle's, which he considered invalidated by metaphysical intrusions".[4] It was a logic, therefore, able to configure the laws of thought, and not only of mathematics, guaranteeing certainty and controllability. It did so on an essentially dualistic conception governed by the binomial 1=True / 0=False, which has been significantly incorporated into the architecture of digital space as the corresponding 1/0 bits that indicate the flow or otherwise of electric current, or more simply, whether an electrical device is switched on or off.

This theoretical inquiry has been historically accompanied by numerous practical advances in the development—according to the technology available—of machines to exploit the algorithm. Pascal, for instance, is well-known as the inventor and the constructor of one of the first calculating machines (the so-called "PascaLine"), while Babbage conceived a universal calculator, which he "sketched in a steam-driven version in 1837 […], and was designed in an eletr(on)ic version by Turing in 1936".[5] Babbage and Turing had the same intuition, although it was the latter that brought it to complete fruition: Turing realized that the tasks of a machine could be extended beyond those for which it had been expressly constructed, so that it became a universally programmable machine (i.e. a prototype of the computer). This happened "as soon as a machine reaches the critical mass that allows it to decode numerically encoded instructions and simulate them step by step".[6]

This was made possible by the algorithm: a procedure of mechanical calculation that, expressed in a formalized and structured language in compliance with precise logical rules on the combination of symbols and connectives, becomes a computer program able to transform input into output with a few and rapid calculations. More precisely, a computer program can be defined as the

> "procedure referred to as an algorithm […] [constituted by] a set of instructions to be followed in certain circumstances. The set of instructions is finite, but the algorithm can be applied an indefinite number of times. An algorithm therefore has two features: the finiteness of the instructions of which it is composed and the closed-

[4] Modestino Nuzzetti *Logica e linguaggio nella filosofia di George Boole* (Napoli: Liguori Editore 1986), p. 54.
[5] Piergiorgio Odifreddi *Il diavolo in cattedra* La logica da Aristotele a Gödel (Torino: Einaudi 2003), p. 242.
[6] Piergiorgio Odifreddi *Le menzogne di Ulisse* L'avventura della logica da Parmenide ad Amatya Sen (Milano: Longanesi&C. 2004), p. 202; it was the machine that Turing called "computer".

> endedness of the procedure. At a certain point, unless there are errors in the algorithm, a result must be obtained".[7]

Put otherwise, to use expressions widely spread in studies on legal computer science, the algorithm "is the set, organized into a sequence, of all the precise, unequivocal, analytical, general, and abstract rules formulated '*ex ante*' (i.e. before concrete questions arise and without specific reference to them) whose scrupulous and literal application, by whomsoever, infallibly enables achievement of the correct result (or the 'exact' or 'desired' one, as it is more appropriate to say in individual cases)".[8]

> "one of the most salient aspects of the computer science/law relationship is the exigency of clear language, not only due to the conviction that simple language can lead to the exact interpretation of the laws through which legislators express themselves [...], but mainly to the fact that only clear univocal language can be used by information technology; in short, the goals of this exigency can be used where the language of algorithms is used".[9]

Accordingly, the normocentric conception that inspires modern legal computer scientists identifies general and abstract rules, formulated '*ex ante*', with the Napoleonic laws and their scrupulous and literal application to obtain the "correct" result through the application of the law through the subsumption of the concrete case under the general law.

This was the form of reasoning which for centuries was identified with the analytical-deductive syllogism. Thus it was from the dawn of scientific thought to the onset of modernity, and so it is still today, when what remains of that thought is the technological power which expresses it. It therefore seems to be no coincidence that the mechanical procedure of the calculating machine envisaged by Turing closely resembles the step-by-step *modus procedendi* of Descartes, who, as evinced by his *Discourse*, had in mind a four-part method able to

> "to divide each of the difficulties under examination into as many parts as possible, and as might be necessary for its adequate solution [...] [and] to conduct my thoughts in such order that, by commencing with objects the simplest and easiest to know, I might ascend by little and little, and, as it were, step by step, to the knowledge of the more complex; assigning in thought a certain order even to those objects which in their own nature do not derive from each other".[10]

Furthermore, the computing method devised by Boole also espoused and developed the empirical sciences (recall that the basis of Boolean logic was also psychologistic and could therefore be verified): "[Boole's] mathematics of the human intellect was essentially an extension to the domain of thought of the Galilean method, which with its

[7] Andrea Rossato *Diritto e architettura nello spazio digitale* Il ruolo del software libero (Padova: Cedam 2006), p. 116.

[8] Renato Borruso & Carlo Tiberi *L'informatica per il giurista* Dal bit a internet, 2nd ed. (Milano: Giuffrè 2001), p. 249.

[9] Mangiameli, p. 155.

[10] Renato Cartesio *Discorso sul metodo* (Bari: Gius. Laterza & Figli 1927), pp. 43–44.

observation of phenomena and their correspondence with algebraic signs had proved so fruitful in the physical sciences".[11] It therefore seems that we may state that computer science embodies the union between the formal and empirical sciences once expressed by the deductive and inductive methods.

But a computer program has the advantage that "the validity of the deductive reasoning is determined by its logical form, not by the content of the statements of which it is comprised"[12]. Or, as Boole wrote in the introduction to his *Mathematical Analysis of Logic*: "They who are acquainted with the present state of the theory of symbolic algebra, are aware that the validity of the processes of analysis does not depend upon the interpretation of the symbols which are employed, but solely upon the laws of their combination"[13]. Indeed, given a general major premise (*genus*) and a particular minor premise (*species*), the mere combination of the two will lead to a certain conclusion whose tautological validity is guaranteed by the fact that the premises have been accepted, and by the relationship of continence in which they stand.

Since Cesare Beccaria, this logical procedure has been the "lodestar" towards which the reasoning of judges has striven, but in the awareness that it can never be reached. Yet progress in information technologies may perhaps bring the practitioners of law enormously closer to this objective. In fact, the digital revolution may fulfil the computational ideal which has so long tantalized jurists as the epiphany of scientificity. The computer algorithm is thus able to operationalize a particular conception of thought. Indeed, it is the way in which an abstract view of reasoning is made concrete. The employment of such mathematical forms within the law is made possible by the use of computer systems to apply norms. More precisely, it is possible to conceive of expert information systems which, if appropriately programmed and configured, may come to replace judges in the formulation of judicial decisions.

3 Expert Systems and the Law

This assumes particular importance in regard to the horizons opened up by the possibility that an expert system may perform the decision-making function as a whole, rather than merely assisting with it. Of course, this is a view in some respects superseded, but it is still embraced by some scholars. I shall now describe it briefly.

As a working definition, we may say that an expert system is a "computer system able to perform activities that require particular abilities (based on specific knowledge or experience)".[14] It is characterized by a particular architecture, because it adopts the one typical of the knowledge-based systems developed on the basis of a "rationalist paradigm"

[11] Nuzzetti, p. 23.

[12] Marco Cossutta *L'algoritmo del Citoyen Cimourdain* Commisaire Délégué du Comité de Salut Public in *Prolegomeni d'informatica giuridica* ed. Ugo Pagallo (Padova: Cedam 2004), pp. 133–164, particularly at 138.

[13] George Boole *L'analisi matematica della logica seguita da Il calcolo logico* [1993] {*The Mathematical Analysis of Logic* Being an Essay towards a Calculus of Deducitve Reasoning (Cambridge & London: Macmillan, Barclay & Macmillian-George Bell 1847)} (Torino: Bollati Boringhieri 2004), p. 5.

[14] Paolo Baldini, Paolo Guidotti & Giovanni Sartor *Manuale di informatica giuridica* (Bologna: Clueb 1997), p. 148.

of declarative type inspired by the abstract logical-mathematical model typical of formal axiomatic systems. It claims that

> "knowledge should be expressed in an axiomatic base, i.e. a set of axioms in a formal language, so that the automatic processing of knowledge can be understood, in principle, as logical deduction by means of general rules of inference. The results of this elaboration are logical conclusions, knowledge implicit in (implicated by) the axiomatic base".[15]

Hence, such systems work on the basis of "prepared" knowledge reduced to a "model" by an expert, and on the basis of an inferential model which uses it to resolve the questions put to it by the system itself, adopting the form of deductivist reasoning that characterizes it. As regards the law, it is sufficient for there to be an expert who converts its norms into axiomatized form, and for there to be a system able to handle them deductively in regard to the case to resolve, whose salient features (selected by the user) are the data fed into the machine. Optimally, of course, the norms would already have been rendered into algorithmic form: which would require only that the legislators write the laws using Boole's propositional algebra, the symbols that it employs, and with the rigour that it requires.

In fact,

> "if the program is written in language like the law and the program is the law of the computer [...], then not only can one try to convert the law into a program and thus have it applied directly by the computer, but [...] one can also try to apply the same language used to programme the computer in the formulation of the law. If we are able to make ourselves understood by a machine to the point that it does all and only what we want, why should we not use the same linguistic technique to make interpretation of the law certain and uniform?"[16]

For my part, I merely point out that legal positivism, which in certain respects can be likened to the model proposed, has fully demonstrated its intrinsic limitations, one of which is that the legal provision is the sole basis, the beginning and the end, of the law. And that the engine of the law, like that of the computer, is the will of the programmer (or user) in the latter case, and of the legislator (or judge) in the former. In short, *auctoritas, non veritas facit legem*: once again apposite is Hobbes' famous dictum, but now backed by the guaranteed (or at any rate obtainable) force of technology.

In this way, however, the law is founded upon nothing other that the mutable will of the agent expressing it, and therefore, ultimately, upon its discursive power. In other words, it is not founded upon the strength intrinsic to its authoritativeness, as would be the case were it guaranteed by use of the classical dialectical method able to ensure the undeniability of a particular proposition motivated by rhetoric. Rather, it is founded upon on the extrinsic force which stems from the authority of the speaker and which coerces the audience because it has the power to do so, albeit disguised behind the facade of an objectivity, even scientific, endowed with the power of ruling certain statements

[15] Giovanni Sartor *Linguaggio giuridico e linguaggi di programmazione* (Bologna: Cleub 1992), p. 86.
[16] Borruso, p. 44.

out of discussion. Such scientificity also resides in the workings of computer systems, and—note—it is only with an error of perspective that it can be understood according to the canons of modernity. I cannot dwell long on this matter here. I merely point out that, as regards logic as well, now long past is the time when it was believed possible to formulate a complete, consistent and decidable system. Given that there is an inseparable linkage between logic and computer science (indeed, computer science *was born* from logic), it should always be borne in mind that the first model of a calculating machine, that developed by Turing, able to describe the operation of any computer (even the most modern), served to prove Gödel's theorem in algorithmic and computational terms.

Nevertheless, there is nothing to preclude that, in certain circumstances, it will be possible, and indeed desirable, to have the automatic formation of judicial decisions. That is to say, one can hypothesise cases in which a machine could take over the entire juridical procedure, instead of being limited in its operation to a particular phase of that process.

In this regard, the distinction has been proposed between the "simple trial" and the "complex trial", meaning that, in the former case, the judge's substitution by the computer is possible because of the relative evidence and the lack of doubt in the judicial case concerned.

Given the syllogistic and normocentric model typical of the modern vision of the law, a process is "simple" when

> "the syllogism is a procedure constituted by a few well-defined and quantified variables [...]. A criminal trial for the issuing of bad cheques, for instance, is a very simple procedure, and easily transformable into an algorithm. In fact, the premise in law normally consists of the application of a single norm; the premise of fact consists of a simple finding, without it being necessary, for instance, to define a contract, listen to testimony, or assume other forms of proof".[17]

Obviously, the conclusion, i.e. the sentence, is the output of the program as the mere logical consequence of the subsumption of the fact in the norm.

By contrast, a trial is "complex", and therefore cannot be transformed into an algorithm, when

> "the premise in law does not consist of a single norm of simple application, but of several norms, sometimes not well coordinated and subject to different interpretations, and which may be affected by general institutes of the legal order. The fact, in its turn, is constituted by a plurality of findings whose importance is determined by the norms that must be applied. And the subsumption of the fact to the norm is not always achieved by a mechanical procedure, but often in an overt process of adapting and completing the norm".[18]

Hence, besides the fact that by virtue of algorithmic norms and technological progress —which can compensate for the limits of the human intellect as regards both ascertainment of the facts and the work of legislative coordination or implementing the norms—the above distinction may be undermined to the point that it becomes meaningless. In simple

[17] Enrico Giannanotonio, *Introduzione all'informatica giuridica* (Milano: Giuffrè 1984), pp. 136–137.
[18] *Ibidem.*

trials, therefore, one may hypothesise the existence of an algorithm that, given the existence of certain pre-established facts, proceeds step by step to the conclusion required. An expert system can thus apply the norm to the concrete case by performing the operations typical of the practical syllogism. I cannot provide practical examples here; instead, I shall seek to show that the conception described thus far is characterized, amongst other things, by ignorance of the disputational nature of the law and of the method most proper to it.

4 The Disputational Nature of the Law

What I say it is due, I believe, to the claim of modernity based on the monotonic and deductivist logic typical of the exact sciences and which, in the juridical sphere, has appealed to the potential of information systems so that it can once again return to the forefront.

This conception of the law not only neglects disputation—in the intent to have the norm be the fulcrum of the law itself—but implicitly asserts that it can be avoided since, on a par with the existent form, it is at the disposal of the subject's volitive capacity. The point is this: are we sure that disputation is something of which one may dispose?

In my view, the answer is "no", because I believe that disputation is an indisposable situation. However, I must explain what is meant by "indisposable":

> "In the legal sense, the quality or condition of an indisposable situation consists in the impossibility for its possessor freely to perform actions that alienate, modify or suppress it. On the experiential level, therefore, indisposability is manifest as the subtraction of a part of reality from the action of the subject, who cannot go beyond a boundary established by an authority external to him but also apparently embedded in the structure of his existence"[19].

For a modern conception of the law, characterized by a rationalist vision, there only exists the

> "individual's dogmatic claim that he knows the whole truth and that it coincides with his will, so that he assumes himself to be the 'measure of all things', under the exclusive privilege granted by the analytical method as a knowledge-gathering device: the method that has also spread into case law as a result of the coherent deduction of the judicial provision from abstract premises posited by the legislator as logical hypotheses".[20]

This approach, which is typical of some theories of legal computer science, does not envisage the existence itself of the controversy, although it is this that gives origin to indisposability.

This is because the only way to give rigorous and original foundation to the concept of "indisposability" is to return to classical thought, for which, for instance, "the subjective rights of man are indeed 'fundamental' when one discusses and defends the dialogic basis

[19] Paolo Moro *I diritti indisponibili* Presupposti moderni e fondamento classico nella legislazione e nella giurisprudenza (Torino: G. Giappichelli 2004), p. 63.

[20] Moro, p. 57.

which is also its limitation and springs from the realization that the subject is a body in relation"[21]. Vice versa, modernity ascribes the property of "fundamental" to subjective law by virtue of mere normative recognition. Accordingly, in the absence of a norm which a subjective law would define as "fundamental", it cannot even aspire to the category of juridicality; even less can its protection be invoked (because "only valid is positive law, the existing law, while on the other hand only the valid law exists"[22]).

From this it follows that "the juridicality of subjective law springs from the trial because its exercise is manifest in disputation",[23] where the concern is not to verify the formal correspondence or otherwise between the behaviour contested and the general and abstract case, but rather to seek mediation by determining what the parties have in common. This is in the knowledge that "statement of the law" by the judge appointed to determine the middle ground between the parties is not a discourse that can be conclusive, because its truth lasts only an instant: that instant in which it occurs, which is not be taken in the sense of a temporal "corpuscle" so insignificant that it cannot be even quantified. Rather, it is an instant that stands out from the others as perfectly exact (because not subsequently questionable) and punctiform.[24]

Hence, such truth can (indeed must) be called into question once again. In fact, controversy is what radically constitutes our essence, which is imbued with difference. An entity is itself to the extent that it is not another entity, since if it were equal to another entity, it would be that entity and not itself (besides, equivalence does not exist in nature, except in the fiction made possible by modern science, which creates it thanks to technology: suffice it to consider the "model" replicated on an assembly line). And the fact that difference, and not identity as perfect equivalence, is the basis of reality necessarily entails controversy.[25] A matter is disputed, in effect, because the claims in its regard are d i f f e r e n t , and so are the points of view from which it is considered. Such claims must be mediated to settle the dispute.[26] As Heraclitus of Ephesus put it at the beginnings of Western thought: "the subjective wish that intends to achieve the authentic exercise of power and authority »listening to the voice of the *lògos*« must be in accordance with the *lògos* of the Principle: that is, always manifesting, concealing and unifying"[27] differences in unity. In other words, it is that will called upon to mediate the conflict in the trial dispute, unifying the differences but safeguarding their original mystery, without being able to eliminate them, and hence without being able to eliminate the controversy as such.

[21] Moro, p. 153.

[22] Enrico Opocher *Lezioni metafisiche sul diritto* (Padova: Cedam 2005), p. 3.

[23] Moro, p. 153.

[24] For an explanation on these concepts, see Francesco Cavalla *Retorica giudiziale, logica e verità* in *Retorica Processo Verità* ed. Francesco Cavalla (Padova: Cedam 2005), pp. 2–100, in particular on 99–100.

[25] On this issue, see above all Maurizio Manzin *Alle origini del pensiero sistematico* Identità e differenza nella concezione neoplatonica dell'ordine (da Plotino a Dionigi Areopagita) (Trento: UNIService 2003) x + 159 pp.

[26] On the controversy as manifestation of reality's structure, see especially Francesco Cavalla *La verità dimenticata* Attualità dei presocratici dopo la secolarizzazione (Padova: Cedam 1996) xiv + 188 pp.

[27] Maurizio Manzin *La natura (del potere) ama nascondersi* in *Temi e problemi di filosofia del diritto* ed. Francesco Cavalla (Padova: Cedam 1997), pp. 85–112 at 93.

5 Conclusion: For a Classical View of the Law

In this way, I believe that I have furnished sufficient support for the notion that disputation is indisposable to the will of man, because it is what precedes him and what informs his very existence. Classically, therefore, one may state that

> "indisposability is the juridical form of property protection which, by drawing on a theoretical base entirely different from the voluntarist one (individualistic and rationalistic) of modern culture, pertains instead to the dialogic structure of the intersubjective relationship that involves every person in his/her constant social experience, so that it is retrievable from what is 'common' to every different subjective juridical condition"[28].

That which is indisposable is therefore whatever comprises the mystery of the Primitive that evades the volitive power of the subject, which is unable to apprehend it as an object in the complex dynamics of display and concealment which is structurally inherent to the Principle.[29]

However, the rationalistic model of modernity "works" on the basis of the claim that the subject can dispose of controversy, understood as law renounceable and available to the self-referential will of the individual. In general, therefore, cybernetic law seems prone to forget the disputational dimension of the law in its endeavour to conceive the latter according to the dual analytical-deductive logic of the algorithm, which besides being the basis on which the computer works, further aspires to being a scheme for the interpretation of existence and explanation of human rationality.

Although (I believe) these assumptions have not been adequately problematized, the supporters of the modern conception of law, and therefore of the consequent theory of legal computer science, justify the preference given to cybernetic law (and, more generally, to the use of information technology) on the basis of the complexity, by now ungovernable, of the contemporary legal system, and which is the cause of uncertainty, inequality of treatment and instability. That this is how matters stand is undeniable: but that the only way to resolve the difficulty is the one indicated seems highly dubious, and in the end undesirable.

Firstly, the notion that the use of information systems in the application of the law will eliminate interpretation (or an excessively subjectivist interpretation) of the law is not only anachronistic (not for nothing is the reference to the Enlightenment and the Napoleonic Code) but wrong in itself. The endeavour to eliminate the semantic vagueness of language—that is, interpretation (vagueness is unacceptable in a formalized system like an algorithm)— has failed, as we know, and not only for the law[30] but also, in general, for formal logic. Not only is vagueness no longer considered a "defect" of language, but it seems to be a necessary condition for meaningfulness and for the possibility itself of communication. The truth, as Gödel's theorems attest, cannot be fully comprised

[28] Moro, p. 207.

[29] See, above all, Cavalla [note 26].

[30] E.g., Claudio Luzzati *La vaghezza delle norme* Un'analisi del linguaggio giuridico (Milano: Giuffrè 1990) x + 433 pp.

within the narrow confines of a formal logical system. Moreover, given proof of the incompleteness and indecidability of any formal system, we must acknowledge that not everything which we hold true can be demonstrated in the terms of the same system: something of the truth therefore remains indeterminable and irreducible.[31]

Secondly, it seems that the entirely modern claim that the structure of judicial reasoning can be conceived in the form of the practical syllogism, on a par with theories that claim to formalize its operation in an algorithmic model, is a commonplace devoid of substance: an ideology, in short.

That said, because it is impossible to ignore the current crisis of law, and because it is neither possible to accept the modern conception of legal computer science as a solution, we are obliged to look for a possible alternative. Put briefly: suffice it to recall some focal points that have emerged from the discussion of the classical conception of the law, whose basis is disputation and not the norm (a basis which remains mysterious in its essence and therefore evades man's dominion). As the ancients, above all Aristotle, taught, one cannot apply the same method to every field of knowledge, appealing to the reassuring certainty that it can hypothetically guarantee in the areas of its more appropriate use. In short, there is no perfect uniformity between legal and scientific knowledge. Their points of departure are different, so are their aims, and so too are their methods. One proceeds from hypotheses, the other from *topoi*; one must "work", the other must persuade; one is founded on the theoretical-experimental method, the other on the rhetorical-dialectical method.[32] And just as science has its own way to seek after the truth (which for science is always c o r r e s p o n d e n c e to facts or axioms), so the law, in the classical perspective, seeks a truth that resides within disputation and the trial. By its very nature, the latter is not susceptible to the formalization otherwise guaranteed by science. Nevertheless, it is structured according to principles of controllability: in fact, if the proper method is restored to judicial decision-making, not only is it no longer arbitrary but it is also controllable. Vice versa, the attempt to confine it within a pseudo-scientific logical form ends up by subjecting it to the arbitrariness of the judger: an outcome certainly not wanted (note that Beccaria constantly extolled the syllogistic model as guarantee) but which necessarily ensues, because what ultimately founds the judge's discourse, from this perspective, is the power that justifies its existence. The price to be paid for the certainty of law would therefore seem to be inevitable: but only if one continues to conceive it in the modern Cartesian and Galilean terms to which, today, not even science subscribes.

The certainty of law should instead be understood as the possibility of determining that, in a certain context, at a certain time, and for certain subjects (in short, in t h a t p a r t i c u l a r controversy), that the judge's discourse is certain—to wit, true. The impossibility of constantly uniform discourse does not deprive man of the ability to state the truth; nor is this reducible, *sic et simpliciter*, to the model of logical-formal proce-

[31] On Gödel and Tarski's theorem, see Federico Puppo *The Problem of Truth in Judicial Argumentation* in *Interpretazione giuridica e retorica forense* Il problema della vaghezza del linguaggio nella ricerca della verità processuale, ed. Maurizio Manzin & Paolo Sommaggio (Milano: Giuffrè 2006), pp. 175–189 [Acta Methodologica II].

[32] For a comprehension of the classical rhetorical-dialectical method, see *Retorica Processo Verità* [note 24] 316 pp.; *La retorica fra scienza e professione legale* Questioni di metodo, ed. Gianfranco Ferrari & Maurizio Manzin (Milano: Giuffrè 2004) vi + 375 pp. [Acta Methodologica I]; *Interpretazione giuridica…* [note 31].

dures (which, moreover, cannot be tailored to the trial). Hence the most appropriate method seems to be the dialectical-rhetorical one of classical memory, not by chance reprised in the twentieth century—also in spurious and incomplete forms (as in Perelman's case)—when the flaws in the model of formalistic reference became strikingly apparent.

To conclude, not only does the use of automated procedures, or of information systems, not make it superfluous to study the classical procedures (where the adjective highlights their continuing validity despite the passage of time), but it renders it all the more urgent: the purpose being to confound highly dubious positions such as those that have been examined here. Let it be clear: I believe that the systems of legal computer science are indeed useful, but their use cannot legitimate a revision of legal method and reasoning in logical-formalistic terms. On the contrary, *palin ex arches*, they offer an opportunity to reflect as much on the role of logic as on that of method: a reflection which is therefore the authentic rethinking of the law from its first Principle.

FACULTY OF LAW
UNIVERSITY OF TRENTO, ITALY
FEDERICO.PUPPO@UNITN.IT

Theory of Legal Informatics

Erich Schweighofer

1 Introduction

Legal informatics covers the area between computers and law. This banal definition cannot constitute the basis for a legal discipline and clearly cannot satisfy the demands of legal theorists. Whereas on the one hand a strong fascination exists concerning this relationship, however, on the other hand a persistent critical tenor has to be stated, in particular from lawyers. This critical approach is best described by a sentence of the famous German sociologist Niklas Luhmann. In his early career, he also worked on information systems in administration.[1] Once he stated that there exists a relation between computers and law but that it is accidental like the one between cars and deer. This sort of a joke had some influence and put pressure—in particular in Germany—on specialists in legal informatics to develop a sophisticated theory.[2] In the Anglo-Saxon world, a practical approach predominates and not much thought is invested in such a theory. The same can be said concerning the Scandinavian region, but extensive fundamental research and a fine study of Peter Seipel in the 1970s on this topic have to be acknowledged.[3]

Like in other disciplines, the importance of legal informatics depends on its demand for legal education, research and practice. This need is not disputed for legal databases, e-government, e-justice, e-commerce, data protection or telecommunications; thus these parts are often part of the legal curricula, post-graduate courses and research programmes. The extensive and even stronger practice in these fields is noteworthy.

The advantage of a theory of legal informatics would be that of a clarification of the topics and methodologies of this science. Peter Seipel has strongly argued that a sufficient theoretical basis is indispensable for the establishment of legal informatics. The most important problem of legal informatics is similar to the one found in computer science: finding a compromise between the required formal model and the non-formal reality. In order to represent the legal system—which is a "non-formal world"—in a formal model, one needs a theory of the formalisation of information and of the knowledge in the process of legal application. Only then models of a legal system can be formed, that can also

[1] Niklas Luhmann *Funktionen und Folgen formaler Organisation bzw. Recht und Automation in der öffentlichen Verwaltung* Eine verwaltungswissenschaftliche Untersuchung [Habilitation] (1967).

[2] Thanks are due to Herbert Fiedler for providing this information.

[3] Peter Seipel *Computing Law* Perspectives on a New Legal Discipline (Stockholm: LiberFörlag 1977).

solve intelligent tasks in the ideal case. In recent years, legal ontologies have been the most prominent endeavour in this direction.

Unfortunately, legal informatics is only beginning to develop such a theory. Criteria for this theory would be the following: a model of the law-application process must be formulated comprising the sub-components of problem recognition, search for materials, interpretation and actual legal application; this theory would have to be universal, transparent and explicit and should make a flexible adaptation to regional subsystems possible.[4]

Computer science is relatively nascent and also does not have a fully developed theory.[5] Coy states, after a longer survey of the field: "We need a theory of computer science!"[6] The approaches range from engineering, organisation science, knowledge engineering to repercussions between formal model and non-formal reality. Computer science should not be a purely formal science but a science of the instrumental use of information and communication technologies (ICT).[7] The Austrian computer pioneer Heinz Zemanek considers as essential characteristics of computer science the tension between formal model and non-formal reality,[8] because the computer science can deal only with artefacts which more or less represent reality.

Contrary to computer science, law has a long-standing practice and a developed theory.[9] In practise, it is still discussed if law is more an art than a science. Recently, more comprehensive approaches like governance[10] have gotten more importance. Legal theory was and is a strong catalyser of legal informatics as results are mutually fruitful. Formalising law in a computer programme requires good theoretical understanding. So, automatic legal reasoning constitutes an important test for legal theories.

As law remains more art and practice than science, the result is the same as for computer science. No fully developed and worldwide accepted theory exists for legal automation. Legal informatics is thus left with many ideas, but not a strong basis for a theory.

Thus, any development of a theory in legal informatics has to take into account these problems. One could conclude that a theory would not help much; stronger and deeper practice but also basic research should be the focus of this discipline, following the Scandinavian example.

Therefore, a practical approach is taken in this contribution. The findings in this contribution are based on the "living example" of the IRIS (standing for *Internationales*

[4] Peter Wahlgren 'A General Theory of Artificial Intelligence and Law' in *Legal Knowledge Based Systems* JURIX 94: The Foundation for Legal Knowledge Systems, ed. A. Soetemam (Lelystad: Koninklijke Vermande 1994), pp. 79–91.

[5] Erich Schweighofer *Legal Knowledge Representation* Automatic Text Analysis in Public International and European Law (The Hague: Kluwer Law International 1999), pp. 3ff.

[6] Wolfgang Coy 'Für eine Theorie der Informatik' in *Sichtweisen der Informatik* ed. W. Coy et al. (Braunschweig & Wiesbaden: Viehweg 1992), pp. 17–32. [„Wir brauchen eine Theorie der Informatik!"]

[7] Coy, p. 18, note 6.

[8] Heinz Zemanek *Weltmacht Computer* Weltreich der Information (Esslingen & München: Bechtle Verlag 1991).

[9] *Einführung in Rechtsphilosophie und Rechtstheorie der Gegenwart* hrsg. Arthur Kaufmann, Winfried Hassemer & Ulfrid Neumann, 7. Aufl. (Heidelberg 2004) as well as *Black's Law Dictionary* ed. Bryan A. Garner, 8th ed. (Minneapolis: Thomson West 2004).

[10] For a definition of governance, see [UN Commission on Global Governance] *Our Global Neighbourhood* (1995) [http://www.cgg.ch/CHAP1.html].

Rechtsinformatik Symposion or International Symposium on Legal Informatics). This conference is now in its 11th year and constitutes, with more than 120 speakers and 300 participants, the biggest event in legal informatics in central Europe.[11] This conference strongly supports basic research but also applications. The strong participation in this conference is a conclusive argument for a more practical approach.

2 The Term 'Legal Informatics'

The origin of the term 'legal informatics' remains unclear. It was obviously coined by a non-native speaker and is thus rather a "Globish" than an English word. In England or America, the terms 'computers and law' or 'information technology and law' are widely used instead of legal informatics. It seems that some literal translation has been introduced in the language due to the importance and strength of the concepts of *Rechtsinformatik* (German), *rettsinformatikk* (Norwegian) *rättsinformatik* (Swedish) in the respective countries. Strong use in Europe (e.g. Netherlands, Germany etc.) supported the global spread of the term that is now quite well known worldwide.

The definition offered by the free encyclopaedia Wikipedia is clearly too limited and focused on library science: "Legal informatics is an area within information science", that is, it concerns the application of informatics within the context of the legal environment, e.g., information retrieval, law and policy, information access issues and practical issues.[12]

The core of legal informatics constitutes the relationship between computers and law. It is quite obvious that this area is complex and concerns several scientific disciplines. This finding has resulted in a long-lasting and not yet finished debate about how these questions should be properly addressed from the point of view of science. The finest debate can be found in the German-speaking countries; the following analysis concerns thus only these discussions.[13]

3 Approaches of Legal Informatics

Four main approaches can be distinguished:[14] legal informatics as an applied informatics ("hyphenated informatics") or an area of jurisprudence (purity theory), legal informatics as an integrative discipline including, among others, legal and informational approaches (integrationist theory), the methodology approach and the socioeconomic approach (socioeconomic theory).

For the p u r i t y t h e o r y , a branch of science should be precise, comprehensive, and simple and should have a common methodology. It is obvious that the various parts

[11] The conference is organised by Erich Schweighofer and Friedrich Lachmayer as general chairs and programme chairs, and Peter Mader and Dietmar Jahnel as local chairs. For more information, cf. http://www.univie.ac.at/RI/IRIS.

[12] http://en.wikipedia.org/wiki/Legal_informatics.

[13] See, e.g., Anja Oskamp & Arno R. Lodder 'Introduction: Law, Information Technology & Artificial Intelligence' *Information Technology & Lawyers* Advanced Technology in the Legal Domain, from Challenges to Daily Routine, ed. Anja Oskamp & Arno R. Lodder (New York: Springer 2006), pp. 1–22 or Colin Tapper 'Out of the Box' *International Review of Law, Computers and Technology 19 (2005), pp. 5–11.*

[14] Schweighofer [note 5], notes 5ff.

of legal informatics are complex and different. No unity of methodology of law and informatics can be observed and also the methodology remains strongly different. Thus, the topic of research has to be divided into two disciplines: legal informatics as an applied informatics ("hyphenated informatics") and "information technology law" (IT law) as the legal counterpart. The strength of this approach lies in its simplicity and practicability. Computer specialists or lawyers can use their respective methodology and apply it to a common subject, e.g. information technology and law. At conferences, in projects or in practice, both approaches meet and develop integrative solutions. Most computer specialists and lawyers follow this approach. Recently Maximilian Herberger has argued for this approach.[15] However, the complex phenomenon ICT and law cannot be described by solely legal or informational means; furthermore, this approach lacks a common theory.

Based on the status of the 1990s, Elmar Bund has argued for a supporting discipline excluding ICT law: "Legal informatics is the science of the application of means of information technology to information and decision structures in the legal system and to jurisprudence." Thus, various methodologies were distinguished: low methodology of the collection, of the preparation and processing of materials, the middle methodology of the judicial examination techniques and the higher methodology of the legal reasoning, of deontic logic, of the analogy and of case-based reasoning.[16] This approach is too defensive and does not explain new developments like e-government or even common concepts like e-persons.

The integration approach of Herbert Fiedler was already developed at the beginning of the 1970s.[17] As a learned mathematician and lawyer, he always argued for a more formal approach in law. In the 1970s, there existed strong support for this approach. Legal informatics was seen as an inter-disciplinary and independent discipline with the main components jurisprudence, social sciences, information sciences, and computer science as a necessary complement to jurisprudence. The main argument for this approach is that the phenomenon "ICT and law" can be best handled interdisciplinarily.[18] According to Steinmüller and Garstka,[19] legal informatics is the "theory about the relationship between EDP and law as well as their assumptions and consequences". The formal aspect was particularly stressed by Leo Reisinger:[20] "Legal informatics (in the broad sense) is the theory of structure and function of the legal system with regard

[15] Maximilian Herberger 'Rechtsinformatik: Anmerkungen zum Verständnis von Fach und Forschungsgebiet' in *Effizienz von e-Lösungen in Staat und Gesellschaft* hrsg. Erich Schweighofer et al. (Stuttgart: Boorberg 2005), pp. 29–34.

[16] Elmar Bund *Einführung in die Rechtsinformatik* (Berlin: Springer 1991). ["Rechtsinformatik ist die Wissenschaft von der Anwendung informatorischer Methoden auf Informations- und Entscheidungsstrukturen im Rechtssystem und in der Rechtswissenschaft."]

[17] Herbert Fiedler 'Automatisierung im Recht und juristische Informatik' *Juristische Schulung* (1970–1971), pp. 432–436, 552–607, 67–71, and 228–233.

[18] Herbert Fiedler 'Grundprobleme der juristischen Informatik' in *Datenverarbeitung im Recht* (1974), pp. 198–205. This approach is also followed by the Council of Europe [*Teaching, Research and Training in the Field of Computers and Law*, Recommendation No. (92) 15].

[19] Wilhelm Steinmüller et al. *EDV und Recht* Einführung in die Rechtsinformatik (Berlin 1970). [„Theorie über die Beziehungen zwischen EDV und Recht sowie deren Voraussetzungen und Folgen"].

[20] Leo Reisinger *Rechtsinformatik* (Berlin: de Gruyter 1977). ["Rechtsinformatik (im weiteren Sinne) ist die Theorie der Struktur und Funktion des Rechtssystems im Hinblick auf die Automation der Datenverarbeitung."]

to automation of data processing." Fritjof Haft sees legal informatics as practice- and application-oriented research of the information and decision structures in law.[21]

This interdisciplinary approach stresses the necessity of the discussion between the formal model and non- formal reality and aims for common concepts and findings. The research programme has been implemented quite slightly in practice and focuses on easier areas like those of the legal information systems or IT law.[22]

In later years, Fiedler has further developed his theory in considering informatics as an increasingly important method for law. The main concept is "model formulation" that should be seen as the *leitmotiv* of legal informatics.[23] Model and model formulation are central in today's science theory, methodology and scientific practice. Informatics should take the place of legal logics and support lawyers in the application of norms, in particular in legal subsumption. The problem of the integrative approach was and is its very strong selection criteria for newcomers. In practice, very few have the training to do research in an integrative way. Model formulation is a quite good example of a common concept between ICT and law.

The fourth approach of the author is based on the approach of Fiedler but takes into account the s o c i o e c o n o m i c realities of modern science. Firstly, legal informatics is a platform of those who deal with questions of ICT and law in a theoretical or practical way. Branches of the discipline are based on different methodologies: legal (ICT law), informatics (ICT in law), philosophical, theoretical and sociological (information society), economical (information and knowledge as the most important production factor). It has to be accepted that one scientist cannot handle the various disciplines alone. A sufficiently high number of researchers in legal informatics do not exist yet. Secondly, the results of this platform of research and practice, and, hopefully, also some contributions, form the basis for the development of a common theory between ICT and law. Model formulation, e-persons, e-transactions, e-documents and e-signatures should be named as examples. Further, a socioeconomic analysis of the changes of law in the information society is enabled, e.g. the topic of risk reduction by law. This layer model supports purity of the various methodologies at the basic level but strongly encourages interdisciplinary research at the higher level. The problem of this approach may be that many contributions remain at the first level and not sufficient research is done at the second level. This might be true if one considers the various talks at the IRIS conference. However, this finding reflects real constraints, e.g., insufficient support for basic research in legal informatics and thus has to be accepted as fact. The resulting strong exchange and cooperation between the various disciplines enables the pursuit of the main goal of legal informatics: deep insights and findings about the change of law in the information society. Similar to Fiedler's endeavours, a *leitmotiv* had to be developed. For the author,

[21] Fritjof Haft *Einführung in die Rechtsinformatik* (Freiburg & München: Alber 1977), pp. 19ff.

[22] Wilhelm Steinmüller *Informationstechnologie und Gesellschaft* Einführung in die Angewandte Informatik (Darmstadt: Wissenschaftliche Buchgesellschaft 1993).

[23] By Herbert Fiedler, 'Die zunehmende Bedeutung der Informatik für die Juristische Methodenlehre' in *10 Jahre IRIS* Bilanz und Ausblick, hrsg. Erich Schweighofer et al. (Stuttgart: Boorberg 2007) {forthcoming}, 'Modell und Modellbildung als Themen der juristischen Methodenlehre' in *e-Staat und e-Wirtschaft aus rechtlicher Sicht* hrsg. Erich Schweighofer et al. (Stuttgart: Boorberg 2006), pp. 275–281 and 'Richterliche Rechtsanwendung als Modellbildungsprozess' in *Effizienz von e-Lösungen…* [note 15], pp. 46–50.

the focus should be on the reduction of complexity by law and ICT. This approach would not only cover the description and analysis of present methods but also include the socioeconomic advantage of law in the information society. One of the main advantages of law is that unworkable complexity of social practice or economic life can be reduced to a feasible degree.

4 Topics of Legal Informatics

The following list of topics is based on the various workshops and contributions of the IRIS conference that covers all aspects of problems in information technology and law. This extensive list of topics proves the broad area of legal informatics but also the difficulty of establishing a common theory.

Theory of legal informatics: Development of a theory of legal informatics, formalisation of important legal concepts and its implications, development of legal ontologies, formalisation of rules by legal logic or concepts, legal reasoning, hypothetical reasoning etc.

E-government: Application of ICT to enhance the productivity the administration via exchange of information and transactions with citizens, businesses, and other arms of government, informatisation of the public sector, organisational change by use of ICT, back office productivity, optimum use of information and communication technologies and communication networks, reorganisation of procedures of administration, redesign of systems, automatic reasoning in administrative systems, electronic service delivery ("virtual administration": portals, forms download, transaction services); improvement and automation of procedures, knowledge management etc.

E-democracy (digital democracy): Use of ICT for enhancing democratic processes, organisation of elections (electronic voting), information and participation of citizens in the democratic process etc.

E-justice: Application of ICT to enhance the productivity of justice via exchange of information and transactions with citizens, businesses, and other arms of government, information systems, improvement and automation of procedures, electronic publication etc.

Legal information systems: Formalisation of law as a legal information system e.g. building and maintaining legal databases, assessment of legal databases, interfaces, coverage of the text collection, recall and precision of queries etc.

Advanced informatics systems and applications: Advanced applications in e-government, e-justice or e-commerce, development of legal ontologies, lexical ontologies, natural language processing, neural networks, logic or concept-based knowledge systems, theory of formalisation etc.

E-commerce: Application of ICT to enhance the productivity of commerce, e.g. applications like interactive websites with transactions services but also legal problems of e-commerce (e.g. E-Commerce-Directive).

Telecommunications: Application of ICT for the transmission of signals over a distance for communication but also legal problems (e.g. EU telecommunications package).

Intellectual property law: Legal problems of software, databases, utility models, patents etc. as methods for protecting intellectual property in ICT.

Data protection law: Legal problems of the protection of private information (e.g. information on health, crimes, finance) but also basic knowledge on collection and organisation of data by ICT.

Legal theory: Topics of legal theory with some relevance to legal informatics.

Visualisation: Improvement of publication of legal norms with visualisations but also, even more important, using videos in legal proceedings (e.g. recording of trials or statements of witnesses, etc.).

Science fiction: Description of new concepts (e.g. robots) in science fiction with regard to legal informatics.

5 Methods of Legal Informatics

The scientific methodology is as different as the various topics. The following methods can be regarded as basic for legal informatics: formalisation and model building in e-government, e-justice and e-commerce, programming, legal reasoning, establishment and maintenance of legal databases, design and development of applications in e-commerce, e-government and e-justice and legal dogmatics.

Formalisation and model building: In mathematics and logic, the real world has to be transformed into a formal system as a model (e.g. description) of external phenomena. Symbols, grammars, inference rules and axioms constitute the basis of the formal system and determine its strengths and weaknesses. An ICT-based legal application faces similar challenges than a mathematic model; however, the threshold for usability is much higher. If the model is not sufficiently strong to cover all relevant cases with a high quality, the system must be considered as not sufficiently developed and thus cannot be implemented in practice. This "scaling-up" problem is well known in artificial intelligence. Legal informatics plays a decisive part in developing appropriate models of law for efficient automation, be it e-government, e-justice or e-commerce.

Software development process: This structure for the development of computer software contains several sub-processes. In the technical part of programming, e.g., the process of writing, testing and maintaining computer programmes, the contribution of legal informatics remains small. The focus is rather on domain analysis, software architecture and testing.

Legal reasoning: The application of law to a particular case is called legal subsumption and also legal reasoning. Based on rules or cases, the applicable rules (or cases) have to be identified and applied. Basis for applicability could be deduction, induction or analogy. The core of artificial intelligence constitutes the emulation of such reasoning by a computer programme. A formal model of the law and the social reality has to be established. An inference mechanism must be developed in order to find "matches" between acts and relevant rules. Such systems, nowadays called knowledge systems, can be rule-based, case-based or concept-based. The wealth of the legal systems remains the main obstacle for a successful development. Whereas small applications are feasible, bigger ones are difficult to implement. Very often, the "scaling-up" problem can-

not be overcome due to lack of financing or overestimation of the complexity problem of social reality.

Legal databases: The text corpus of a legal system has to be transformed in a structured collection of records of data stored in a database management system allowing handling and querying the documents. Legal informatics is active in the design of database systems, the identification of the relevant text corpus, maintenance of the database, and reflection and analysis of test results, in particular concerning recall and precision.

Applications: The methods are mostly those of domain analysis and testing. The main contribution of legal informatics constitutes a smooth involvement of the various experts and a fine management of the process model.

Legal dogmatics: The application of legal rules to real cases involves particular knowledge of a domain and its rules. Legal dogmatics constitutes the core of legal practice. Legal informatics covers the following main sub-areas: general theory of ICT and law, telecommunications, data protection, electronic intellectual property law, e-government law, e-commerce law, e-justice law, cybercrime law and e-competition law. The main focus should be on a general theory of ICT and law.

6 Conclusions

The theory of legal informatics still needs deeper development. No consensus exists if the approach should be based on informatics, law or both. So far, the integrationist and socioeconomic approach seem to have achieved the best theoretical insights whereas pure approaches deliver the bulk of research results. The variety of topics and methods makes it difficult to identify genuine legal informatics methods. As emerging concepts, model building in law, legal knowledge representation or general theory of ICT and law could be identified.

For the future, the socioeconomic approach should be maintained as it leaves room for pure as well as integrative research and practice. However, the genuine theory should be more developed and deepened in order to have a sufficiently strong basis for a better founded discipline of legal informatics.[24]

ARBEITSGRUPPE RECHTSINFORMATIK
UNIVERSITY OF VIENNA, AUSTRIA
& EUROPEAN COMMISSION, BRUSSELS, BELGIUM
ERICH.SCHWEIGHOFER@UNIVIE.AC.AT

[24] Thanks are due to Anton Geist for his comments.

Integration without Emancipation: Reflections on "Social Europe"

Alexander Somek

Is the European Union undermining the national European social welfare state? Or has it succeeded at balancing the project of market building with social concerns?

An answer to this question presupposes a clarification of what social policy is to be about. Two conceptions can be distinguished. Social policy in a weak sense is aimed at enabling market-participation or compensating for the loss of a market-income; in a strong sense, social policy is designed to establish independence from market-demand. The distinction between these two conceptions can be developed by juxtaposing the notion of de-commodification (Polanyi, Esping-Andersen) with Eduard Heimann's attempt to attribute to social policy an emancipatory objective. On this basis, it can be seen how European integration has consistently contributed to the weakening of social policy in Europe.

It should not come as a surprise, then, that European integration has not been perceived by European citizens as a process of emancipation.

1 A Reality of Conflicting Interpretations

There is growing concern that the European Union is undermining the national European social welfare state without rebuilding, at the supranational level, an equivalent system of social protection.[1] It is feared, more precisely, that individual social guarantees and public goods are going to be scaled back to a residual level. In a word, the Union is perceived to be an agent of economic liberalism.[2]

At the same time, the Union is also cast in a different light. The Union creates opportunities by facilitating and encouraging—not least as a consequence of European cit-

[1] See, e.g., Fritz W. Scharpf *Governing in Europe* Effective and Democratic? (Oxford: Oxford University Press 1999).

[2] See, e.g., *Das kritische EU-Buch* Warum wir ein anderes Europa brauchen, hrsg. Attac (Vienna: Deuticke 2006); Guglielmo Carchedi *For Another Europe* A Class Analysis of European Economic Integration (London: Verso 2001).

izenship—the mobility of workers and students.[3] Both groups are given more access to the panoply of the social benefits of any Member State in which they happen lawfully to reside.[4] The Union can thus be said to have successfully attempted, since the mid-1980s, to balance the project of market building with social concerns.[5] It has developed, slowly and incrementally, its own set of policies[6] and begun to assist Member States in reforming existing regimes.[7] Not by accident, the draft constitutional Treaty explicitly endorses the "social market economy" as an epitome of the Union's commitment to social justice and inclusion.[8] Nothing could be further from the truth, hence, than depicting the Union in the stale colours of neo-liberalism. Rather, owing to the successful balancing of economic prosperity with solidarity and a deep commitment to the quality of life there seems to have emerged, in Europe, a powerful and potentially universally alluring alternative to "the American dream".[9]

This conflict of perceptions exists. It is part of Europe's social reality. It would be reckless to trivialise it by saying that the matter is merely about seeing the glass as either half empty or half full. Whether or not there is indeed a noticeable European social policy or whether the Member States have sufficient room to pursue their objectives is not even the issue; what matters, instead, is what is inside the glass.

This is not easy to determine because of the deep-seated ambivalence of social policy

[3] See, e.g., Case C-209/03, *The Queen (on the application of Dany Bidar) v. London Borough of Ealing and Secretary of State for Education and Skills* [2005] ECRI-2119.

[4] For introductions, see merely Catherine Barnard 'EU Citizenship and the Principle of Solidarity' in *Social Welfare and EU Law* ed. E. Spaventa & M. Dougan (Oxford: Hart Publishing 2005), pp. 156–180; Maurizio Ferrara 'Towards an »Open« Social Citizenship? The New Boundaries of Welfare in the European Union' in *EU Law and the Welfare State* In Search of Solidarity, ed. G. de Búrca (Oxford: Oxford University Press 2005), pp. 11–38. This may be a disquieting development of its own. See, more recently, Gareth Davies 'The Process and Side-Effects of Harmonisation of European Welfare States' *Jean Monnet Working Paper* (2006) 02/06 <http://www.jeanmonnetprogram.org/papers/06/060201.html>.

[5] See, ″e.g., George Ross 'Assessing the Delors Era and Social Policy' in *European Social Policy* Between Fragmentation and Integration, ed. S. Leibfried & P. Pierson (Washington: Brookings Institution,1995), pp. 357–388.

[6] For an overview, see Catherine Barnard 'EU 'Social' Policy' in *The Evolution of EU Law* ed. P. Craig & G. de Búrca (Oxford: Oxford University Press 1999), pp. 479–516.

[7] The one policy innovation that is usually appealed to in this context is the "Open Method of Co-Ordination". See David M. Trubek & James S. Mosher 'New Governance, EU Employment Policy, and the European Social Model' *Jean Monnet Working Paper* (2001) 6. Nevertheless, the advent of the Open Method of Coordination did not change the fact, described by Paul Pierson, that European social policy has a "hollow core". Its development is going to be the result of mutual adjustment rather than of central guidance. See Paul Pierson 'Social Policy and European Integration' in *Centralisation or Fragmentation?* Europe Facing the Challenges of Deepening, Diversity, and Democracy, ed. A. Moravcsik (New York: Council of Foreign Relations 1998), pp. 124–158 at p. 144.

[8] Article I-3/3 of the Draft Treaty establishing a Constitution for Europe reads as follows: "The Union shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment." See <http://gandalf.aksis.uib.no/~brit/EU-CONST-EN-cc/>. For a powerful critique, see Christian Joerges & Florian Rödl 'The »Social Market Economy« as Europe's Social Model?' *EUI Working Paper Law* 2004/8 <www.iue.it/PUB/law04-8.pdf>.

[9] See Jeremy Rifkin *The European Dream* How Europe's Vision of the Future is Quietly Eclipsing the American Dream (New York: Penguin 2004), pp. 3, 37–57 & 370.

to be simultaneously complicit with and opposed to a market society.[10] Any meaningful conception of social policy needs to address this ambivalence lest this type of policy is to come out as yet another variety of market-correction or re-distribution.[11] I do not mean to deny that there is great value to taking stock of the different purposes that a social welfare regime can be seen to serve;[12] any theoretically appealing conception, however, needs to explain its point by positioning such objectives vis-à-vis both the affirmation and the negation of the market.[13]

Accounting for an ambivalent social reality presupposes, thus, some conceptual clarification. To that end I use a set of three well-known distinctions: commodification and de-commodification, legal and social freedom, and the split in our roles as employers/workers, on the one hand, and consumers, on the other. Their use helps to distinguish between two different versions of social policy. Their meaning should emerge clearly already after the first two distinctions have been applied. I am using the third distinction, however, to explain in which respect economic liberalism r e m o v e s from social policy a remaining and precious ambivalence. Social policy is thus threatened to become an appendix of economic policy.

I begin with a discussion of commodification in the course of which I also turn briefly to its philosophically more eminent sibling, namely, reification. Both commodification and reification can be mitigated through strategies of de-commodification, that is, attempts to rescue humans from the loss of self-determination that they endure in a market society. Drawing on the work by Eduard Heimann I am going to distinguish between a weak, participation-enabling and a strong, freedom-restoring social policy.

Lest I be misunderstood, I hasten to add that this article is not intended to be a piece of normative political philosophy. Its aim is not to confront social realities with lofty normative ideas. Rather, I introduce the conceptual clarifications in the attempt to articulate the n o r m a t i v e h o r i z o n that accounts for the e x p e r i e n c e that is made by disempowered Europeans with the European Union.[14] The experience encapsulates a critical principle. At a societal level, the principle remains in an inchoate state. It needs to be

[10] See Eduard Heimann *Soziale Theorie des Kapitalismus* Theorie der Sozialpolitik [1928] (Frankfurt am Main: Suhrkamp 1980), pp. 167–168, who explains the ambivalence in terms of a dialectical relation.

[11] Usually, social policy is defined pursuant to T. H. Marshall's classic formulation as the use of political power with the aim of correcting, modifying or superseding the operation of the economic system in the pursuit of values that are not supported by market forces themselves. See T. H. Marshall *Social Policy* (London: Heinemann 1975), p. 15. Thus understood, social policy comprises a whole plethora of activities ranging from facilitating universal health insurance to the provision of affordable housing, free public education or maintaining hospitable urban environments. This understanding of social policy, however, sweeps too broadly. Any market-correcting activity can be given the appearance of "social policy". Subsidising a religious denomination would appear to be just as much social policy as the provision of security through an armed police force (rather than private security agencies competing in a market). Eventually, any use of political power would be tantamount to social policy.

[12] See, e.g., Robert E. Goodin, Bruce Headey, Ruud Muffels & Henk-Jan Dirven *The Real Worlds of Welfare Capitalism* (Cambridge: Cambridge University Press 1999).

[13] It is the great virtue of Robert Goodin's emphasis on the central objective of avoiding exploitation of people who are in some state of dependency. See Robert E. Goodin *Reasons for Welfare* The Political Theory of the Welfare State (Princeton: Princeton University Press 1998), p. 121. The analysis that follows focuses on a broader ambition, though, namely the preservation of freedom in a market society.

[14] For further methodological clarification, see, by Axel Honneth, 'Critical Theory' in *Social Theory Today* ed. A. Giddens & J. Turner (Stanford: Stanford University Press 1987), pp. 347–382 at p. 351 and 'Die soziale

made explicit by theory. In the process of articulation, the normative element underlying social experience comes to the fore. It amounts to an immanent critique of a core promise of liberalism. In a sense, then, the observations can be read as claiming why, from the perspective of the people affected, stronger social policy is morally more commendable than its weaker counterpart. Nevertheless, the immanent critique does not leave unaltered the ideal, for its success depends on drawing out its meaning. It is suggested that this process reflects a real social force. The argument, therefore, will be convincing only to those who share the same normative sensibility with regard to freedom that is articulated in the course of the critique.

I conclude with observations as to which type of social policy currently prevails in the European Union and that its prevalence explains why it is impossible for Europeans to experience the process of European integration as a process of emancipation.

2 Commodification

The first distinction that I would like to use is that of commodification and de-commodification. Their meaning will be forever associated with the work of Karl Polanyi and Gøsta Esping-Andersen.

The commodification of labour means that something which, by its very nature, is not produced with the aim of being sold on a market is, under capitalism, treated—and has to treat itself—as though it were precisely an entity of that kind, namely, a commodity.[15] Evidently, human labour is not a commodity. Not only can it scarcely be withheld from the market or stored when wages are low,[16] the activity of work is much too intimately e n - t a n g l e d with leading a life to be distinct from life itself. Life, in turn, is not tantamount to the dispensation of work-place obligations and the requisite training thereto. Life is m o r e than work. Since work is an integral part of life, work is also m o r e than m e r e work, if the latter is understood as the mindless execution of pre-defined tasks.

The commodified dependence of life on the labour market with its constitutive risk of social exclusion[17] almost necessitates the introduction of strategies of de-commodification. They are aimed at making people m o r e o r l e s s independent from markets by insulating the satisfaction of wants and needs from the nexus of voluntary transac-

Dynamik von Mißachtung: Zur Ortsbestimmung einer kritischen Gesellschaftstheorie' *Leviathan* (1994), pp. 78–93.

[15] See Karl Polanyi *The Great Transformation* The Political and Economic Origins of Our Time [1944] (Boston: Beacon Press 2001), p. 75.

[16] Polanyi was particularly intrigued by the economic peculiarities of fictitious commodities. See Fred Block 'Towards a New Understanding of Economic Modernity' in *The Economy as Polity* ed. Ch. Joerges et al. (London: ULC Press 2005), pp. 1–16 at p. 8. In the text above, I am exploring the meaning of de-commodification from a more existential angle.

[17] For a sketch, see Alexander Somek 'A Constitution for Antidiscrimination: Exploring the Vanguard Moment of Community Law' *European Law Journal* 5 (1999), pp. 243–271.

tions.[18] Thus understood, de-commodification stands for a bundle of measures that help to establish and to sustain a certain d e g r e e of market-independence.[19]

It should not go unnoticed that the great value of de-commodification, as a concept, lies in a significant normative ambivalence. This ambivalence is inherited, indeed, from the concept of commodification. I shall begin by examining the latter and then turn to the former.

The commodification of labour poses a threat to workers, but it can also be a well-spring of opportunities. When the command over elementary goods is dependent on market exchanges, the onset of a serious, but curable, illness could amount to a major catastrophe. It might result in the enduring exclusion of the person affected from the labour market. On what is perhaps a less dramatic level, commodification exacts from people adaptations to the demand of the labour market that may deeply compromise their lives. Commodification is the mode in which reification appears in economic form.[20] Reification, as was first to be observed by Lukács, affects the will.[21] In the context of reified social relations people perceive of themselves as though they were mere observers of their own rational choices. In a strange and, indeed, alienated way, they become detached from their lives.[22] Only a change of the power structure of production promises to reconnect them with their selves and, thus, to enable them to lead an autonomous life.

Nonetheless, the necessity to adapt to market pressure may also create the conditions under which people become capable of cutting themselves loose from social conventions, to break up fixes or to discover hitherto undiscovered potential. For some, at any rate, the indispensability of commodification can open up the door to self-transcendence and self-discovery.[23] Adaptation to the market and success in catering to the tastes of others may,

[18] See, generally, Gøsta Esping-Andersen *The Three Worlds of Welfare Capitalism* (Princeton: Princeton University Press 1990), pp. 21–22; for a critical assessment of Esping-Andersen's use of the concept from a feminist perspective, Ann Shola Orloff 'Gender and Social Rights of Citizenship: The Comparative Analysis of Gender Relations and Welfare States' *American Sociological Review* 58 (1993), pp. 303–328 at 311–314. I take it, however, that the critique does not extend to the usefulness of the notion itself.

[19] See *id.*, p. 37.

[20] In all fairness to Polanyi it needs to be noted that he himself wished to have ruled out all association of commodification with the fetishism of commodities. See Polanyi [note 15], p. 76, footnote.

[21] See Georg Lukács *Geschichte und Klassenbewusstsein* Studien über marxistische Dialektik, 10th ed. (Darmstadt: Luchterhand 1988), p. 179. The observation was also to be made by Max Horkheimer *Eclipse of Reason* (New York: Oxford University Press 1947), pp. 98 & 143. Interestingly, it is absent in Honneth's most recent attempt to vindicate the relevance of "reification" for a critical social theory. See Axel Honneth *Verdinglichung* Eine anerkennungstheoretische Studie (Frankfurt am Main: Suhrkamp 2005). I mention, in passing, that "governmentality" studies are getting at something similar when analysing "technologies of the self". For an introduction, see Thomas Lemke 'The birth of bio-politics: Michel Foucault's lectures at The Collège de France on neo-liberal governmentality' *Economy and Society* 30 (2001), pp. 190–207 at 202–203.

[22] For a more recent analysis, see Rahel Jaeggi *Entfremdung* Zur Aktualität eines sozialphilosophischen Problems (Frankfurt am Main: Campus 2005), pp. 71–90.

[23] Successfully copying with challenges is undoubtedly a source of pride and self-esteem. See, for example, David Schmidtz, 'Taking Responsibility' In David Schmidtz & Robert E. Goodin, *Social Welfare and Individual Responsibility. For and Against* (Cambridge: Cambridge University Press, 1998) 1-96 at 93-94. Usually, it is claimed in this context, that the market also elicits certain moral virtues such as perseverance, working for distant rewards, diligence, reliance, trust and a sense of fair dealing. For an overview of the relevant arguments, see Neil Gilbert *Transformation of the Welfare State* The Silent Surrender of Public Responsibility (Oxford: Oxford University Press), pp. 183–184.

in themselves, offer enriching experiences. At any rate, there must be some liberating thrill that explains the robust "you can do it" appeal of a liberal social model.[24]

Commodification, I conclude, can be both liberating and enslaving.

A similar ambivalence can be observed for its negative counterpart, namely, de-commodification.

According to one understanding, de-commodification consists of a set of strategies that aid people in sustaining long-term market-dependence through the creation of a "safety net". You do not fall if you fail. Thus understood, de-commodification is neutral with regard to freedom. It does not affect the basic distribution of social power in the relationship between capital and labour. The market may have its way, all that de-commodification does is to remove from it the omnipresent existential threat. Social policy supplies the means for substituting the temporal or permanent loss of an income that is earned on markets.

Alternatively, de-commodification can be conceived of as fundamentally altering the power structure on markets. The interests of the de-commodified workers are backed up by the force of the collective to which they belong. They have more power to determine their lives at the work-place than the commodified workers who are confronted with dismissal in the event that they try to assert their interests. De-commodification in this stronger sense is politically effective in that it changes the relationships among persons at the work-place. It is precisely such an alteration of power-relationships that advocates of a strong social policy want. Workers with a state-provided pension plan are more independent. They can 'call it quits' and terminate their contract without having to fear that their next employer might not offer some fringe benefit that would pay for the pension insurance plan.

De-commodification, thus understood, has both a pro-market *and* an anti-market thrust, just as much as commodification has dimensions that are favourable and inimical to self-determination.

3 Two Types of Social Policy

The distinction between commodification and de-commodification, taken by itself, does not suffice to formulate a tenable conception of social policy. It reveals ambivalence but it does not tell us how to deal with it.

At this point, it is useful to turn to Heimann's observation regarding the fate of freedom in a capitalist society. In his opinion, the lack of s o c i a l freedom is the most visible trait of developed capitalism.[25] By this he does not mean that the capitalist economy thwarts the equal legal freedom of most people by leaving a large majority in a position in which they are materially incapable of enjoying their formal rights. In fact, Heimann's concern with the lack of social freedom is not a concern with a lack of means or op-

[24] It should go without saying that an ethics of self-transcendence and self-invention does not necessarily imply the endorsement of a laissez-fair political economy. See, e.g., Robert Mangabeira Unger *False Necessity* Anti-Necessitarian Social Theory in the Service of Radical Democracy (Cambridge: Cambridge University Press 1987).

[25] See Heimann [note 10], p. 121.

portunities. What he objects to is that capitalism forces people into self-denial.[26] Every labour contract as a consequence of which a person becomes subordinated to the seemingly impersonal demands of the bureaucratic organisation of a *Großbetrieb* is, in a sense, a self-denying ordinance. They are legally free only to conclude a contract as a result of which they relinquish control over their lives.[27]

Consequently, Heimann accords to social policy the task of restoring, to the greatest extent possible, the freedom that capitalism cannot guarantee. This freedom-restoring mission draws out the meaning of de-commodification in a strong sense, for it takes into account how power-structures affect autonomy. Heimann links it with what he takes to be the critical principle underlying our perception of subordination, namely, the "dignity of work" [*Arbeitswürde*].[28] Arguably, this principle has two implications. It requires, where possible, the incorporation of life into work, that is, the infusion of processes of production with collective and individual self-determination.[29] In many instances, however, it merely demands sufficient respect for human pursuits that lie outside of work, ranging from child-rearing to simply having a good time. Indirectly, through alleviating work it can be recognised that people do not live for their work but work for their life. The minimisation of effort honours the importance of external pursuits.

Against this background, a distinction can be drawn between strong, f r e e d o m - r e s t o r i n g social policy and its weak, p a r t i c i p a t i o n - e n a b l i n g counterpart.[30] A participation-oriented social policy is almost exclusively concerned with keeping people in the position of market-participants. What matters, ultimately, is not transforming the relations of production so that people are more free, but aiding them, instead, to avail themselves of the wherewithal to be market-participants, either as producers or as consumers.[31] Social policy, thus understood, can accomplish this objective in either of the two following ways: through (more or less generous) transfer payments, or through methods that reintegrate people into the labour market even if such integration comes at the expense of the privileges and rights that have been previously associated with the more strongly de-commodified jobs.

Participation-enabling social policy is social policy, without doubt, for it exercises a de-commodifying effect.[32] People are not left completely at the mercy of markets. The "enabling state" helps them to re-inscribe themselves in the economic script. However, it is a type of social policy that is amenable to being subsumed under economic policy,[33] for all that the managers of a healthy economy need to be concerned about is that there

[26] See *ibid.*, pp. 123–124.

[27] This explains why, according to Heimann, the loss of freedom under capitalism is qualitatively different from the unequal freedom prevalent in a feudal society. *Ibid.*, p. 124.

[28] See *ibid.*, pp. 140–141 & 162.

[29] See *ibid.*, pp. 144 & 163.

[30] It is similar to what Titmuss once called the "industrial achievement-performance" model of social policy. See Richard Titmuss *Social Policy* ed. B. Abel-Smith & K. Titmuss (London: George Allen & Unwin 1974), p. 31.

[31] In a similar vein, Gilbert [note 23], p. 189 notes that the enabling state "promotes work-oriented policies, limits entitlements, and heightens public support for private responsibility".

[32] I fully agree with Block [note 16], pp. 7–8 & 13–14, that any market, to be stable and functional in the long-run, needs to be socially embedded.

[33] See Gilbert [note 23], p. 182.

are enough consumers making and spending their income. Consequently, participation-enabling social policy does not break the circle of commodification where reification is concerned.

4 Individualism and Dissociation

I am confident that the final pair of concepts will further clarify what is at issue here. It is the distinction—or rather, the dissociation [*Entzweiung*]—between us in our capacity as workers and in our capacity as consumers.[34] It plays a pivotal role in economic liberalism. I should like to explain this by linking the puzzling psychological fact of dissociation with the distinction that I introduced at the outset, namely, commodification and de-commodification.

Laissez-faire liberals and libertarians alike usually sing their praise of the market economy by invoking the value of "individualism".[35] This value, however, stands for the very removal of ambivalence from commodification. Commodification is deemed to be good simply because it creates the incentives to exact from oneself the greatest possible energy and to realise unrecognised potential.[36] Once the ambivalence of commodification has been removed—and the imprisoning and alienating effects of the labour market been erased from the picture—it does not matter to people what they do with their life. Why should it? All that people do is to realise productive potential and thereby generate the funds necessary to create utility for themselves. This indifference as to whether what we do is adequate to who we are[37] is congruent with what economic liberalism takes us essentially to be, namely, consumers. Consumers are nothing but faceless choosers. The more opulent the supply of goods, the greater our freedom of choice. Every additional commodity creates a new liberty. Consumer welfare is the theodicy of economic liberalism,[38] Wal-Mart its epitome.

Economic liberalism dissociates the life of the worker from the life of the consumer.[39] No sacrifice that has to be made for work appears to be out of proportion as long as it is rewarded with consumption. The meaninglessness of a job does not suffice to undermine its value as an "asset" for the generation of income,[40] nor does it matter that the maximisation of consumer welfare minimises workplace liberty.

Social policy in a weak, participation-enabling sense pursues de-commodification

[34] The idea to take *Entzweiung* into account is borrowed, of course, from Hegel. See G. W. F. Hegel *Grundlinien der Philosophie des Rechts* in his *Werke in 20 Bänden* hrsg. E. Moldenhauer & K. M. Michel, 7 (Frankfurt am Main: Suhrkamp 1969–1971), § 184, p. 339.

[35] See Friedrich A. Hayek *The Road to Serfdom* [1944] (London: Routledge 1993), pp. 9–10 & 40.

[36] Hence, if generalised, "individualism" is a perfectionist ethic and, if dominant in a society, incompatible with liberalism.

[37] For an elaboration of this point, see Georg Lohmann *Indifferenz und Gesellschaft* Eine kritische Auseinandersetzung mit Marx (Frankfurt am Main: Suhrkamp 1990).

[38] See Robert H. Bork *The Antitrust Paradox* A Policy at War with Itself, 2nd ed. (New York: Basic Books 1993), pp. 7 & 51.

[39] Heimann quite perceptively noted that capitalism looks at us in our capacity as consumers. The dissociation between worker and consumer is merely the extension of the dissociation between citoyen and bourgeois.

[40] See, interestingly, Phillipe van Parijs *Real Freedom for Al.* What (If Anything) Can Justify Capitalism? (Oxford: Oxford University Press 1995).

with the aim of sustaining the life of men and women as consumers, regardless of how much it may be filled with meaningless work or the pursuit of "self-improvement" ("life-long learning") in order to be fit for it. Social policy in the strong, freedom-restoring sense is about incorporating independence from the market into a person's life, in particular, at the level of the workplace. Weak social policy targets de-commodification at moments of impending exclusion (for example, mass redundancy, bankruptcy, long-term unemployment, etc.) but leaves commodification in place as long as people are active participants of society. Strong social policy infuses the commodified life of workers with de-commodifying relief.[41] It protects against dismissal even though people are, from a market perspective, merely substitutable factors of production. It recognises that they may have care-taking responsibilities and that they are concerned about the biographical unity of their lives or feel attached to certain places.[42] In a word, it embraces a positive individualism in contrast to the mere negative individualism boasted by the champions of laissez-faire.[43]

Against this background, strong social policy appears to be the immanent critique of its weak counterpart. Its pursuit seems to be indispensable to rescue a central value of economic liberalism. The argument to that effect has been made by Heimann. Without social policy, free legal subjects would be forced into denying their wants by submitting themselves to a work organisation in which they are treated as objects of shifting demands. If it were not for strong social protection the choices made by employees would not reflect the use of what Charles Taylor calls a contrastive vocabulary. It allows for strong evaluations without which the choices made by people would lack the dimension of inwardness that sets them apart from mere adaptations.[44] The opportunities created by a market society are indifferent to this condition of autonomy. More independence from market forces, in turn, promises to increase the scope for autonomous choices.

Advocates of neo-liberalism may want to reply that freedom to adapt to shifting circumstances is all there is in the system of mutual dependency that is coextensive with a market society. As long as this type of freedom is equally available to all, it is morally vindicated, in particular when everyone it better off than without it, including the least advantaged members of society. The counterargument presupposes dissociation, however, which can be overcome through integrating solidaristic and evaluative elements into work.[45] More freedom is possible, even, if necessary, at the expense of a modicum of consumer welfare.[46]

[41] I find the distinction between weak and strong social policy more helpful than Streeck's distinction between productivist and protectionist social policy, for it does not conceal a qualitative difference that needs to be observed here. See Wolfgang Streeck 'Competitive Solidarity: Rethinking the »European Social Model«' <http://www.mpi-fg-koeln.mpg.de/pu/workpap/wp99-8/wp99-8.html>.

[42] It recognises other interests, too, such as privacy interests.

[43] It is a negative individualism in that is does respect people as they are, but only in their capacity to dispose of themselves in adaptation of shifting demands.

[44] See Charles Taylor *The Ethics of Authenticity* (Cambridge, Mass.: Harvard University Press 1991), p. 39.

[45] On their association with happiness, see Robert F. Lane *The Loss of Happiness in Market Democracies* (New Haven: Yale University Press 2000), pp. 168–174.

[46] In the final event, the argument would have to proof that leading a dissociated life makes people, contrary to its own promise, unhappy. See Hartmut Rosa *Beschleunigung* Die Veränderung der Zeitstruktur in der Moderne (Frankfurt am Main: Suhrkamp 2005), pp. 386–390.

5 Weakening Social Policy: The »European Social Model«

With these clarifications, I am in a position to explain in which respect the European Union has contributed to the weakening of social policy in Europe.[47] More precisely, European social policy is best understood as the pursuit of social policy with the aim of making it weaker. It creates numerous incentives for the Member States to change the thrust of their programs and the mode of provision. In what follows I would like to highlight, briefly, a number of factors underpinning this general observation.

At the outset, it should be noted that the overall normative orientation of European social policy is, using Streeck's[48] parlance, productivist. Accordingly, resources ought to be used to facilitate market access for those who happen to be burdened with obstacles, no matter whether these result from national borders or the lack of personal skills. This core idea is articulated with resort to different vocabularies, for example, using the language of Amartya Sen's capability approach.[49] More often, the value of "inclusion" is invoked in this context. Variations of signification aside, it is obvious that the point of such social policy is not to shelter from, but rather to create, "equal opportunities for commodification".[50] Arguably, the leading vision for the Community and the Member States is that of the "enabling state", which is concerned, essentially, with access to employment, regulating privatised services and reallocating part of the responsibility for insurance for life-risks from the collective to the individual.[51]

Owing to its productivist orientation, European social policy is also instrumentalist in that it subordinates social to economic policy. The former is increasingly treated as though it were merely an extension of the latter. The official mantra has it that a happy and contented workforce is also likely to be more productive.[52] What is at stake is the optimal investment of human capital[53] into productive pursuits.

This basic normative orientation and its subordination to the attainment of economic objectives is manifest at different levels of European social policy and—along different paths—in two of its major fields, namely, employment on the one hand and social insurance on the other.

As regards levels, the limited success of positive harmonisation by the Community legislature is quite noticeable. Existing social policy legislation is a mere patchwork of regulations that were borne out of initiatives made in the 1970s and late 1980s. It is widely

[47] It cannot be claimed that it is solely responsible for this development.

[48] Streeck [note 41].

[49] See Simon Deakin 'The »Capability« Concept and the Evolution of European Social Policy' in *Social Welfare and EU Law* [note 4], pp. 3–24 at p. 7.

[50] Streeck [note 41].

[51] See Gilbert [note 23], pp. 43–52 & 180.

[52] See Presidency Conclusions of the Lisbon European Council (March 23-24, 2000) <http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/00100-r1.en0.htm>, para. 24: "People are Europe's main asset and should be the focal point of the Union's policies. Investing in people and developing an active and dynamic welfare state will be crucial both to Europe's place in the knowledge economy and for ensuring that the emergence of this new economy does not compound the existing social problems of unemployment, social exclusion and poverty."

[53] On the „human capital" as the (neo-)liberal revision of the traditional economic concept of labour, see Lemke [note 21], p. 199.

acknowledged that the legislation, taken as a whole, lacks a coherent design.[54] Much of the legislation bears the imprint of ad hoc efforts to put a more social face on the Common Market.[55] Paradoxically, however, as a result of the deepening integration, Member States have found themselves locked into an awkward situation. It has been famously described by SCHARPF as the "joint decision-making trap"[56]. According to SCHARPF, in certain key areas co-operation among states on the European level is likely to encounter insurmountable obstacles or to end in an impasse because of a lack of consensus among high-standard and low-standard states.[57]

The absence of political consensus explains also why, almost by default, a participation-oriented social policy is taking the lead along two different paths in two different fields of policy-making. The first path is the oft-hailed informal co-ordination of employment policy on the basis of the so-called Open Method of Co-ordination.[58] The second path concerns negative integration, that is, the removal of obstacles to free movement of economic activity and the elimination of "appreciable" distortions of competition. It affects health and pension insurance in Europe.

Nowhere could European social policy be more blatantly commodifying and participation-oriented than in the field of employment. The effect may well be intrinsic to the field. The European employment strategy[59] rests on four labour supply oriented guidelines that have been designed to ensure better access to the labour market, the creation of lasting jobs and of opportunities for self-employed occupations. The four guidelines come under the headings of "employability", "entrepreneurship", "adaptability" and "equal opportunity".[60] The employment strategy is not implemented through the use of "hard legislation" but rather on the basis of a special method of co-ordinating national policies. Its organising core, however, is the vision of the employee as an entrepreneur of his or her own endowments and skills.[61]

As regards negative integration, both the Treaty provisions on the free movement

[54] See Barnard [note 6], p. 496.

[55] *Ibidem.*

[56] Fritz W. Scharpf 'The Joint Decision Trap: Lessons from German Federalism and European Integration' *Public Administration* 88 (1988), pp. 239–278. See also his 'Die Politikverflechtungsfalle: Europäische Integration und deutscher Föderalismus im Vergleich' *Politische Vierteljahresschrift* 26 (1985).

[57] As he explains, "[I]f social-welfare and environmental regulations were harmonized at, say, the Danish level, the international competitiveness of economies with lower productivity would be destroyed. If exchange rates were allowed to fall accordingly, the result would be higher domestic prices and, hence, impoverished consumers. If devaluation were ruled out (e.g. in a monetary union), the result would be de-industrialisation and massive job losses." Scharpf [note 56], p. 79.

[58] For a most recent analysis, see Erica Szyszczak 'Experimental Governance: The Open Method of Co-ordination' *European Law Journal* 12 (2006) 4, pp. 486–502.

[59] <http://europa.eu.int/comm/employment_social/employment_strategy/index_en.htm >.

[60] For a discussion of how these objectives appear to conform with ideas that have been recently developed about the "third way", see Simon Deakin & Hannah Reed 'The Contested Meaning of Labour Market Flexibility: Economic Theory and the Discourse of European Integration' in *Social Law and Policy in an Evolving European Union* ed. J. Shaw (Oxford: Hart Publishing, 2000), pp. 71–102. There is a constitutional basis, as it were, for these labour supply side strategies. Article 125 EC Treaty commits the Member States and the Community toward developing a coordinated strategy for promoting a "skilled, trained and adaptable workforce and labour markets responsive to economic change".

[61] See Lemke [note 21], pp. 199–200.

of services and the rules prohibiting anticompetitive practices in the internal market[62] make it increasingly difficult for the Member States to sustain their traditional, nationally bounded social welfare regimes.[63] As a result of the judicial exposition of fundamental market freedoms, the recipients of welfare services are to be treated as consumers who are to be given a choice as to where to obtain their services.[64] The benefits of state supported health insurance can thus be enjoyed in a different Member State, regardless of whether the domestic system is based on reimbursement or on the provision of benefits in kind.[65] Correspondingly, service providers are treated as though they were commercial enterprises among others. In particular, state provided compulsory insurance plans and services are recast as potential monopolies and subject to justificatory constraints that have become increasingly narrowly and more rigidly defined by the European Court of Justice.[66] The resulting European welfare reform is not inspired by principles of social policy but by fundamental rules of market creation.

It is not the case, however, that this legal framework results in an all out attack on the state as a provider of social welfare.[67] Its existence and application, nonetheless, has a remarkable side effect, namely, the creation of a strong incentive for the state to retreat from both direct provision and monopoly.[68] When states are forced to compete with private providers or with providers from other countries they tend to become concerned about appearing comparatively weak and inefficient. In the face of impending political repercussion, submitting welfare to the legal discipline of competitive markets creates for the state an incentive to steal itself away from onerous responsibilities and to shift from direct provision to regulation.[69] Apparently, European social welfare states are moving into a direction in which states are still going to be in a position to regulate insurance markets and, possibly, the fees that may be legitimately asked by providers of services, however, the welfare service sector is likely to become trans-national and non-public. In the long term, this development might result, as it were, in increasing "Americanisation". Citizens may find themselves burdened with cumbersome choices and segregated into different classes according to the attitudes that they adopt towards the most elementary risks of life.

[62] Articles 49 & 86 EC Treaty.

[63] For an analysis, see Davies [note 4] and Vassilis Hatzopoulos 'Health Law and Policy: The Impact of the EU' in *EU Law and the Welfare State* [note 4], pp. 111–168.

[64] The legal regime for that has been established by the European Court of Justice in a number of innovative rulings. See, in particular, Case C-158/96, *Raymond Kohll v. Union des caisses de maladie* [1998] ECR I-1931 and Case C-385/99, *V.G. Müller-Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA* and *E.E.M. van Riet v Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen* [2003] ECR I-04509.

[65] For a reconstruction of the case law as it currently stands, see Hatzopoulos [note 63], pp. 135 & 142.

[66] See merely Julio Baquero Cruz 'Beyond Competition: Services of General Interest and European Community Law' in *EU Law and the Welfare State* [note 4], pp. 169–212. The *Venanzio* case, however, may have been a turning point in recent developments since it exempts insurance schemes incorporating the principle of solidarity from being classified as undertakings. Case C-218/00, *Cisal di Battistello Venanzio & C. Sas v. Istituto nazionale per l'assicurazione* [2002] ECR I-691. However, as Hatzopoulos, pp. 153, 156 & 167 observes, the law is next to impossible to predict as the Court seems to have abandoned all principles to mindless casuistry.

[67] According to Hatzopoulos, pp. 145 & 151, a pure national health system may stand a better chance of being exempted from the rigors of the internal market than a contribution-based insurance system.

[68] See Davies [note 4], p. 44.

[69] See *ibid*., 44, 49 & 53. Davies, p. 55, also notes, quite succinctly, that more liberalisation means more regulation, which results in a transfer of authority to Brussels.

6 Political Identity

Such a development affects profoundly the various de-commodifying shields that have so far sheltered life in Europe. In fact, it goes to the heart of the political identity of Europeans.[70]

Where national insurance plans are in place which cover the most severe risks of human existence (such as loss of health and employment)—either for all citizens equally and universally or according to some traditional, employment-based system of differential provision[71]—the management of risks is not treated as a matter of private calculation. The de-commodifying effect does not end where the mere availability of health or pension insurance on the job ends with confronting the employee with the onus of choosing one or the other plan, each of which containing different trade-offs between service and cost. The effect extends beyond that and is much stronger.[72] Every citizen is seen as part of a community whose existence liberates individuals from being burdened with unpalatable choices. It also links a n d likens everyone's life, in a very important respect, to the life of his or her neighbour.[73] In matters such as risk-assessments, where we are notoriously dependent on the opinion of others,[74] nobody needs to be afraid to end up worse off than any other. When all get the same they can all rest assured to have done enough for themselves. It also creates the common awareness of being part of a community. The commitment made by this community comes with an aura of unconditionality (which varies considerably, I need to grant, as to the social welfare regime affected). The community affirms to be there for you no matter what you have chosen to do. Whatever people happen to make in and of their life may affect their fortune and their weal but it does not threaten to undermine their existence. The community thus r e c o n c i l e s everyone with his or her life. Weakly commodifying insurance plans that confront people with countless options for trade-offs or with the choice of having no insurance invite gambling with life and health. People are not reconciled with their life.

From a distributive perspective, such a more or less unconditional endorsement involves cross-subsidisation. The cautious and fearful support the life of the more enterprising and daring, the vigorous lend their strength to the ailing.[75] Without it, to be sure, there would be no reconciliation of real differences among different ways of life. It exercises a strong de-commodifing effect. The life of citizens is conceived of, not least by themselves, as part of the life of the community inasmuch as the community emancipates everyone from the necessity to adjust one's life to the actuarial niceties of private insurance plans.

[70] On pride in the welfare state as a type of patriotism that was deemed permissible after the Second World War and as part of European identity, see *id.*, pp. 46–47.

[71] On the elementary differences between a contribution-based ("Bismarck") and a tax-based ("Beveridge") system, see Hatzopolous [note 63], pp. 116–117.

[72] On the following, see Alexander Somek 'Solidarity De-composed: Being and Time in European Citizenship' *European Law Review* 32 (2007) 787–818.

[73] See Davies [note 4], p. 49.

[74] Mary Douglas & Aaron Wildavsky *Risk and Culture* An Essay on the Selection of Technological and Environmental Dangers (Berkeley: University of California Press 1982), pp. 73, 80 & 85.

[75] The attribution of responsibility that accounts for the institutional fabric of a market economy becomes radically reversed. In a market economy, the law of demand automatically burdens individuals with a responsibility to adjust to existing opportunities.

In particular, health insurance schemes where people are not penalised for one or the other idiosyncrasy exercise freedom-enhancing effects. They prevent dissociation. The fat folks are free to overindulge, the smokers free to satisfy their craving and the climbers free to fall. Society cannot magically relief them of ailments or pain, but it mitigates the consequences.[76]

The sense of community that is created by a welfare state is reaffirmed by national systems which send out the message that everyone's life is equally important regardless of the value people happen to attribute to their health or old age at different stages of their life. The community values every person's life equally even when people themselves would at some point be disinclined to do so. They are thus not even presented with the option of depreciating themselves or discounting their future owing to economic pressure or the lure of other enjoyments. What is more, everyone's life is lived, where most elementary matters are concerned, on the basis of the s a m e assessment of risk and risk management strategy. Shared assessments of risks are essential to expressing commonly shared political commitments.[77]

The weakening of social policy, which results from increasing liberalisation, dispenses with the solidarity that likens one's life to the life of all others. Consequently, privatisation cuts deeply into the political self-understanding of European societies. Not only does life become de-communitarised, the management of risks itself becomes subject to de-politicisation. Experiences with welfare become fragmented and less shared. As a result, support for redistribution becomes diminished once lives are experienced as no longer linked to one another.[78] More importantly, problems of service and provision do no longer affect everyone equally. When pension insurance becomes privatised only an isolated group may be experiencing the impact of an "adjustment". The problems may then not reach up to the political level. Choosing a notorious example, if an Airline decides to phase out its pension plan this affects only certain groups of employees and not the population as a whole. The cutbacks may well be bemoaned by the public, but they are not likely to trigger collective political action.

7 Concordantia Catholica

The gradual weakening of social policy is based on a steadfast faith[79] in the concordance in the relation of social and economic objectives. Indeed, ever since the launching of the Lisbon Strategy,[80] which is about transforming Europe into the world's most dynamic and competitive knowledge-based economy, European economic and social policy appears

[76] For a discussion, see Alexander Somek 'Soziale Überdeterminierung: Über den internen Zusammenhang zwischen Diskriminierung und gedemütigter Freiheit' in *Freiheit, Gleichheit und Autonomie* hrsg. H. Pauer-Studer & H. Nagl-Docekal (Berlin: Akademie Verlag 2003), pp. 200–233 at 229-232.

[77] See, most recently, Dan M. Kahan, Paul Slovic, Donald Braman & John Gastil 'Fear of Democracy: A Cultural Evaluation of Sunstein on Risk' *Harvard Law Review* 119 (2006), pp. 1071–1109 at p. 1073.

[78] See Davies [note 4], p. 52.

[79] Faith requires the belief, in the absence of evidence, that a superhuman power is going to do something wonderful in the future. The legitimacy of a market economy is based on the faith that in some "long run" all people are going to benefit from markets – some more, others less, but everyone enough.

[80] See note 52.

to be based upon what might be called, with an eye to Cusanus' classic treatise,[81] a new *concordantia catholica*.

In the medieval intellectual world of Nicholas of Cusa, the church was perceived as being permeated and animated by "a sweet spiritual harmony of agreement."[82] It was thus taken to partake of the concordance of God's external existence and creation. Where there is eternal life, according to Cusanus, there cannot be contradiction, for otherwise instability and conflict would threaten such life with extinction. But since concordance, nevertheless, presupposes difference, he concludes that "the less opposition there is among these differences, the greater the concordance and the longer the life."[83] Concordance thus accounts for the ontological dignity of things: the more concordance, the greater the similitude to God.

In a similar vein, in the age in which there seems to be nothing outside, and no more alternative to, the market economy,[84] the European Commission would like to see its own *raison d'être*, the Common Market, as being ruled by a basic concordance of its elements. Unity and concord are to prevail in the relation of economic and social objectives. The European Council does not even perceive a tension, let alone a contradiction, between transforming the Community into the most competitive and dynamic knowledge-based market economy on the one hand, and the promotion of social cohesion and social inclusion on the other.[85] European social policy is rooted in the firm belief that the tension between capital and labour will magically disappear or, at any rate, somehow take care of itself—possibly through the use of the simulacrum of harmonisation, i.e., the Open Method of Co-ordination, and the deployment of hybrid strategies, combining legal directives with more soft-law.[86]

It does not come as a surprise, then, that "the European social model",[87] whatever it may be, does not present itself in institutional terms. Aside from obstacles of convergence that stem from recalcitrant historical differences of design, a mere "normative orientation" does not translate into a full-blown European social Welfare state. A welfare-state is more than just a tool of intervention into the distribution of wealth that is brought about by private transactions. It is a b attempt to combat the de-personalising effects of capitalism. It cannot be restricted, for example, to the regulation of working time when the protective effect of such a regulation may easily be subverted through flexible arrangements, such as fixed term contracts, part-time employment, outsourcing etc. A social welfare

[81] See Nicholas of Cusa *De Concordantia Catholica* [1443] trans. P. E. Sigmund (Cambridge: Cambridge University Press 1991).

[82] *Id.*, p. 5.

[83] *Id.*, p. 6.

[84] This age has been called by Block the period of "reascendant market liberalism". See note 16, p. 7.

[85] See Presidency Conclusions, note 52. Yet, there is a recognition that established European social welfare states are necessary to sustain "the transformation to the knowledge economy" and they also "need to be adapted […] to ensure that work pays, to secure […] long-term sustainability in the face of an ageing population, to promote social inclusion and gender equality, and to provide quality health services."

[86] See David M. Trubek, Partick Cottrell & Mark Nance '»Soft Law«, »Hard Law« and European Integration: Toward a Theory of Hybridity' *Jean Monnet Working Paper* (2005) 02/05.

[87] As a rhetorical gesture, the invocation of the European social model has recently given way to appeals to the "social market economy". This is an unfortunate development, for many reasons that have been explored by Joerges & Rödl [note 8].

state, in other words, needs to create a whole system of protection that makes it difficult for capital to find refuge in niches for the perpetuation of exploitation and control.

8 The Absence of Emancipation

Three conclusions can be drawn from the discussion above.

First, it is impossible for European citizens to perceive European integration as a process of emancipation. According to GIDDENS,[88] emancipatory politics aims at overcoming relations of dependence and hierarchy which are epitomised by exploitation, inequality and personal oppression.[89] One need not elaborate this notion any further in order to realise that no liberation of this kind can be associated with the EU—even the ado about antidiscrimination policy merely seems to reconfirm its absence.[90] Weak social policy does not create islands of liberty in the sea of economic necessity. Of course, European policies are going to foster even more internationally co-ordinated tinkering with methods of inclusion and are going to make more efforts to re-integrate those who have been eliminated from the labour markets; at the same time, however, more than ever before the control over their life is going to be taken out of the hands of European citizens.

Emancipation, to be sure, presupposes that those whose emancipation is at stake also take an interest in their freedom. Emancipation is not for happy slaves. There can be no strong social policy for people who believe in nothing but the redeeming value of affordable cell-phones and increasingly capacious MP3-players. It may well be the case, then, that Europeans currently get what they do indeed deserve.

Second, I surmise that it would pay to confront the central question and ask whether the endorsement of international capitalism, even though it helped to create an "ever closer union among peoples" in the past, should also define the path of European integration in the future. I do not think that, as of yet, we in Europe are prepared to embrace the highly diverse legacies of socialism, in one form or another, as part of our common inheritance. But I think we have all the reason seriously to reconsider the economics and politics of democratic socialism.

Third, what could be accomplished in the short term, even though it would require some effort, is constitutionalisation through de-constitutionalisation. With all the euphoria about the constitutional project, it has been overlooked that there has been a t l e a s t o n e g o o d r e a s o n to reject the Constitutional Treaty. The Treaty, just like the existing European constitution, constitutionalises t o o m u c h, in particular, where economic policy is concerned. There is too little leeway left for politics on both the national and supranational level. A constitutional debate over an organisation that has, at its core, an e c o n o m i c constitution, cannot ignore that this is a major question.

[88] See Anthony Giddens *Modernity and Self-Identity* Self and Society in the Late Modern Age (Cambridge: Polity Press 1991), pp. 210–212.

[89] *Ibid.*, pp. 214, 218, 223 & 228 contrasts emancipatory politics with "life politics" which he sees to originate from successful emancipation. However, aside from an identification moral entrepreneurship as a common element of diverse practices I do not see a coherent conception of "life politics" emerging from GIDDENS' analysis.

[90] For a further elaboration of this point, see Alexander Somek 'Concordantia Catholica: Exploring the Context of European Antidiscrimination Law and Policy' *Journal of Transnational Law and Contemporary Problems* 14 (2005), pp. 957–1001.

In fact, the constitutional debate needs to address alternatives to the economic liberalism that is currently entrenched as the supreme law of the land in Europe.

In consequence of a failure to engage in such a debate the Union would likely experience more *Thermidors* à la 29 May 2005 in the future. It appears as though the observation that was once made by Hannah Arendt regarding the French revolution can be given a much more general application: no European constitutional experiment can avoid being haunted by "the social question".[91][92]

COLLEGE OF LAW
UNIVERSITY OF IOWA, USA
ALEXANDER-SOMEK@UIOWA.EDU

[91] See Hannah Arendt *On Revolution* [1963] (London: Penguin Books 1990), pp. 47–58.

[92] I would like to thank Hartmut Rosa and John Holmwood for helpful comments and probing critique. As always, my wife Sabine helped me with a number of questions of expression. All errors are mine.

Pluralistic Structure of Social Norms in Asia

Teruji Suzuki

1 What are the Differences between the Legal Culture of Non-western Societies like those in Asia and that of the West?

Most laws in non-Western societies today were transplanted from Western legal systems as a result of modernization.[1] Although some of them were imposed during the colonial period, most Western laws were transplanted voluntarily by the new nations at the time of their independence or their political reforms because they considered them inevitable.[2] For them these seemed superficial, a fact of which they have later become more aware. Simultaneously, unofficial law in varied forms also survived as a part of social norms. Sometimes it was approved by courts or the administration. Then, it turned into official norms. In recent years, it has been recognized that indigenous elements of social norms based on traditional perceptions of people or on their traditional customs are key to understanding legal systems in these societies as a whole.[3] While empirical researches in the sociology of law or the legal anthropology of socio-cultural realities of Asian societies have not yet fared well on these issues, there are some interesting results (for examples, those on Indonesia[4] and Sri-Lanka[5]). According to them, there are cases that have functioned harmoniously, but no definitive rules yet.

Besides, there was a specific modification between indigenous norms and official legal policy during the Socialist period in Sri Lanka and China. According to Cohen,[6] a kind

[1] M. B. Hooker *Legal Pluralism* An Introduction to Colonial and Neo-colonial Laws (Oxford: Clarendon Press 1975).

[2] Teruji Suzuki 'Westernization as Public Interest in Non-Western Cultures' *International Review of Sociology* 8 (November 1988) 3, pp. 377–387.

[3] Motoyashi Omori 'Discrepancy and Conflict between the Conventional and the Current Norms in a Village of South Sri Lanka' in *Law and Culture in Sri Lanka* A Research Report on Asian Indigenous Law, ed. Masaji Chiba (Tokyo: [Tokyo University] Research Group on Asian Indigenous Law 1984), pp. 89ff. [RGAIL Working Paper].

[4] Daniel Fitzpatrick 'Disputes and Pluralism in Modern Indonesian Land Law' *The Yale Journal of International Law* 22 (Winter 1997) 1, pp. 171ff.

[5] M. L. Marasinghe 'The Use of Conciliation for Dispute Settlement: The Sri Lanka Experience' *International and Comparative Law Quarterly* 29 (1980) 2–3, pp. 389–414 and *Law and Culture in Sri Lanka* [note 3].

[6] J. A. Cohen 'The Chinese Communist Party and Judicial Independence, 1945-1959' *Harvard Law Review* 82 (March 1969) 5, pp. 967ff.

of conciliation that had traditionally prevailed in Chinese societies was revived by the Communist party as a Socialist form of judiciary, instead of the state courts, which were liquidated by the Socialization of the legal system during the Cultural Revolution.

In Sri Lanka the traditional form of conciliation survived in combination with the new idea of Socialist judiciary.[7] However, those cases both in China and Sri Lanka were later criticized and, then, reformed again. Therefore, we need time to conclude on the role of indigenous norms there.[8]

However, it is worth seeing the opinions based on their researches. Some Western observers (from the classical school) like Max Weber[9] understood them as a kind of feudal social order, negatively affecting the adoption of Western law and playing a negative role for the modernization of the legal system. However, despite the fact that the pluralistic and contradictory character of indigenous legal norms contrasts with the modern legal system transplanted from the West, there are indeed harmonious functions of varied legal norms in some societies in Asia.[10] Therefore, we may find some sources of theoretical innovation as a result of recent research.[11]

Other fields of social sciences, which have approached the same issues from the various aspects such as economic development or transition of socio-economic system, have tended to conclude that the traditional element of society is a positive element for further social development. They even evaluate the non-democratic period of the modernization process in these societies by using the terms "developmental state".[12]

Modern legal system according to European legal history has logically shaped as "*Ratio Scripta*" since Roman law. The successive reception of it was followed by developments of legal sciences such as the Historical School of German jurisprudence.[13] It is also natural to add the Christian tradition based on the Roman Church and the legal spirit originated from Canon law.[14] These two elements have been particularly important in order to comprehend legal culture in Europe.

On the other hand, there are no such spiritual and religious backgrounds in Asia. It is true that Confucianism is influential in Asia, particularly in East Asia, but it is not

[7] Teruji Suzuki 'Conciliation as a Means of Popular Justice in the Socialist Period of Sri Lanka, 1958-1977' in *Law and Culture in Sri Lanka* [note 3], pp. 59ff and Neelan Tiruchelvam *Ideology of Popular Justice* (1973) [Working Paper for Program in Law and Modernization at the Yale Law School, No. 21].

[8] Masaji Chiba *Legal Pluralism* Toward a General Theory through Japanese Legal Culture (Tokyo: Tokai University Press 1989).

[9] Max Weber *Gesammelte Aufsätze zur Religionssoziologie* I–III (1920–1921), cf. *Max Weber on Law in Economy and Society* ed. Max Rheinstein (Cambridge, Mass.: Harvard University Press 1954).

[10] Chiba *Legal Pluralism* [note 8].

[11] *Asian Indigenous Law* In Interaction with Received Law, ed. M. Chiba (London & New York: KPI 1986).

[12] By A. Jerayatnam Wilson, *Politics in Sri Lanka* 1949–1979, 2nd ed. (London: Macmillan 1979) and *The Gaullist System in Asia* The Constitution of Sri Lanka (1978) (London: Macmillan 1980) as well as Robert Wade *Governing the Market* Economic Theory and Role of Government in East Asian Industrialization, 2nd ed. (Princeton, New Jersey: Princeton University Press 1990).

[13] Carl J. Friedrich *Philosophy of Law in Historical Perspective* (Chicago: Chicago University Press 1963) and Reinhard Zimmermann 'Savigny's Legacy: Legal History, Comparative Law, and The Emergence of European Legal Science' *Law Quarterly Review* 112 (1996), pp. 576–605.

[14] H. J. Berman *Law and Revolution* The Formation of the Western Legal Tradition (Cambridge, Mass.: Harvard University Press 1983).

as predominant as Christianity in Europe. There were debates on the influence of Confucianism in East Asia in relation with the economic development of the 1970s and 1980s because the rapidly developed East Asian countries such as South Korea, Taiwan, Hong Kong and Singapore are all influenced by the Confucian culture[15]. However, it was found that the rapid economic development was not limited to the Confucian-oriented countries but extended to countries such as Thailand, Malaysia and Indonesia, which have different religious backgrounds.

In general the religious and cultural background of Asian societies is so decentralized that, in the minds of people, such pluralistic or scattered phenomena as behavioural norms are common in every aspect.[16] Therefore, despite the fact that the centralized legal system as an official legal system based on the Western model functions as a unified legal norm of the existing society, it is obvious that various societies have differently shaped social norms.

2 What are the Characteristics of Legal Culture in Asia?

Except a modern legal system, which has secured formal resolution of conflicts, there is a wide application of amicable methods for conflicts resolution. Amicable methods are characterized by their easy formalities (easy access to legal remedy for concerned people), the informal character of judges, speedy resolution, and inexpensive cost. However, the weakness of legal resolution compared to modern litigations by courts or the other state agencies is that the latter are decisive in conflict resolution by judging the winning and losing sides.

However, it is not necessary for legal proceedings, in the case of amicable conflict resolution, to be judged by professional lawyers, but instead, by qualified experts. On the other hand, litigations in an advanced Western society like the USA are highly developed and as the result legal professionalism is prosperous, see for example the high ratio of professional lawyers to the population in the USA. It has been supported by highly developed law schools and has no doubt been established as a legal institution. However, less advantaged people tend to be reluctant to use it as a means of conflict resolution.

There is another characteristic that should be mentioned in the case of amicable resolution, i.e. conciliation. Contrary to a lawsuit, where the concerned parties, defined as the plaintiff and the defendant, never restore their relationships afterwards, the amicable means of conflict resolution that is conciliation is not so risky in damaging relations, because of the application of harmonious rules for the given society.[17]

[15] Dore, Ronald 'Confucianism, Economic Growth and Social Development' in *Social Evolution, Economic Development and Culture* What it Means to Take Japan Seriously, ed. D. Hugh Whittaker (Cheltenham: Edward Elgar 2001).

[16] Livingston Armytage 'Justice in Afghanistan: Rebuilding Judicial Competence after the Generation of War' *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht / Heidelberg Journal of International Law* 67 (2007) 1, pp. 185ff.

[17] Mahathma Gandhi *Autobiography* The Story of my Experiments with Truth trans. Mahadev Desai (Washington, D.C.: Public Affairs Press 1954).

Conflicts could be judged and sentenced by litigation for the winning and losing sides and severely strain relationships. As a result, the person who lost the case would not see the person on the other side of the lawsuit again. Thus human relations are completely destroyed by litigation. Therefore, it is then a question of how we could expect that litigation, as a legal institution once established for the purpose of realizing social justice, could improve its function. If it cannot, then, it should be a question of why litigation cannot accomplish the anticipated role as a legal institution.[18]

That is the reason why an amicable resolution like the conciliation is valued as a complementary institution, where the harmonious rules of society have been applied for the purpose of conflict resolution. That way, people are not necessarily separated into the winning and the losing side.[19] Traditional value system including indigenous rules could be restored through the application of harmonious rules as a part of the legal norms of today's society. Conciliation is one of the most popular institutions for amicable resolutions, and is usually performed by socially experienced people and experts. Even though they have a complementary role, amicable resolution forms as legal institution have become a part of the judicial system of the nation.

3 The Importance of Studies on Legal Culture in Asia

Some legal scholars such as Leon Petrazycki,[20] Eugen Ehrlich[21] and Max Weber[22] observed pluralistic legal cultures based on several religious, cultural and social structures which existed at the time of their research on European cultures, almost a century ago. However, their comparative scopes were limited to the aspects of European cultures alone (within European jurisprudence).

Today non-Western societies are all full members of the global world society and rapidly developing socio- economically, and have become new players of the world without suffering from the burden of their traditional indigenous cultures. Both Stanisław Ehrlich and Adam Podgorecki[23] stressed that law, in the broadest sense, is a tool for social engineering. Without efficient function of law and Legal norms there is no social development, and therefore, no economic development either. Ehrlich developed the idea as a criticism on the Socialist Legal system.[24]

We had better see about the complex structure of social norms and their harmonious functions based on pluralistic legal norms. Perhaps it is a kind of hybrid model of legal system.[25] It is worth seeing the uniqueness of Asian societies be applied in Western soci-

[18] Critically commenting on legal culture in the USA by quoting Gandhi's message, see Edgar Bodenheimer *Treatise on Justice* (New York: Philosophical Library 1967).

[19] Marasinghe [note 5].

[20] N. S. Timasheff *An Introduction to the Sociology of Law* (New York: Harvard University Committee on Research in the Social Sciences 1939) [Harvard Sociological Studies III].

[21] Eugen Ehrlich *Grundlegung der Soziologie des Rechts* (Müchen & Leipzig: Duncker & Humblot 1913).

[22] Weber [note 9].

[23] Adam Podgorecki *A Sociological Theory of Law* (Milano: Giffrè 1991).

[24] Stanisław Ehrlich *Oblicza pluralizmów* (Warszawa: Państwowe Wydawn. Nauk 1980).

[25] Chiba *Legal Pluralism* [note 8] and Stanisław Ehrlich *Wiążące wzory zachowania* Rzecz o wielości systemów norm (Warszawa: Wydaw. Naukowe PWN 1995).

eties. For example, some small scale conflicts such as traffic accidents, housing troubles and family conflicts are preferable to be resolved by amicable resolution than through lawsuits.

FACULTY OF LAW
TOKAI UNIVERSITY, TOKYO, JAPAN
KOZMINSKI LAW SCHOOL, WARSAW, POLAND
SUZUKI@KOZMINSKI.EDU.PL

Neutral Principles, Justice and Law

Gülriz Uygur

Regarding the relationship between law and ethics, our claim is that the moral grounding of law depends on principles. In Ronald Dworkin's view, since legal principles are moral in form and law consists of principles beside rules, principles lead to a link between law and morality.

On the other hand, in the Dworkinian and Rawlsian views, we may claim that these principles are also neutral principles. In order more clearly to explain this point, it should be insisted upon the meaning of neutrality. Before explaining this meaning, it may be claimed that neutrality is also a principle. Though this claim is right, we insist that principles which underlie a legal system are neutral, i.e. neutral principles are based on a neutral conception of principles.

1 Meaning of Neutrality

Neutrality has different meanings in different contexts. For this reason, it seems suitable to examine in which contexts this term is used. It may be understood within the context of impartiality. For example it may be defined "as requiring non-intervention (or non-involvement) or impartiality (or equal promotion of conflicting interests). In other words, the party who wants to be neutral between two competing parties must either disengage itself from the conflict altogether, or try to affect the interests of the parties to an equal degree".[1] On the other hand, impartiality and neutrality are not the same concepts. There are differences between them. "Neutrality is a passive policy, without a core principle other than the avoidance of trouble, and with its limits defined by the belligerents. But impartiality—whether defined by the parties to the conflict or the actor himself—is a coherent position predicated on a judgement of the protagonists".[2]

In this regard, neutrality may be understood as a passive attitude. We may support this claim with a specific conception of neutrality, namely the conception of value neutrality. In fact, neutrality is generally understood in this context. According to this approach, neutrality means being free from value.

[1] Wojciech Sadurski 'Neutrality of Law towards Religion' *Sydney Law Review* (1990), p. 453.

[2] Dominick Donald 'Neutal is not Impartial: The Confusing Legacy of Traditional Peace Operations Thinking' *Armed Forces & Society* (Spring 2003), p. 418.

Value neutrality holds together pluralism, positivism and proceduralism. In the field of legal positivism, as a requirement of the distinction between fact and value, law is considered as morally, politically and evaluatively neutral. In this respect, neutrality requires being value-free and in harmony with the model of the impartial, detached observer. According to this model, norms could be described and analyzed objectively as norm-facts.[3] We may connect this model with the positivism's separability thesis. This thesis requires separation between law and morality. According to this thesis, at least, there is no necessary relationship between law and morality.[4] Since value neutrality promotes tolerance, pluralism is also possible. Finally, proceduralism requires neutral procedures.[5]

There are various reasons to adopt this conception of neutrality. One of them is that "no one should be allowed to dictate to any one else what their convictions and priorities in life should be".[6] In this regard, we may discuss neutrality in the context of liberal democracies, especially as the requirement of liberty and autonomy. For example, according to Robert Audi, "a liberal democracy is one that promotes liberty, as opposed to maintaining the minimum level of freedom required for autonomous voting by the populace".[7] If so, one may argue that a liberal state should be neutral between competing comprehensive conceptions of the good and provide suitable conditions for improving autonomy. The distinct feature of a liberal state is that it does not promote any ideals of the good. Rather, liberal states provide suitable circumstances to citizens for improving their conceptions of the good.[8] In this regard, neutrality concerns the claim that actions of the state should disregard all divisive differences among the citizens.

But value neutrality is not sufficient to explain the liberal democracies and the liberal state, since this state is based on specific values. Common critics argue that the liberal state fails to be neutral and arbitrarily favours one form of conception of good over others. In this regard, the problem is connected with the negative aspect of neutrality. According to Audi, neutrality has two dimensions. One requires that state or law does not favour any particular or comprehensive doctrines; the other implies limited neutrality which requires the prohibition of some conducts, such as harms to other persons.[9] Then one may say that the last dimension of neutrality imposes limitations on the conceptions of the good. In this context, it may be suitable to claim that the meaning of neutrality cannot be value-neutral. For example, justice and liberty are important values for the liberal state. Then this state should not be neutral about such values. Instead of this, it should be neutral about "the aesthetic preferences of citizens in their own dwellings, their choice of friends, and their vacation preferences".[10] Then, neutrality and the good can be compatible with

[3] Julius Cohen 'The Myth of Neutrality in Positive Legal Theory: Hart Revisited' *The American Journal of Jurisprudence* (1986), p. 97.

[4] Randolph Marshall Collins 'Constitutionality of Flag Burning: Can Neutral Values Protect First Amendment Principles?' *American Criminal Law Review* (1991), p. 894.

[5] Collins, p. 896.

[6] Raphael Cohen-Almagor 'Between Neutrality and Perfectionism' *Canadian Journal of Law and Jurisprudence* VII (1994), p. 225.

[7] Robert Audi 'Moral Foundations of Liberal Democracy, Secular Reasons, and Liberal Neutrality toward the Good, *Notre Dame Journal of Law* 19 (2005), p. 199.

[8] Cohen-Almagor [note 6], p. 217.

[9] Audi [note 7], p. 204.

[10] Audi, p. 210.

each other, i.e. neutrality does not exclude the good. This point can easily be seen in the context of limited neutrality.

The limited neutrality may be explained through the conceptions of the good which are concerned with human flourishing. If one regards morality as an institution which guides correct decisions, it is natural to suppose that neutrality should give a place to the good with which it is connected.

From this point, we may say that neutrality does not require allowing any conception of the good, whatever this might be. For example, Ronald Dworkin and John Rawls accept that neutrality does not prevent limitations on the conceptions of the good. Rawls makes a distinction between comprehensive doctrines and reasonable comprehensive doctrines, since in the pluralist society there are also comprehensive doctrines behind the reasonable comprehensive doctrines.[11] Since reasonable comprehensive doctrines are compatible with the essentials of democratic regimes, fair social co-operation based on mutual respect is possible. On the other hand, there is a difference between Rawlsian and Dworkinian arguments about the neutrality. According to Rawls, since people agree only on the basic principles of society, the state must be neutral with regard to other matters.[12] On the other hand, "Dworkin advocates neutrality in order to respect to the capacity of persons as free citizens or autonomous agents to choose their conceptions of the good for themselves".[13]

The other division regarding the neutrality is the distinction between negative and positive meanings of it. Negative neutrality claims that the state does not intervene in religious matters, while positive neutrality requires the opposite of this, namely "the state actively intervenes in religious matters".[14]

We may explain this division with the two forms of neutrality. These forms are formal neutrality and substantive neutrality. Douglas Laycock explains the meanings of these forms of neutrality according to religious neutrality and moves away from Philip Kurland definition of religious neutrality. This definition is: "The (free exercise and establishment) clauses should be read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden".[15] According to Laycock, this standard resembles the standard of equal treatment and equal opportunity.[16] For example, with respect to formal equality, if the state gives financial aid to the private schools, it must also give to the religious schools.[17] According to Laycock, substantive neutrality is: "the religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or non-observance".[18] This

[11] Cohen-Almagor [note 6], p. 226.
[12] *Ibidem.*
[13] *Idem.*, p. 227.
[14] L. Scott Smith '»Religion-Neutral« Jurisprudence: An Examination of its Meanings and End' *William & Mary Bill of Rights Journal* 13 (2005), pp. 815–870 at p. 819.
[15] Douglas Laycock 'Formal, Substantive, and Disaggregated Neutrality toward Religion' *Depaul Law Review* (1990), p. 999.
[16] *Ibidem.*
[17] *Idem.*, p. 1001.
[18] *Ibidem.*

conception requires that government encouragement and discouragement to religion is minimized. Substantive neutrality is "akin to equal impact, equal outcome side of the affirmative action".[19] It is hard to apply substantive neutrality, since this neutrality requires making more judgements than formal neutrality does.[20] It must be examined in each case whether religion has been encouraged or discouraged.

Formal neutrality requires that the law must "treat all races with equal solicitude and all views with equal tolerance".[21] This neutrality demands that government should remain neutral in this limited sense. According to Suzanna Sherry, this limited neutrality principle does not say anything about society's ultimate values. It does not imply any requirement to foster basic values. For example, the formal neutrality only requires that government does not improve autonomy on the basis of race or does give equal opportunity for all different views. In this regard, formal neutrality and formal equality are connected with each other. But equality and neutrality are not the same concepts. According to Laycock, "equality refers only to tangible penalties and rewards; neutrality also includes expression of government opinion".[22] On the other hand, substantive neutrality or equality of resources allows different treatment. For this reason, formal neutrality and substantive neutrality may conflict with each other.[23] Namely, to enhance liberty, the liberal state may need to put limits on certain views.

2 Neutral Principles

Having examined the meaning of neutrality, we may say that neutral law consists of neutral principles. Depending on the meaning of the neutrality we may divide these principles into two categories.

The meaning of neutral principle is not totally lacking in value content. Neutral principles are based on values. These values are not listed from among a personal collection of political, economic, or social preferences,[24] but concerned with the public conception of justice. It would be helpful at this point to make reference to Rawls's views about neutrality.

Rawls makes a distinction between procedural neutrality and neutrality of aim. According to Rawls, procedural neutrality is related with the neutral values such as impartiality, consistency in application of general principles to all reasonably related cases, equal opportunity for the contending parties to present their cases and the like which justify or legitimize this procedure.[25] Neutral values do not only include values which regulate fair procedures for adjudicating between conflicting claims, but also values "that

[19] *Idem.*, p. 1003.
[20] *Idem.*, p. 1004.
[21] Suzanna Sherry 'All the Supreme Court Really Needs to Know it Learned from the Warren Court' *Vanderbilt Law Review* 50 (1997), p. 477.
[22] Laycock [note 15], p. 1011.
[23] Sherry [note 21], p. 478.
[24] John O. Newman 'Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values' *California Law Review* (1984), p. 207.
[25] John Rawls 'The Priority of Right and Ideas of the Good' in his *Collected Papers* ed. Samuel Freeman (Cambridge, Mass.: Harvard University Press 1999), p. 458.

underlie the principles of free rational discussion between reasonable persons fully capable of thought and judgement, and concerned to find the truth or to reach reasonable agreement based on the best available information".[26] We may connect procedural neutrality with formal neutrality.

In contrast to procedural neutrality, neutrality of aim requires moral values. Rawls's conception of neutrality of aim means that state should not be neutral towards all the views espoused by its citizens. Rawlsian justice requires not only neutral values but also moral values, since two principles of justice, which are the principles of political conception of justice, are substantive and require moral values which are understood by reference to its political conceptions of society and person.[27] Rawls says "The aims of basic institutions and public policy of justice as fairness can be said to be neutral with respect to comprehensive doctrines and their associated conceptions of the good. Neutrality of aim means that those institutions and policies are neutral in the sense that can be endorsed by citizens generally as within the scope of a public political conception".[28] Then this neutrality implies that the public conception of justice is neutral common ground. Namely, it is shared by citizens and does not depend on any comprehensive conception.

Neutrality of aim should be coherent with important aspects of Rawlsian justice, e.g. priority of right, the idea of permissible conceptions of the good and political virtues. Neutrality of aim requires that the basic structure of society and public policy are not designed to favour any comprehensive conception or doctrine. This neutrality does not require that public conception of justice has no effect on comprehensive doctrines or even on ways of life. According to Rawls, this conception includes political virtues such as civility, tolerance, reasonableness and the sense of fairness and encourages them.[29] To sustain fair social cooperation between citizens who are regarded as free and equal, a constitutional regime should strengthen these virtues.[30]

Connected with this point, one may find the idea of permissible conceptions of the good in the Rawlsian justice. Rawls accepts that the political conception of justice does not encourage all of the comprehensive conceptions. To maintain certain fundamental values, it excludes some ways of life. The important point is that "these inevitable exclusions are not to be mistaken for arbitrary bias or injustice".[31] Thus, it is possible to make a connection between the aim of neutrality and substantive neutrality.

Then, in the Rawlsian conception of justice while some comprehensive doctrines are not favoured, others survive. For example, Rawls says that "there are at least two ways in which comprehensive doctrines may be discouraged: those doctrines and their associated ways of life may be in direct conflict with the principles of justice; or else they may be admissible but fail to gain adherents under the political and social conditions of a just constitutional regime".[32] His main aim is to provide necessary conditions for justice. In

[26] *Ibidem.*

[27] John Rawls *Justice as Fairness* A Restatement, ed. Erin Kelly (Cambridge, Mass.: Harvard University Press Cambridge 2003), p. 153, note 27.

[28] *Ibidem.*

[29] Rawls 'The Priority…' [note 25], p. 460.

[30] Rawls, p. 461.

[31] Rawls *Justice…* [note 27], p. 154.

[32] *Ibidem.*

fact, Rawlsian neutrality is not first order value, but second order value. For this reason, we may also claim that Rawlsian neutrality should be understood within the framework of his conception of justice.

If we return to neutral principles, we may divide them into two categories: procedural neutral principles and moral neutral principles. In fact we may explain neutral values and moral values in connection with formal justice and substantive justice. While formal justice includes neutral values, substantive justice includes moral values. Then, we may define neutral principles as requirements of justice. But which justice?

Since we move from Rawls's conception of justice, we may define neutral principles according to this conception. Firstly, since his conception of justice is neutral, we may claim that his principles of justice are also neutral. In fact, Rawlsian principles are formulated in a neutral fashion. According to Rawls, in the original position in which principles of justice are selected, the veil of ignorance prevents biased knowledge and provides a neutral basis for these principles. This starting point also states neutrality principle. On the other hand, since Rawls's conception of justice includes neutral values, we may claim that it is possible to improve neutral principles on the basis of this conception.

3 Neutral Principles and Law

> "The only question should be: How can we make things better?"[33]

In the Rawlsian framework, the basic institutions of society should be designed according to the principles of justice. Then, we should expect that legal system should also be designed according to these principles. Rawls says that after the selection of principles of justice in the original position, delegates to constitutional convention are to adopt a just constitution which is settled by the principles of justice.[34] In fact, in the political conception of justice, the first principle of justice is applied at the constitutional stage. Rawls states that "the constitution specifies a just political procedure and incorporates restrictions which both protect the basic liberties and secure their priority".[35] If so, we may claim that procedural neutral principles and moral neutral principles are applied at the constitutional stage, since a just political procedure is provided by the procedural neutral principles and basic liberties connected with the moral neutral principle, that is the first principle of justice. On the other hand, the second principle of justice plays a role on the legislative stage. According to Rawls, legislators must enact laws which accord the constitution and two principles of justice.[36] Then, we may say that in a legal system which designs a public conception of justice, laws must accord the morally neutral principles.

On the stage of legal practice, on the other hand, we may also say that there are procedural neutral principles and moral neutral principles. To reach a just decision, we need

[33] Ronald Dworkin *Justice in Robes* (Cambridge, Mass.: The Belknap Press of Harvard University Press 2006), p. 50.

[34] John Rawls *Political Liberalism* (New York: Columbia University Press 1996), p. 336.

[35] Rawls, p. 339.

[36] *Idem.*, p. 340.

not only neutral values (like impartiality), but also moral values. Connected with the formal justice, neutral values provide fair and accurate application of rules. These values also underlie the principles of free rational legal discussion concerned to find the truth based on the best available information. On the other hand, in the legal discourse the best available information is constructed with the moral neutral principles. Since these principles underlie the legal system, judges must take care of them. Furthermore, depending on the meaning of adjudication, it is possible to give place to neutral principles.

We may define adjudication as interpretation. According to Owen M. Fiss, "Adjudication is the process by which a judge comes to understand and express the meaning of an authoritative legal text and the values embodied in that text".[37] If so, we may claim that neutral principles provide its objectivity. To explain this point we may apply to Dworkin's account of legal practice.

Dworkin's approach includes the theoretical reconstruction of judicial reasoning. One may find the conditions of a rational discourse in his views.[38] Dworkin's approach may be regarded in the argumentation theory of law. "The aim of this theory is to expose that argumentative position (its foundations, its stock of arguments, its processes and rules) which will necessarily lead from the law's own presuppositions and propositions to a given legal decision".[39]

The Dworkinian approach may seem suitable to find the role of moral neutral principles in the legal reasoning. As it is known, Dworkin studies "norms and principles within the framework of enacted law in order to find their role in decision-making within the boundaries of the same law".[40] In the Dworkinian framework, interpretivism instructs judges "to seek an interpretive equilibrium between the legal structure as a whole and the general principles that are best understood as justifying that structure".[41]

The best way to enforce the integrity-based interpretation of legal practise will occur by stating the truth conditions about law. "A proposition of law is true, [...] if it flows from principles of personal and political morality that provide the best interpretation of the other propositions of law generally treated as true in contemporary legal practise".[42] Thus, principles provide the best justification of practise. That is, in order to justify their decisions, judges should demonstrate the principles that support them. On the other hand, lawyers may disagree about which principles provide the best justification. For this reason, Dworkin claims that justification has two dimensions: "First a justification must at least roughly fit what it purports to justify. [...] .Second, a justification of a practise must do more than roughly fit that practise; it must also describe some sufficiently important value that the practise serves".[43] Then, which principle provides better

[37] Owen M. Fiss 'Objectivity and Interpretation' *Stanford Law Review* (1982), p. 739.

[38] Csaba Varga 'The Nature of the Judicial Application of Norms' in his *Law and Philosophy* Selected Papers in Legal Theory (Budapest: Lorand Eötvös University 1994), p. 299.

[39] Csaba Varga *Theory of the Judicial Process* The Establishment of Facts (Budapest: Akadémiai Kiadó 1995), p. 7.

[40] Varga 'The Nature…' [note 38], p. 445.

[41] Dworkin *Justice…* [note 33], p. 251.

[42] *Ibid.*, p. 14.

[43] *Ibid.*, p. 15.

justification is shown in this way: "better, that is because it fits legal practise better, and puts it in a better light".[44]

We may claim that these principles should be morally neutral principles. One reason for this is that these principles provide the truth conditions about the legal statement. If we take this truth as objective truth, then this truth is independent of anyone's belief or preference. Fiss states that "Objectivity implies that the interpretation can be judged by something other than one's own notions of correctness. It imparts a notion of impersonality".[45] Neutral principles constrain the interpreter and constitute the standards by which the correctness of the interpretation is to be judged. Namely, these principles provide good reasons for legal claims.[46]

Finally, at the stage of practising law, we may give place to the neutral principles of Herbert Wechsler. In Wechsler's formulation, neutrality is concerned with decision-making in cases. According to this view, cases should be decided on grounds of adequate generality and neutrality. He says: "A principled decision, in the sense I have in mind, is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved".[47] He thinks neutral principles as the principles which "apply not only to the present case but to all reasonably foreseeable related cases likely to arise given the constitution and the existing political structure. Neutral principles transcend the case at hand and must be defensible as widely applicable".[48]

Wechsler's neutral principle is important in the sense that "it relates to opinions as well as decisions, and forces a judge to confront the relationship between the two. It is also a standard of both theoretical integrity and practical significance. Judges can examine what they do to see how far they are stating principles to which they are willing to adhere and to re-examine tentative judgements when the reasoning supporting them falls short".[49]

But Wechsler's neutral principles do not provide a sufficient basis for judicial decisions. To reach a just and objective decision these principles may play a complementary role in the legal system which incorporates moral neutral principles.

[44] *Ibid.*, p. 52.

[45] Fiss [note 37], p. 744.

[46] This model which describes how judicial decisions are taken provides normative modelling and may be regarded that it does not sufficient to provide ontological reconstruction (Varga *Theory…* [note 39], p. 211).

[47] Herbert Wechsler 'Toward Neutral Principles of Constitutional Law, *Harvard Law Review* (1959), p. 19.

[48] Rawls [note 34], p. 191.

[49] Kent Greenawalt 'The Enduring Significance of Neutral Principles' in *Moral Theory and Legal Reasoning* ed. Scott Brewer (New York: Garland Publishing 1998), p. 1021.

4 Conclusion

> "Law is a fraternal attitude, an expression of how we are united in community though divided in project, interest and conviction"[50]

As Rawls rightly stated "the term neutrality is unfortunate; some of its connotations are highly misleading, while others suggest altogether impracticable principles".[51] But neutrality takes place among the enlightenment ideals. If we give up this ideal, we "return to a world in which it matters not what is said, but who says it".[52]

Then, we may try to redefine neutrality. First of all, neutrality is not first-order value, but instrumental second-order.[53] For this reason, we may define it as a requirement of justice. Neutrality and justice are connected with each other. For example, when we assume that a preferred solution is fair, we also think that it is neutral.[54] In fact, without it, allocation of society's goods and benefits cannot be defended or justified.[55] But we should understand it in the context of a specific conception of justice. In this regard, Rawls's neutrality approach may be found suitable.

Especially in a pluralistic society, it is important that there are neutral principles which underlie a legal system and which are understood within the political conception of justice. Rawls's account of neutrality is intrinsically connected to his political conception of justice. Since one of the main features of this conception is that it is a free standing view, neutrality should be understood in accordance with this feature.

We may derive neutral principles from Rawls's distinction between the meanings of neutrality. We may claim that these principles should underlie the legal dialogue at the legislative stage and adjudicative stage. Finally, if it is possible to speak of law with the objectivity required by the idea of justice, we may connect neutral principles with the concept of objectivity and argue that these principles provide the conditions of objectivity.

FACULTY OF LAW
ANKARA UNIVERSITY, TURKEY
GUYGUR@LAW.ANKARA.EDU.TR

[50] Ronald Dworkin *Law's Empire* (Cambridge, Mass.: The Belknap Press of Harvard University Press 1986), p. 413.
[51] Rawls 'The Priority…' [note 25], p. 458.
[52] Sherry [note 21], p. 484.
[53] Smith [note 14], p. 816.
[54] Laycock [note 15], p. 994.
[55] Sherry [note 21], p. 485.

Human Dignity and the Right to Dignity in Terms of Legal Personalism: From the Conception of Static Dignity to the Conception of Dynamic Dignity

Alfonsas Vaišvila

1 Human Dignity

Actual protection of human rights requests logically clear legal concepts legally established or thoroughly discussed in legal doctrine that would be equally understood in different applicable situations and would presuppose rights and duties of unambiguous behaviour. 'Human dignity' and 'right to dignity' are concepts also bound to such discussion.

The right to dignity is nowadays accepted as "the highest human right", "the source of rights".[1] However, the transfer from emphasis of the right's meaning to revelation of its content discloses immense variety of opinions both in the philosophical and legal literature;[2] besides, dignity has often been inseparable from the right to dignity, the right itself is not differentiated in the terms of suability and subjective right, and dignity and its origin has been rarely linked to the cultural human activity. It strengthens the indetermination of the concepts of dignity and of the right to dignity and makes their application in practice more difficult.

The framework of this paper hinders broader discussion of the problem, related research and criteria that make human dignity recognizable in legal practice. An extensive amount of literature in various languages is available on the issue. The author of this paper aims to present a specification of the concept of human dignity approaching it in terms of rights' and duties' subordination as well as differentiating the right to dignity in terms of suability and subjective law.

[1] Francisco Fernandez Segado 'Godnosc czlowieka jako najwyższa wartosc porządku prawnego w Hiszpanii' in *Godność człowieka jako kategoria prawa* ed. Krystiana Complaka (Wrocław 2001), p. 179.

[2] In addition to Segado, cf. Matthies Kettner *Menschenwürde als Begriff und Metapher* / Irmgarrd Schultz *Soll die »Würde des Menschen« politisch oder philosophisch begründet werden?* (Hamburger Institut für Sozialforschung 1994); P. Balzer, K. P. Rippe & P. Schaber *Menschenwürde versus Würde der Kreatur* (Freiburg & München: Alber 1998); E. Benda 'Erprobung der Menschenwürde als Problem der sozialen Wirklichkeit' *Politik und Zeitgeschichte* (1985) 3; W. Brugger *Menschenwürde, Menschenrechte, Grundrechte* (Baden-Baden 1997); B. Edelman 'La dignité de la personne humaine, un concept nouveau' *Recueil Dalloz* (1997) 1.

The right to dignity has been usually explained through its objectivistically understood origin: it has been claimed that this right has neither been granted by the state nor created by the person himself or herself but exists

> "irrespectively of sex, race and nationality, as well as from life style. Every human being has been provided [*ausgestattet*] with it [[…]]. Dignity is related to human subsistence [*Mensch-Sein*] itself; no one can take this right to dignity away. This right is owned not only by the honest, but also by dictators, children molesters or other asocial individuals [[…]]. Even an unborn life in the body of a mother, mortally ill [[…]] have the matter-of-course dignity."[3]

This is meant to say that an individual himself or herself is not involved in the creation of his or her dignity, that dignity is put into the person like a ready-made conformation from aside, that it is like a biological human property that may neither be given, nor created or lost, that is characteristic even to the "unborn life in the body of a mother".

Such ontologization and absolutization of some objective features lying in the essence of dignity comes from the Christian tradition that has started and justified the concept of passive dignity. According to the tradition, dignity is neither a creation of society nor of the person himself or herself, it rises from the suppositional fact that human being has been created following the image of God, it has a divine immortal soul that gives unmeasured worth called dignity to every human being. Therefore, if dignity is not provided to a person by people, it means it can neither be taken away nor limited by people. At this point we come across the so-called one-dimensional personal worth.

The above described traditions of the passive or static dignity have one way or another affected various legal acts, international declarations and conventions. The Virginia declaration [Virginia Bill of Rights (June 1, 1776)] claims: "All people are born equal, free and have certain i n b o r n r i g h t s that, as soon as individuals accept the status of society, may not be taken away by any later agreements made by their descendants" (Article 1). The same tradition of "inborn rights", although in a weaker form, has been continued in the Universal Declaration of Human Rights (1949): "All human beings are born free and equal in dignity and rights" (Article 1).

The above statements ignore the fact that birth may become a source of rights only if the society in which "the birth has happened" is ready to recognize *a priori* each person as worth. This is not, however, a universal fact. History names primitive societies that, forced by their survival needs and low economic possibilities that could assure such needs, were killing "the born free and equal in dignity and rights" but weak babies, powerless old people as if they did not know that these babies and old people "were born equal in dignity and rights" to other members of the society. In slaveholding and feudal societies only the noble were taken as dignified; the right to dignity was not recognized for slaves and villains "born free and equal in dignity and rights" and "created by the same God"—the latter people were only granted a status of "talking labour instruments". Jews and Gypsies in Nazi Germany were also not treated as subjects of the right to dignity.

This proves that the right to dignity is a historical and social category of the (democratically oriented) positive law. The theological and biological attitudes to human dignity

[3] Jochen Zenthöfer *Rechtsphilosophie* (Berlin 2001), p. 75 [H. P. Richter: Juristische Grundkurse 20].

coincide in that fact that in both cases human dignity (worth) is distinguished from society and from the cultural activity of the person on which the concept of the passive or the static dignity is based. However, the dignity of a person genetically appearing beyond society and cultural activity must have become inapproachable and therefore mystical for scientific cognition. Explaining it, criticality had to give place to dogmatism.

But if the right to dignity is still a right, then right always begins with a permission to obtain certain good or to use it in the performance of certain duties (orders, obligations). Therefore, talking about right, a question may not be avoided on where does a person get a permission to treat oneself as good and why is he or she regarded as good (virtue) by other persons? The answer to the first part of the question is—from society organized into a state, because law exists only in an organized society where universally accepted virtues exist in a territory of a certain society. There are no permissions and orders next to society, therefore there is no law. Robinson does not know law and the right to dignity not because he "has not been created by God" and because he has not inherited "human nature" but, obviously, because he lives beyond the boundaries of society: there is no one at whose respect to claim and prove one's worth and from whom to request recognition of such worth. Thus, claiming that a human being "has the right to dignity irrespective of any social legal order" is talking about anything but law.

But if we do not know what is law, how can we know what is "the right to dignity" as a special case of law in general? In order for the "unborn life in the body of a mother" to have the right to dignity, that "body of a mother" must exist in a society organized into a state, a society that follows appropriate virtues and their hierarchy. But in this case society must solve a collision: how the acknowledgment that "an unborn life in the body of a mother has the right to dignity" can be combined with the universally accepted subjective mother's right to her body?

Lithuanian laws in force do not define the concept of dignity. This function has been left for the competence of legal doctrine and legal practice. The Senate of Judges of the Supreme Court of Lithuania defined honour and dignity in their Ruling No. 1 of 15 May 1998 as "person's self-evaluation that is determined by society's evaluation".[4] It is a dominating definition of dignity not only in Lithuania. Philosophical literature summarizing the research on the topic in question basically advocates the same conception of passive dignity: it defines human dignity as personal awareness of one's own social value, as the right to request respect from society based on human worth accepted by the society.[5]

The origin of social human dignity, although a little too strong, was already in the 17th century defended by the English philosopher Thomas Hobbes: "Human dignity the public worth of a man, which is the value set on him by the commonwealth".[6] However, as we will see later, Hobbes also recognized the role of the person himself or herself in creating one's worth by which he raised assumptions for formation of the concept of active dignity.

[4] Decree No. 1 of the Senate of the Supreme Court of Lithuania (May 15, 1998) in *Teismų praktika* (1998) 9, p. 52.

[5] *Философская энциклопедия* II (Москва 1962), p. 58.

[6] Tomas Hobbes *Leviathan* V (1999), p. 104.

The tendency to define human dignity as "self-evaluation determined by societal evaluation" expresses an idea about the existence of objective and subjective dignity features, about their interaction where probably the identity of human dignity should be looked for.

2 Dignity as Human Worth Rising from an Individual's Ability to Live Properly in a Society

To avoid dogmatism in the definition of the dignity concept it is important to understand which feature of the concept should start the explanation. This can be shown by the nominal meaning of the term itself. In all national languages human dignity is linked to human worth and the way the human being understands one's worth. Dignity in Latin is *dignitas*: worth, noble appearance; *dignatio*: respect for someone; and in Russian: *достоинство* [dostoinstvo], in German: *die Menschenwürde*, in English: dignity. However, not all meanings of the concept orient to the beginnings of dignity because they describe the essence of dignity through the final result, the worth, instead of through its reason (source) or technologies creating it. In this definition one uninformative abstraction (dignity) is defined by another abstraction with the same level of uninformativeness (worth) evading the main question on who forms this human worth, if it is multidimensional and if there is a criterion that would let human being individualize valuably? If dignity is not differentiated, can then society make a difference between a violator of the right and a person loyal to the right?

The search for technologies creating dignity can benefit from a nominal meaning of a Polish term *godność* that has a meaning of suitability (*godnie* standing for 'nobly, worthily, properly') next to the meaning of *worth* and *honour*. The Polish law theorists do not directly relate dignity to appropriateness; they still stick to the above mentioned tradition to define dignity through abstract worth. Mariusz Jablonski basically repeats a definition proposed by the Supreme Court of Poland: "dignity is that field of personality that is specified by human being's understanding of one's own worth and waiting for respect from other human beings".[7]

An attempt to derive human dignity technologically from human being's suitability is for the first time found in the already mentioned *Leviathan* by Hobbes: "Human worth [[…]] is special power or ability for something that, as said, he or she is worth, this special ability is usually called s u i t a b i l i t y or adaptability".[8] Hobbes talks about "suitability" as of human being's "inborn ability" to perform certain duties important for the society properly (with quality). Thus, this attitude at some level still recalls the above mentioned theological and biological opinions that are looking for human worth next to socio-cultural activity although dignity itself is now treated instrumentally, therefore should be understood not as a feature (not as "inborn ability") but as human being's relation with the interests of the state or the society in terms of implementation of the above

[7] Jablonski Mariusz 'Pojęcie i ochrona godności człowieka w orzecznictwie organow władzy sądowniczej w Polsce' in *Godność człowieka jako kategoria prawa* ed. Krystiana Complaka (Wrocław 2001), 295–296.

[8] Hobbes *Leviathan*, p. 111.

mentioned attitudes. Hobbes is trying to combine the traditional attitudes of theology or biology (the objective absolutization of dignity features) with the instrumental (subjectivist) attitude of the New Times to human powers that he wants to treat as instruments used by the same person to settle in nature and in society.

But if dignity is a human being's relation with society (other human beings), then it cannot be treated as "inborn subsistence", that is, a biological feature of a human being. Although related to inborn biological powers of human beings, it is still dignity; the powers themselves are not dignity (human worth) because a person can use the same "inborn powers" both for and against the society. That is why they can at the same time be valuated both as useful and harmful, therefore, as invaluable for the society.

However, Hobbes' method to explain human dignity based on person's social suitability is undoubtedly promising and presents a possibility to create the conception of the active dignity—to explain rationally the origin, content and social purpose of dignity.

3 The Right to Dignity in Terms of Suability and Subjective Right

Indetermination of reasonings about dignity appears also because human dignity, as it has been told already, is often confused with the right to dignity, and the right to dignity itself is treated notionally disregarding two levels of its possible existence: suability and subjective right. Without making this difference it is unclear where does human right to dignity come from and what is dignity itself as an object of the right to dignity. Is each person valuable only because he or she was born as a human being or does that initial worth of the human being exist because society *a priori* recognizes each person as a subject of law and undertakes to protect his or her vitally important interests thereby indirectly acknowledging that person's worth and right (permission) to that worth? Truly speaking, if society recognizes every human being's right to life, health, freedom, personal immunity, and so on, it thereby accepts each person as worthy. Every person acquires this general (formal) worth without any personal efforts (it is enough to be born in a civilized society to acquire this level of worth). This is why such worth is called static or passive: it cannot be increased or reduced; tradition, as it has been mentioned above, identifies it with human dignity. This tradition avoids the question of what is the role of human being himself or herself in creating his or her own social worth as an object of the right to dignity, which, in my opinion, is the weakest part of the tradition.

4 Two Levels of Human Worth: the Passive and the Active

Relating dignity to the cultural activity of a person, a possibility to distinguish two levels of human worth appears: 1) worth that originates from each person's recognition as a subject of law in general and that, as it has been mentioned, is the same to everyone because is acquired from society without personal effort (performance of duties), and 2) individual social worth of a person that can be created by the person only through fulfilment of obligations in respect of one's neighbour which, following the logics of swap, commits other persons to reversible services.

The distinction of the difference requests specification of the "right to dignity" itself

identifying two possible ways for existence of such right, that is, suability and subjective right.

5 The Right to Dignity in Terms of Suability

If the right to dignity is a right then one, as it has been said, cannot be born with it, as it may not be acquired beyond society. Therefore the right to dignity at level of suability is a permission granted to a person by society or state from the moment of birth to exist properly in society, i.e. to create one's ability to use granted permissions for fulfilment of obligations. This permission originates from the person's recognition as a subject of law in general and signifies society's obligation to not encroach on and to protect the person's vitally important interests. At this point a person's worth completely coincides with the person's recognition as a subject of law in general, i.e. with recognition of his or her rights to life, health, freedom, personal immunity, etc. and with society's commitment to accept the above goods as social and personal values. That is why this level of worth is recognized equally to everyone: no person in his or her worth stands above or below others. It is formal worth that is recognized to persons by international declarations, conventions and national constitutions. Therefore, person's right to dignity at this level "does not depend on person's sex, race, social status and lifestyle" because this, as it has been told already, is not conferment of individualized worth but only recognition of a formal permission to acquire it to a person, i.e. to take up any activity (performance of duties) not banned legally, thereby create existential means, swap them with a neighbour on the grounds of equivalent swaps and so form one's individual social worth the content of which shall consist not of biological person's properties but of services provided to a neighbour based on such biological properties.

This right at level of suability may neither be taken away nor lost because it does not give to a person any particular good; it only gives a permission to create such good or acquire it through swap. Society itself is interested in granting such permission to a human being because it is important for society that the person would develop as personality useful (valuable) both for himself or herself and for society, taking the following assumptions into consideration: life, health, freedom, and so on. Limiting, inhibiting this permission (right) would mean to inhibit person's possibilities to develop one's ability to live properly (under conditions of peace and cooperation) and thereby increase the general level of society's humanity.

But if the person for whom general (formal) worth has been recognized is still requested to use permissions (rights) for performance of appropriate duties, it shows that general worth of the person is insufficient because, as it has already been told, is recognized for a person prior to him or her taking up any activity and does not depend on the social content of the activity: aggressive or respectful the activity is in respect of another person. It is only the worth of a passive human being granted for a person from aside based on a fact that this human being has been born in a civilized society. Meanwhile, the right to dignity speaks about the worth of an active person (using the rights and performing appropriate duties). And the worth of an acting person must be something more than formal worth and that "more" may not appear from something else but from

the person's positive actions in respect of a neighbour that will increase and specify the general worth of a person.

6 The Right to Dignity in Terms of Subjective Right

The unity of rights and duties is a legal formula of human dignity.

Absolutely different is the right to dignity in terms of subjective right because it implies realization of the right to dignity at level of suability, i.e,. the necessity for the person himself or herself to create his or her individualized, therefore, sapid and differentiated social worth by performing duties, and to acquire the subjective right in respect of it. Such self-creation demands for person's sapid worth to be derived from person's ability to live properly in a society following specific values.

But what does the person have to be suitable for to make the society value him or her more than formal recognition of the person as a subject of law in general commits the society and to have the person acquire proper reason to feel such worth and the cause of it?

A Duty is the Source of Individualized Social Worth

Because a human being is a social being (lives in a society and it is only the society where he or she maintains his or her identity), his or her social suitability cannot express itself in anything but person's ability to live in harmony with a neighbour. And only those who use rights (permissions) for performance of appropriate duties are suitable for such harmony: restrain from actions that may cause danger to the neighbour and use services provided by other persons by means of equivalent swap.

However performance of duties does not automatically by itself create person's individualized social worth.

Only Performance of Free Person's Duties Creates Human Dignity

For the process of acquiring dignity it is important if, by fulfilling duties, the person acquires the proprietary right to the good that he or she has created by fulfilling duties and that would be by the right protected from other persons' infringement to gratuitously use or embezzle it. If performance of duties does not create such right, then it does not increase person's social worth either. Performance of duties the results of which can be gratuitously embezzled by other persons is not valued by those other persons; therefore the performer of the duties is not valued as well. An opportunity emerges for other human beings to treat the performer of duties (or, to be precise, obligations) not as a target but as means for implementation of targets set by those persons or the state. Other persons using the services provided by such person are not reversionary committed in his or her respect or are committed out of proportion. Something that does not commit reversionary is of smaller or no value at all. Such performance of duties starts to deny and enslave the performer of duties instead of increasing his or her human worth. This helps to understand why in history a slave, villain or a subordinate of totalitarian regimes was neither valued nor considered respectable despite being turned into performers of duties

to their masters or the state. Performance of duties did not create appropriate subjective rights for the performer to request performance of duties from other persons, therefore it was negation of worth instead of increase of worth (dignity) and it was enslavement of worth instead of liberation of the performer of duties.

Meanwhile those that are committed to reversionary services understand the difficultness and complexity of performance of duties the results of which he or she has used and, based on that awareness, starts appreciating and valuing those in respect of whom he or she has to perform reversionary services thereby increasing the social worth of duties' addressee. Individuals participate in creation of each other's dignity through reversionary services.

Therefore only dignity of a free person can be discussed because only performance of duties executed by such persons creates person's individual social worth as new social and psychological reality and the subjective right to request similar reversionary services from other persons or the state that use the results of performance of duties executed by this person and thereupon treat the performer of duties as an addressee of reversionary duties and a social virtue. This means that subjective right acquired by a free person to the good created through performance of one's duties and so to appropriate degree of social worth is also characteristic of the meaning of a proprietary right: no one can use the results of performance of person's duties without permission of the performer in question and free of repayment in reversionary services. Namely the possibility to acquire the subjective proprietary right to the values created by performance of duties and to maintain it in swap relations renders meaning and value to performance of duties, turns it into source of human dignity as individualized social worth, gives a reason for such person to consider oneself as worthy and request appropriate respect from society that he or she has provoked by expressing one's actual respect for that society (by performance of duties). At this point all that society can do is recognize person's proprietary right to person's degree of individual worth that he or she has created by performance of duties. This new social and psychological reality created by the person himself or herself as increase of person's self-creation (socialization) turns into a reason for value-related differentiation of persons (in terms of suitability to live in a society). This is a prove that society does not and cannot grant differentiated social worth to human beings; all it can do is protocol it socially and commit in respect of the worth. It is also a proof that the right to dignity is characteristic of the meaning of the proprietary right. If there is no proprietary right, there is no dignity and right to dignity.

This leads to a conclusion that neither person's rights, nor his or her duties separately create dignity as individualized sapid social worth; it is created only by their unity that makes all human rights rational and comprehensible and turns human dignity into individual, sapid, dynamic social and legal category: dignity is created and increased through performance of duties and is reduced and lost by using rights without performance of appropriate duties, i.e. threatening the rights of other people.

It means that only those can be considered as suitable to live in a society that renders the form of rights' and duties' unity to its behaviour which means realization of mutual benefit. A person behaving in this way is treated as socially useful and therefore valuable (helping or not disturbing other people in realizing their own rights) by the society (other

persons), and the person himself or herself understands this worth as recognition of his or her suitability to live in a society.

Thus, the increase of a person's social worth created through performance of one's duties becomes an object of the right to dignity, and the protection of the worth created turns the person's relation to society into the subjective right to dignity.

This makes one more independent human right appear in the catalogue of human rights, or the right to dignity appears next to the rights existing on the grounds of persons' general (formal) worth.

7 Human Dignity is a Unity of Objective and Subjective Features

Derivation of the right to dignity from performance of duties shows that human dignity cannot be only a subjective category (wilful ambition of one's own worth) because suitability to live in a society places demands on the person that the person himself or herself can neither identify nor change, all he or she can do is accommodate do them thereby proving his or her suitability to live in this society. This accommodation, as it has been mentioned, can only take place by performance of appropriate duties, or, by creation of goods meaningful both for oneself and for the society. Therefore at this point it is not enough to introduce oneself as respectable (worthy); one's necessity (worth) must be constantly proved to others by creation of meaningful goods and participation in equivalent swap. The non-occasionally mentioned Hobbes has once written that "human value is determined by the buyer, not by the seller. Although human being (as is usually practiced) values himself or herself best, his or her real value is not bigger than the one other people value him or her by".[9]

This means to say that in terms of dignity the person is not valuable by itself but only in respect to other people and by providing of services beneficial for other persons' needs; other people value him or her as provider of services, colleague and respecter of a foreign right. Therefore taking a person away from his or her lifestyle (performance of duties) would mean taking him or her away from personal ability to participate in relations of equivalent swap, i.e. from the ability to live in harmony with a neighbour. This kind of dignity would become mystic, uncognizable and basically worthless.

Performance of duties and real good created thereby frames the objective base of dignity, and the subjective proprietary right of the creator to that good is the subjective feature of dignity because it commits other people that want to use that good to commit in response, i.e., to recognize the worth of the good and of the creator not by action instead of word. Therefore property, the size of salary or pension acquired through performance of duties is at the same time material expression of individualized worth, actually recognized by the society, differentially certifying the quality and scope of duties performed by the owner of the property in respect of a neighbour, the scope that has become a reason to get services of the same scope in return that are material expression of the public recognition. Then a person understands why he or she is useful both for himself or herself

[9] Hobbes, p. 104.

and the society and how those other persons externally express (repay) the recognition of his or her worth. Such awareness allows him or her to evaluate oneself properly and "lift" valuably. By creating publicly meaningful full through performance of duties, a person creates his or her dignity as an object of the subjective right to dignity.

8 "You Will Be What You Will Make Yourself"

Dignity created by human cultural activity was also discussed by the Renaissance tradition that is related to a work called *Oration on the Dignity of Man* presented by a great thinker of the time, Giovanni Pico della Mirandola. Mirandola understood human dignity (worth) as social reality created expressly by the person himself or herself. He did formally recognize the Christian tradition about the divine origin of a man but explained it taking the needs of the time into consideration, i.e. following the general attitude of the day to a man as creator of his happiness, destiny and individualized social worth. The divine creation of man has not been finished; the man has to constantly create oneself and his specific historical forms of humanity (worth). God was saying:

> "We have given you, O Adam, no visage proper to yourself, nor endowment properly your own, in order that whatever place, whatever form, whatever gifts you may, with premeditation, select, these same you may have and possess through your own judgment and decision. The nature of all other creatures is defined and restricted within laws which We have laid down; you, by contrast, impeded by no such restrictions, may, by your own free will, to whose custody We have assigned you, trace for yourself the lineaments of your own nature. I have placed you at the very centre of the world, so that from that vantage point you may with greater ease glance round about you on all that the world contains. We have made you a creature neither of heaven nor of earth, neither mortal nor immortal, in order that you may, as the free and proud shaper of your own being, fashion yourself in the form you may prefer. It will be in your power to descend to the lower, brutish forms of life; you will be able, through your own decision, to rise again to the superior orders whose life is divine."[10]

Every person is invited to take up various duties and through their performance to create to increase one's individual social worth with no limits attached ("through your own decision, to rise again to the superior orders whose life is divine") or, in case of avoiding the duties, to reduce it ("to descend to the lower, brutish forms of life"). It is a hypothesis of dignity as dynamic category.

9 The Unity of Rights and Duties Demystifies the Human Dignity

Human dignity explained through the unity of rights and duties may be an additional proof of the fact that human dignity is of social and cultural origin. It is not an "inborn" nor a granted feature, it is a social value-based relation originating from equivalent swap of services performed by persons with equal rights. If dignity is a legal category, not a

[10] Giovanni Pico della Mirandola 'Oration on the Dignity of Man' in [Reader of philosophy history: renaissance, in Lithuanian] (Vilnius: Mintis 1984), pp. 123–124.

legitimate category, then law protecting it must be of no other form of existence than the equilibrium between rights and duties; its source must be the cultural life of the person, and social conditions – person's freedom and proprietary right to the publicly meaningful good created through performance of duties (cultural activity). Only within dependent societies person's right to dignity may be a purely legislative category as it can be granted as a privilege by law. In terms of worth a person is distinguished from the circle of other individuals not by merits but on the grounds not related to personal cultural activity (background, party-favour, level of nationality, etc.).

Therefore statements claimed by authors who think that "dignity is granted [*ausgestattet*] to every human being irrespective of sex, race or nationality as well as lifestyle"[11] should not be taken for granted. The fact that human right to dignity at suability level does not depend on race, sex, nationality and even on lifestyle is comprehensible and we have just proved it. But it would be absolutely impossible to understand if this attitude were also applied to the subjective right to dignity because it would be unclear how this right can "depend on lifestyle" because "lifestyle" is nothing more than relation of one person with other people: the fact whether the person commits crimes or leads honest life has essential importance to the degree of a person's suitability and his or her individualized social worth. Dignity shall not be affected only by issues of lifestyle such as whether a person drinks tea or coffee in the morning because this cannot neither help, nor harm other people. If the right to dignity existed next to lifestyle in general, it would not be possible to be defined based on person's suitability to live in a society. After all, lifestyle is nothing more than a way of a person's specific existence in a society. It is here important how a person exists in that society, in a peaceful or an aggressive way. Next to the society and lifestyle a human being can neither be respectable nor unrespectable because the reason for such distinction is eliminated.

10 Dignity as Foundation Legitimating and Creating the System of Human Rights

The Helsinki Final Act 1975 says that human rights "derive from the inherent dignity of the human person", and "recognition of dignity [[…]], equal sovereign rights shall be foundation for freedom and justice".[12] It means that here attempt is made to qualify dignity as foundation of all human rights. But it can exist in such form only if human dignity is understood as person's suitability for harmony and cooperation, in other words, if human rights themselves are treated as social as well as individual good. Only so understood person's social suitability may encompass all human rights and their legality. Then human right to life, health, freedom and ownership, the right to acquire qualification and other rights do not only assure personal autonomy, they also become means and conditions for human dignity formation. Therefore violation of the specified person's rights reduce or block the person's biological, material or qualification powers to perform duties that legalize his or her rights. Weakening of the ability to perform duties must also mean weakening of the ability to properly live in a society. For example, in case of violation

[11] Zenthöfer [note 3], p. 75.

[12] [Human rights: collection of regional international documents, in Lithuanian] (Vilnius 1993), p. 232.

of human right to health (injury of a person's body), physical possibilities of the person to perform certain duties are restricted for some time, duties through performance of which the person has been proving actual suitability to live in a society. A person incapable of performing one's duties sooner or later beggars economically, is not able to pay for some utilities, for example, and therefore is becoming aggressive, conflicting and so less respectable and less suitable to live in a society based on equality. At the same time he is gradually becoming more in need of social care which means official recognition and compensation of such person's partly non-suitability.

On the other hand, if a person is using his or her main rights not for maintenance and strengthening of his or her suitability to live in a society, then legitimacy of all his rights is put in doubt. In this case violation of human rights is a fact of such person's non-suitability to live in a society in respect of a certain situation, and performance of justice is restriction of his or her subjective right to dignity. Imprisonment means recognition that the convict appeared to be disrespectable by committing crime, i.e. non-suitable to live in a society of persons loyal to law, therefore he or she, by sanction assigned by court, is transferred to the society of individual with limited dignity (prisoners) for a certain time. Restriction of the right to freedom in this case accompanies restriction of the subjective right to dignity.

It shows that the right to dignity integrates all human rights and legalizes them only because it gives a possibility to value them in one generalizing measure, and this is the person's suitability to live in a society. It creates possibilities to treat person's rights and their system as a force creating human dignity, respectively, to treat commitment of crime as a case of person's non-suitability to live in a society and execution of justice – as restriction of the subjective right to human dignity.

11 Children's Right to Dignity in Terms of Unity of Rights and Duties

Discussing the right to dignity in terms of suability and subjective rights, a possibility appears to understand what meaning is rendered to the right to dignity when dignity of people and the disabled is taken into question, i.e., of persons that cannot objectively participate in swap relations, therefore, do not create their personalized social worth. Their right to dignity does not supersede the suability level, i.e. does not supersede that level of worth which originates from their recognition as objects of law in general.

What is treated as children's "dignity" is only that degree of their worth which coincides with the society's obligation to protect their life, health and to realize their need for studies, etc., i.e., the anticipatory recognition of the mentioned children's needs as social values as there are children's biological and legal assumptions to develop their abilities to create consumable values and participate in relations of equivalent swap in the future based on those values, i.e. to properly live in a society. Thus, the society's and a child's attitudes to human dignity (self-evaluation) differ. A child may think that the fact that society forces him or her to go to school until the age of 16 violated his or her right and thus humiliates his or her dignity because forces to go somewhere where quite possible he or she does not want to go at the moment. Society disregards this kind of understanding of "dignity" because follows both the child's and own perspective interests. Society

needs to grow not just any kind of person; it needs a respectable person, i.e., a healthy person with qualifying, voluntary-virtuous powers assuring his or her abilities to properly live in a society following certain values. A child that would avoid going to school on the grounds of protection of his or her assumed dignity and thereby acquire qualification would become less respectable against his or her will in the future because would appear to be less capable of performing more complicated duties and therefore would suit less to live normally in a society based on swap relations; his or her dignity would be humiliated in much more painful ways because such person would find less and less situations where he or she could meaningfully prove to others his or her worth.

12 The Fight of the Disabled for Integration into Society is a Fight for the Right to Participate in Creation of One's Individualized Social Worth or Dignity

Distinction of two levels of human social worth explains one more question: why are the disabled not content with the formal worth recognized in their respect, seek integration into society and understand it as retrieval of the ability to perform accessible duties and thereby create their individual social worth? They understand that social allowances do not create human dignity but only guarantee that level of human dignity (worth) that originates from recognition of a person as an object of law in general, i.e. at minimum level assures their right to life, health and other essential goods without which a personality would not exist. The right to dignity of a person incapable of performing duties remains at suability level and may never become the subjective right. Therefore integration of the disabled into society is creation of conditions for them to come back to swap relations based on mutual performance of duties.

FACULTY OF LAW
MYKOLAS RÖMERIS UNIVERSITY, VILNIUS, LITHUANIA
TFK@MRUNI.EU

Legal Hermeneutics and Cultural Pluralism

Francesco Viola

In a pluralistic and multicultural society does legal interpretation have to modify its traditional methods, which were worked out for a culturally homogeneous society and in a framework of primacy of state law?

I believe that in order to answer this question we need to take a step back, and precisely this is the object of this paper. The aim is simply to review the preliminary conditions necessary to answering the issue raised.

Even before updating the methods we need to ask ourselves whether it is necessary to reflect again on the role that interpretation has in the context of a legal practice. In particular, we need to challenge the idea that interpretation is l e g a l in virtue of the role of the interpreters and/or the methods used. To this there will be opposed the idea that it is the presuppositions, the goals pursued and the contexts of exercise that make interpretation "l e g a l" at all.

The Role of Precomprehension

Interpretation as such is never a final goal. One interprets for the purpose of understanding. But in turn, understanding, unlike simply knowing, has a practical character, so that it bears in itself the reasons why one wants to understand. Indeed, these reasons precede understanding and help to determine and to direct precomprehension. They are forestructures of understanding. Interpretation as an activity takes on a sense of its own because it takes place within anticipatory understanding, which is the very place in which meanings live. Every activity only has a meaning of its own within a totality of meaning. Accordingly, understanding precedes and affects interpretation, which in turn develops it, corrects it and frees it of misunderstandings.[1] This consideration is based on elementary observations. If we do not anticipate the point of our discourse, we do not even succeed in constructing it. In scientific research too, for the data to be enucleated, we need first to anticipate their point and then to verify it with experimental tests. But for philosophi-

[1] These ideas are famously developed by philosophical hermeneutics, from which this paper derives its inspiration. Cf., in general, Georgia Warnke *Gadamer* Hermeneutics, Tradition and Reason (Cambridge: Polity Press 1987) xi + 197 pp.; *Gadamer and Law* ed. Francis J. Mootz III (Aldershot: Ashgate 2007) xx + 523 pp.

cal hermeneutics all this takes on much profounder importance in that understanding is seen as a way of being, the way of being proper to that hermeneutic animal that is man.

According to GADAMER, not only discourses and writings but all human creations are informed by a general meaning, which it is the task of hermeneutics to extract. The point of an interpretive social practice is the general goal of the enterprise involved. It precedes and illuminates the actions that are set within it. These actions may be correct or incorrect (appropriate or inappropriate, just or unjust, good or bad) in relation to what they aim at, that is so say strictly speaking they can be sensible or foolish. From this perspective the point of a social practice is a task one is called on to perform, an enterprise that is undertaken, a general objective that is pursued. This means that what is at the basis of hermeneutic understanding has a practical character and that a hermeneutic philosophy of law can only be a practical philosophy.

In general understanding indicates—as WITTGENSTEIN pointed out—going towards someone, that is trying to grasp other people's intentions (one understands intentions), but in understanding a social practice the object is broader in that it concerns not only the immediate context that helps to confer relevance on the intentions, but also more in general the traditions and the forms of life to which the intentions belong. Hence comprehension is at one and the same time an apprehension of the "world" of which the intention is part. It is proper to a task and, more in general, to a purpose to set something going without it yet properly existing. Likewise, precomprehension of the thing being dealt with neither contradicts nor prejudges the interpretive search for the meanings in which it is articulated and enacted. In the field of aesthetic creation it cannot be said that the artist simply enacts his intentions. Actually he feels called on to understand something that asks to be grasped in its totality. However, this does not yet exist, since only the interpretation makes it exist. If this horizon of meanings which does not yet exist were a mere chimera, then the interpretive event would be the judge of itself and there would be nothing except the interpretation, as NIETZSCHE thought in the past and the deconstructionists think today. Yet in the name of what do we ask ourselves whether the interpretive action (or the work of art) has succeeded or not? In the name of what is it that the artist in the throes of creation corrects himself and is satisfied with the result of his work? It is the very essence of the thing that does not yet exist that asks to be correctly interpreted.[2]

The Hermeneutic Character of Legal Interpretation

Legal interpretation too, practised in a monocultural state with the monopoly of legal production, has its precomprehensions, its undisputed presuppositions and its anticipations of meaning.

Since the time of *Code NAPOLÉON* the idea of law has been concretized in the image of a national legal system constituted by norms endowed with an internal consistency of meanings and emanated by a formally recognized authority. ALF ROSS has compared a legal system seen in this way to the game of chess. While the rules of chess refer to

[2] Cf., in general, Hans-Georg Gadamer *Truth and Method* trans. Joel C. Weinsheimer & Donald G. Marshall, 2nd rev. ed. (New York: Crossroad 1989).

the movements made by the players, legal rules refer to the social actions of citizens and public authorities, two different kinds of players, and therefore we need the distinction between norms of conduct and norms of competence.[3] For Ross a national legal system is, so to speak, "a legal entity" substantially incommensurable in comparison to other valid systems of law. It is as if there were many different possible games of chess, each with its own internal rules. Their common denominator would only lie in organizing in a consistent and practicable way the movement of the pieces on the chessboard. Likewise, the different national legal systems simply have in common the fact of being a set of rules on the organization of the public force and the operation of the coercive apparatus of the state. This representation of law demands once and for all for a rigorous delimitation of the context within which the game of law is played out. Consequently it tends to identify valid law with the national dimension (German law, Danish and Italian, etc…), that is to say with a particular form of life endowed with its own "ideology of the sources of law". This conviction is still widespread in contemporary legal thought, but it is false for historical and theoretical reasons.

In epochs preceding the birth of the modern state and its taking over the monopoly of public force, one certainly cannot speak of "national legal systems", but what counts more is that today these cannot be conceived as closed, even supposing that they once were this. It is a matter of fact that today in order to determine what the sources of law are, we have first to identify their scope of application. A legal system, though being by and large characterized by a constitutional hierarchy of sources, evolves within itself and continually has to put order in the jungle of facts and normative acts. Furthermore, the importance of laws and other constitutive acts of external legal or semi-legal orders, with which the normative system has relations that are not always anticipated or predictable, grows, without considering the anomalous character of sources *extra ordinem*. In short, the rules of the game are not preset once and for all, apart from some general indications, and continually have to be rearranged.

A legal system has its own internal evolution which is far from being purely logical. Legal praxis has to give continuity to the succession of forms of life that collapse on one another. The legal and cultural world of the Framers was not the same as our present world, but, if the law that originates from them can be considered as still in force, this means that its language is somehow meaningful for different forms of life.

This means that, in spite of appearances, legal interpretation has always developed and develops, today even more clearly, inside a precomprehension aiming to fuse different cultural horizons and not rigorously entrenched inside a determined cultural world.

Normality and Normativity

The role of legal interpretation is to translate normative claims originating from past forms of life (or from ones that are simply different) into the present one, which has particular bonds with them. Traditions and institutions are not isolated worlds but develop through an intense exchange and a dense network of relationships among them. This would be impossible if the historical contexts were incommunicable and closed up

[3] Alf Ross *On Law and Justice* (Berkeley: University of California Press 1959) xi + 383 pp.

in themselves, but then law too in its normative sense would be impossible. In a sense normativity is what does not originate from our own world and challenges its normality. For this reason normativity needs a justification, while it is not so for normality. What already belongs to our world or to our form of life is already by definition constitutive of our identity and so we can only raise the issue of whether this or that interpretation is in agreement with consolidated social practices. But we have normativity in a strong sense when we are asked to accept the extraneous or the different and to encompass it in our world.

As is well known, in the wake of Wittgenstein the thesis of the incommensurability of paradigms and the untranslatability of languages was strengthened. I do not intend here to discuss whether it is well founded. However, it is a fact that law as a language of interaction has for a long time faced the challenge of incommunicability of differences. Legal praxis itself is based on the presupposition that the same rule can measure situations differing in time and distant in space. Today this has become even more visible in the attempts to constitute around human rights a stable place of communication of different legal systems. It does not matter to what extent these efforts are successful, but it is clear that the passage from the national state to multicultural societies would be impossible if law was not able to make different cultures converse and only served to resolve family quarrels.

Philosophical hermeneutics, at least because of its origins and in its main developments, is particularly sensitive to the fusion between different cultural worlds, and conceives forms of life not as closed entities, but as more fluid, porous and permeable environments. Nevertheless, it would be wrong to limit the demands of philosophical hermeneutics to the problem of intercultural dialogue. It is not exactly this that we are looking at. The hermeneutical experience is not by chance emblematically represented by Gadamer in the encounter with the work of art and with its normative function. In the interpretation of the work of art or the classical text there is a transformation of the very world of the interpreter, that is to say a process of integration occurs in the Hegelian sense. "The relationship with the work is not simply subjective, nor objectively reconstructive, but represents a form of mediation between our present as interpreters and the traces and the sense of the past that are transmitted to us".[4] Hence it is not directly a meeting between two or more different cultures, but an encounter between the world of the interpreter and something normative, which in turn belongs to a different cultural world. The latter recommends itself not for itself, but as the bearer of something that is also able to talk to those people who belong to other universes of meaning. There is an extension of the work of art beyond its world of origin. This hermeneutic function is not performed only by the work of art, but is also found in other linguistic events. There is no doubt, for instance, that human rights originate from a particular culture, the western one, but are valid and normative only insofar as they are able to talk to different cultures than the one of origin.

[4] Maurizio Ferraris *Storia dell'ermeneutica* (Milano: Bompiani 1988), pp. 269–270.

The Royal Roads of Intercultural Dialogue

A hermeneutic problem is never exclusively internal to a tradition or a culture and cannot be reduced to the correct application of the rules or the lifestyles proper to a specific cultural context. A hermeneutic problem proper only arises when we have to deal with the encounter between different cultural worlds. Interculturalism and multiculturalism are the necessary presuppositions for there to be not merely an interpretive problem, but strictly speaking and to all intents and purposes a hermeneutic issue, that is to say one regarding the relationship between different cultural horizons.

There is not always full awareness of this configuration of the hermeneutic issue. Moreso has rightly emphasised that an important difference between the analytical approach and the hermeneutic one lies in the way of considering the background of our social practices.[5] According to Heideggerian hermeneutics this would be an opaque background, inarticulate and not further analyzable. Precomprehension is therefore that starting point within which we already are and which constitutes our very identity, which it is impossible to abandon, because self-comprehension is incorrigible.

I do not contest that this is the line of Heidegger's thought or even that this result is attained following Wittgensteinian theory of meaning as a social practice. But it seems to me that precisely in this respect Gadamer's hermeneutics intends to go over different orientations, though in a way that is not always clear and unequivocal. In any case it has directly thematized the issue of precomprehension, i.e., the background that confers relevance on human practices. This does not mean that it has been oriented towards the working out of a theory justifying the how of our conceptual apparatus and ensuring its dominion, and consequently control according to the canons of Enlightenment thought.

Between the irremediable opacity of the conceptual background and its unveiling by linguistic therapy there is a third way, which is the one sought, rather than clearly traced out, by Gadamer and Taylor.[6] This is not yet a well defined direction, but is still at the stage of a research project that can develop according to different internal variables. The multiculturalism of our time constitutes an extra stimulus to go all the way with this orientation of thought.

Taking up this point of view, I will only try to clarify, first of all to myself, what problems should be faced with specific reference to law and what spillover there is for the configuration of the contexts within which legal interpretation is practised. I am interested in the general orientation of thought and not directly in the arrangement that it has been given by the authors that have upheld it.

We have said that the hermeneutic issue arises more in the presence of several cultural universes. There are necessarily at least two of them: that in which the interpreter is and that to which the object to interpret belongs. Now it is possible that the hermeneutic objective, that is to say the fusion of horizons, is attained, on condition that a point of contact is found between these different cultural universes. A common framework cannot be taken for granted, but has to be discovered and, in a sense, justified. Indeed, at

[5] José Juan Moreso 'Notas sobre filosofía analítica y hermenéutica' in *Prassi giuridica e controllo di razionalità* ed. Lucia Triolo (Torino: Giappichelli 2001), pp. 217–219.

[6] Cf., e.g., Charles Taylor *Philosophical Arguments* (Cambridge, Mass.: Harvard University Press 1995) xii + 311 pp.

the beginning there is diversity and extraneousness. Nevertheless, the search for a common framework between the cultural horizons implies that the precomprehension of the interpreter must be challenged. If there is unwillingness to accept this, then hermeneutics has to forego any cognitive claim regarding its object, irremediably swallowed up in the conceptual background of the interpreter. Instead, the claims of hermeneutics go in exactly the opposite direction: the text or object to be interpreted broadens the original horizons of the interpreter, or at any rate modifies their arrangement, since the object plays a normative role, that is to say it presents a validity claim which the interpreter has to reckon with. This—in my opinion—is the sense of Gadamer's d i a l o g u e between different worlds.

Challenging of the precomprehension by the person that is immersed in it first of all means "comprehending it" better, identifying its real expectations and managing to discern the prejudices in it that make communication impossible. Precomprehension has to be purified of prejudice, an "inevitable drawback" but one that can be remedied.

In the hermeneutic outlook this work of reflection and correction of misunderstandings is not the fruit of a theory deriving from the practice of concepts, but is work of adjustment *in itinere* following on from the promptings of the object to be interpreted. It is not a matter of working out the grammar underlying or implicit in the use of concepts, not because this grammar is not there, but precisely because it has to be challenged in order to understand worlds regulated and governed by different grammars. Hence the analytical task is not so much rejected as foolish or unreasonable, but as inadequate to explain the ongoing hermeneutic undertaking. The latter has the objective of comprehending the other or the different and not in the first place comprehending itself. To this it must be added that in order adequately to comprehend oneself one needs to be able to converse with those who are different.

The ambitious goal of the hermeneutic undertaking is to overcome particularism from inside, through progressive understandings with other cultural particularities. The awareness of being in a particular context is essential for the hermeneutic pathway, blended however with openness towards other cultural universes for the purpose of constituting a horizon of understanding among several particulars.[7] This means that the interpretive action is far from being a mirroring, but its result, that is to say comprehension, is precisely an event in which sharing of cultural horizons is enacted.

According to philosophical hermeneutics comprehension has a radically temporal character. Human experience is not made up of atomistic and punctiform states of conscience, but of connections between meanings implying incessant rearrangement, retrospective and prospective. Hermeneutic awareness is historical awareness; it is exposed to history in such a way that its action cannot be objectified without eliminating the historical phenomenon itself. But epistemological objectivization introduces in this awareness a sort of estrangement [*Verfremdung*] which destroys the original relationship of affiliation. So it will be necessary to recover the deep unity of historical awareness, showing the possibility of overcoming the rift between the tradition in which and on which the interpreter lives and the one to which the text, or more in general the message, belongs

[7] "Good" universalism is the horizon of agreement of at least t w o particulars when they are capable of universalization.

[*Horizontverschmelzung*]. Every approach to historical documents is never neutral. Each interpreter brings with himself or herself models instilled by his or her own tradition and culture. These pre-judgments [*Vorurteile*] lead him or her to have particular expectations regarding the meanings of a text. Hence comprehension will be a circular movement between the interpreter's expectations or anticipations and the meanings nested in the text. The meeting and fusion of horizons is possible, because, on one side, awareness of the prejudices makes it possible to govern and correct them, and hence the expectations and, on the other side, the meanings to be comprehended reach out beyond the author's intentions. For this reason hermeneutic comprehension is not mere reproduction, but has a productive aspect and itself develops as a historical event, which is available in turn for further actualisations.

Legal experience too has an ineliminable historical character. The past makes its weight felt in the present, which in turn feels somehow bound by it. Legal practice is everlasting work of mediation between different cultural universes: the world in which the legal text (or other equivalent) has originated, and the world of its interpreters or its present users, that is to say of those people who use the text nowadays to complete the undertaking of coordinating social actions. The interpreter is traditionally a mediator and a translator. It is not only a matter of establishing communication between different cultures, but also between different situations, historical events distant in time and conflicting expectations. This requires a capacity not only to engage in a particular linguistic game, but also to grasp what a particular form of life can communicate to a different one and what this can receive from the past.

Because of the historical character of legal experience, one may well wonder whether law is to be identified as a particular linguistic game[8] or as a way of establishing communication between different forms of life and separate historical events. Is law a form of life in itself or a way of governing communication between the multiplicity of languages? Is legal coordination of social actions only possible inside well-defined and circumscribed contexts or does it take place in the interrelation of forms of life distant in time and space?

I believe that the most adequate way to answer such questions is to consider law as a seeker of common values without indissolubly tying it to a specific form of life or a particular anthropology. The general conditions for this to be possible all lie in the way of considering the common framework of a dialogue that is not one between deaf people. And here different variants or different pathways of research are possible that can be seen as alternative or as cumulative.

We can believe that the object to be interpreted is normative not only in the sense that it presents itself as what has to be comprehended, but also because it belongs to a tradition that is endowed with paradigmatic value and is therefore able to speak in a way to everybody. In this case the normativity of the object to be interpreted originates from its content and not from the task that the interpreter takes on. Gadamer's reference to classical texts and classicism has to be seen in this light. There are cultural experiences of the past that have an emblematic meaning as representative of the consolidated canons that govern a practical sphere. This does not mean that such models cannot and must not

[8] Cf. Eduardo Á. Russo & Alicia C. Moguillanes Mendia *La lengua del derecho* Introducción a la hermenéutica jurídica, 3rd ed. (Buenos Aires: Editorial Estudio 2001) 163 pp.

be challenged, even with the result of being profoundly modified. After all, this is what inevitably happens when the interpreter actualizes them, applying them to particular contexts. Nevertheless, they maintain their role as a reference point, in that social practices have to justify their specific articulation of paradigmatic models or their moving more or less radically away from them.

There is also another way of going in search of the common framework of values between the world of the interpreter and that of the object to be interpreted. Now this point of contact is found in the sort of practice that is being discussed. The cultural horizons holding a dialogue with one another, however different they may be in contents or in the values at stake, have in common practical reason, that is to say the aims proper to human operations. One can perhaps identify a convergence between the reason why one interprets and the reasons why the object to be interpreted has come to light.[9] Some practices of the past or some texts are emblematic or meaningful precisely because they have been constructed around demands similar to those that drive the interpreter to interpret them. We admit, for instance, that one of the main aims for which law exists is guiding social actions and coordinating them so that in society there will be order and justice, a just order. This implies unifying different cultural horizons, even though in actual fact they have given very different and conflicting answers and have worked out different models of social order and matured different views of what is right. Nevertheless, the fact that we are talking about answers to the same question makes it possible to identify in this the ground for the hermeneutic dialogue. This requires that awareness be achieved of these structural forms of human action that are implicit in precomprehension itself, saving it from mere facticity. These are not purely formal structures if they are governed—as should be recognized—by the same aims, though seen in different ways.

We can consider these two ways of recovery of a common framework as two variants of the hermeneutic approach to interpretation. The first one has a clearly historical character and, if absolutized, can lead to historicism. The second has an ontological character, since it presupposes that there are universal reasons underlying specific social practices and common questions which these intend to answer.[10] This justifies a critical comparison and allows a mixture of lifestyles. The latter approach, if absolutized, can lead to an abstract metaphysics, such as that which at times has characterised natural law.

Within hermeneutic thought a debate is still open regarding these two main souls that it has, represented by the principle of effectiveness [*wirkungsgeschictliches Bewußtsein*], on one side, and by the rehabilitation of practical reason on the other.[11] Nevertheless, in principle, these two orientations are not necessarily conflicting ones, but become so in the presence of a radicalization of the one or the other. It would be possible, instead, to show that in their moderate form each needs the other. The fact is that identification of the paradigmatic texts and the symbolic practices is only possible if one recognizes

[9] Cf. Joseph Raz 'Why Interpret?' *Ratio Juris* 9 (1996) 4, pp. 349–363.

[10] For the distinction between analytic and ontological hermeneutics, see Roy J. Howard *Three Faces of Hermeneutics* An Introduction to Current Theories of Understanding (Berkeley: University of California Press 1982) xvii + 184 pp.

[11] Cfr. Hans-Georg Gadamer 'Hermeneutik als praktische Philosophie' in *Rehabilitierung der praktische Philosophie* ed. Martin Riedel, I (Freiburg: Rombach 1972), pp. 325–344 and Franco Volpi 'Herméneutique et philosophie pratique' *Ars interpretandi* [Journal of Legal Hermeneutics] 7 (2002), pp. 11–42.

that they intend to answer the questions that the interpreter asks himself and the search for which he engages in interpretative practice. By contrast, the demands that justify the search can only be clarified through specific answers that in our view enjoy particular relevance. There remains the fact that historicism and metaphysical abstraction are just round the corner.

I would now like to show how these articulations of hermeneutic thought can be applied to legal interpretation, thus helping to clarify the general sense within which the interpretive methods consolidated in the tradition of legal thought are practiced.

The Interpretation of "Legal Texts"

Hence the primacy of comprehension drives hermeneutics as a philosophy to question itself on the general meaning of human works. We have already noticed that it is not simply a matter of establishing relations between different cultures, that is to say a problem of translation of languages, but also comprehending the t h i n g involved. The latter does not allow itself to be imprisoned in the relativity of a culture, or to be exhausted by the multiplicity of its applications. It is precisely with reference to this "common meaning" that cultures can really communicate. Hermeneutics is set in this interstitial space that does not properly exist, because every interpretive event unavoidably belongs to a cultural process. It asks itself questions about how forms of human life can hold a dialogue through events that yet remain within and proper to each of them. In the name of what do we consider as l a w such different systems of rules if not because the t h i n g in question is in some way common to them? Why do we not consider the science of comparative law a place of foolishness and misunderstandings unless it is because the legal enterprise has in some way a common significance everywhere?

The particular attention that hermeneutics pays to texts is explained by the fact that texts speak to us of something or, more exactly, are the place in which it is possible to grasp the reason why they are interpreted. Since interpretive activity is set going by the cogent demand of the realization of a work, the texts in question are the s a c r e d ones, that is to say those that call on people to perform a task that is perceived as inescapable.[12] We can consider them c l a s s i c a l t e x t s if we give a broad meaning to this expression.[13] The great literary and artistic works are classical texts, but so are religious and legal texts. They are considered emblematic, because in them the sense of the work to be performed is disclosed in a specific and particular way, so that they take on the role of being a reference point for comprehending the meanings of actions. One must not only think of written texts. The way of behaving that is common to men can also take on the role of being a reference system through which we understand an unknown language.[14]

Hence the main difference between the legal positivistic approach to the text and that of legal hermeneutics becomes fully evident. In this connection, the former believes

[12] Cf., e.g., Mauro Barberis 'The Sacred Text: Legal Interpretation between Hermeneutics and Pragmatics' *Ars interpretandi* 4 (1999), pp. 279–297.

[13] Cf. Enrico Berti 'The Classical Character of a Philosophical Text' *Ars Interpretandi* 2 (1997), pp. 7–20; Reinhard Brandt *Die Interpretation philosophischer Werke* Eine Einführung in das Studium antiker und neuzeitlicher Philosophie (Stuttgart & Bad Cannstatt: Frommann Verlag & Günther Holzboog 1984) 260 pp.

[14] Ludwig Wittgenstein *Philosophische Untersuchungen* (Oxford: Blackwell 1953), § 206.

that the whole meaning is immanent in the text and contained in it. Legal positivism is not characterized as affirming that the whole of law is a product of human action—an idea that in many respects is acceptable—but fundamentally by its maintaining the self-reference of positive law, i.e., the identification between the point of law and legal texts or, if we like, the self-legitimization of the text. This seems sound both in the case in which legal texts are thought of as having become absolutely independent of their authors, and in the case in which they are always considered as the place of manifestations of authorial intentions. In any case it is felt that texts can be interpreted without grasping the thing that lies outside them and constitutes their basis. Interpretation becomes independent of understanding and turns into a mere linguistic technique. The enterprise is similar to that of Baron MÜNCHAUSEN, who gets out of the slush by pulling his own wig.[15]

In the hermeneutic perspective, instead, it is not a text that has a relevant sense in itself, but a sense that has (or expresses itself in) one or more texts. This means that it is law as a specific form of human action that precedes and confers meaning on texts, which precisely for this reason are considered l e g a l. None of them, however, can seize on and contain in itself the whole point of law, each one only being a more or less adequate instantiation of it. If this were not the case, comprehending and interpreting would be the same thing, and consequently no criteria of evaluation would be possible in relation to the correctness of the latter. Positive law would always and infallibly realize its sense. And this is historicism.

The specific horizon of meanings, which is presupposed in precomprehension, makes it possible to reject NIETZSCHE's affirmation that everything is interpretation. This thesis is inconsistent and self-contradictory, because, if everything were interpretation, nothing would be interpretation, since interpretation is always interpretation of something. All interpretation implies an object to be interpreted which is different from the interpretation itself. If everything were interpretation, one could not even say that l e g a l texts are interpreted. It is certainly not interpretation that makes a text l e g a l, but on the contrary it is legal texts that make the interpretation l e g a l. Indeed, even more radically, we should say that legality itself does not depend on the texts, but, before them, on the form of life of which the texts are expressions.

Interpretation is certainly linked to positivity to such an extent that we can affirm that the very positivity of law is the result of interpretations and the beginning of other interpretations. Nevertheless the horizon of meanings is not strictly interpreted but comprehended, and this results in an endless chain of interpretive events. The methodological issue of the correctness of the interpretation is therefore subordinate to the hermeneutic one concerning the conditions of possibility of the comprehension of legal texts.

Hence the l e g a l t e x t in its own sense is not to be confused with legal texts. Every interpretation certainly addresses legal material (written or oral) from which to derive the meanings of the rules, but this material gets its point from something else, be it a tradition, a social practice that persists in time, or a consolidated way of seeing relationships and social situations. In short, the very text in which to read law is a social

[15] Cf., in general, Joachim Hruschka *Das Verstehen von Rechtstexten* Zur hermeneutischen Transpositivität des positive Rechts (München: Beck 1972) 101 pp. [Münchener Universitätsschriften, Reihe der juristischen Fakultät 22].

practice that is updated in time and in space, preserving continuity, though slender or hardly discernible.[16] This does not mean that every legal epoch has not been marked by legal texts that are in some way emblematic or paradigmatic, like Justinian's *Corpus iuris*, the *Decretum* Gratiani, Napoléon's *Code civil* and, today, the *Universal Declaration of Human Rights*.

In the western legal tradition—as Berman rightly observes—law is conceived as an organic whole, as a unitary b o d y, *corpus iuris*, which evolves in time over the centuries and the generations.[17] This idea, a trace of which can already be found in Roman law, was elaborated in a conscious manner in the medieval age by the European canonists of the twelfth and thirteenth centuries and by the Romanists, who taught Justinian law in the European universities. This organic corpus is made up of norms and doctrines, principles and concepts. Its configuration is closely linked to the rise of legal science and of the class of jurists. In other words, law includes not only the commands and decisions of the political authority, but also the doctrines and the concepts worked out by jurists, and the interpretations and decisions of judges. This means that law possesses within itself the criteria for its own order and for its own evaluation. This is the meaning of the appeal to a 'corpus', which would be betrayed if seen as a 'system' in a logical sense.[18]

This configuration of law is absent in non-western cultures and in European cultures of barbaric origin down to the eleventh century. In these cultures one cannot speak of law as an order distinguished from morality, religion and politics. However, this does not necessarily mean that law is exclusively made up of prescriptions and formal procedures.

One must not confuse this idea with Kelsen's idea of the unity of a normative system deriving from a fundamental norm [*Grundnorm*], which if anything is a reductionist application of it produced by demands for rationalization taken to their extreme. In the medieval age law as a corpus was the result of the integration of different legal systems. This integration was favoured by the doctrine of the hierarchy of the sources of law and by doctrinal criteria for the resolution of conflicts between norms belonging to different legal regimes.

The first example of this way of facing the relationship between norms of different origin is found in the *Concordantia discordantium canonum* of the monk Gratian in 1140. Gratian affirmed that in the case of a conflict custom had to give way to written law, the latter to natural law and this in turn to divine law. This is an emblematic case of "competition between orders", that is to say between the order of law deriving from society (custom), the one deriving from the political sovereign (written law), the one proper to reason (natural law) and the one deriving from divine revelation (divine law). As can be observed, here the unity of the *corpus iuris* is not only compatible w i t h but even constituted by the pluralism of legal regimes. This pluralism extends to everything, that is to say it also concerns the nature of these different legal regimes, which have heterogeneous sources and rules.[19] If precisely this pluralism, on the historical plane, is fully

[16] Francesco Viola *Il diritto come pratica sociale* (Milano: Jaca Book 1990), pp. 5–28.

[17] Harold J. Berman *Law and Revolution* The Formation of the Western Legal Tradition, 2nd ed. (Cambridge, Mass.: Harvard University Press 1990) 672 pp.

[18] It can also be shown that the term 'system' originates precisely from the concept of 'organism' in medicine. Cf. Francesco Viola *Autorità e ordine del diritto* 2nd ed. (Torino: Giappichelli 1987), p. 113, note 146.

[19] I observe this to mark the difference from the present-day problem of " competition between legal systems"

compatible with the unitary idea of *corpus iuris*, Weber's thesis of the incompatibility between traditional law, charismatic law and rational law is challenged. The fact is that when rational law has prevailed, the idea of *corpus iuris* has disappeared and has been replaced by the idea of a logical normative system, which in legal pluralism sees a defect or an evil to be fought.

Today in the place of *corpus iuris* there is the "European legal space" in which in a disorderly way there fluctuate norms which have come from no one knows where, applied no one knows how and by whom. In our view a mess arises, a fragmented mass of *ad hoc* decisions and conflicting norms, united only by common t e c h n i q u e s. This situation nurtures cynicism, and in the last resort favours nihilism.[20]

A legal space, which is neither a corpus nor an order, at the same time helps to destructure the state orders and makes it problematic to apply the current notion of l e g a l s y s t e m to them. The fact is that, despite everything, for us the concept of legal system preserves a certain appeal as an expression of the state. I believe that this is also true for Santi Romano[21] when he conceives every legal order as being exclusive on the inside and alternative on the outside, which are characteristics clearly deriving from a state-oriented conception. In this way the pluralism of legal systems is built up with the model of the pluralism of the state arrangements in mind. If we remain anchored to this "state-oriented" notion of the legal system, then we have to recognize that law is no longer a corpus and that the state order now is no longer a legal system in a strict sense. Today, to use the words of Gustavo Zagrebelsky, a well-known contemporary Italian jurist, "law as a system is no longer a fact, as it was in the nineteenth century, but, if anything, we could say it has become a problem, a very serious problem".[22] Nevertheless, if we are prepared to abandon the reductionist idea of a normative system, there is perhaps the possibility of recovering the Roman and medieval idea of *corpus iuris* in a profoundly new form.

This new orientation has an unwitting origin and justification in the very idea (also proper to the western legal tradition) of the Rule of Law, which is not to be seen as an identification of state and law [*Rechtsstaat*]. If law and state were one and the same thing (as Kelsen thinks), then every state in itself would conform to the law and, therefore the principle that states must be subjected to the law, and to nothing but the law, would become void. How can law impose constraints on politics if law is merely the product of politics?[23] If instead the law is a corpus, in some way unitary, of norms, procedures, decisions, doctrines and principles at one and the same time preceding and resulting from the interaction between different legal regimes, then the point of the legal enterprise precedes and justifies all legal institutions, including that of the state.

In the light of a refreshed theory of law we can understand why the western legal tradition has been very careful not to reduce law to the laws produced by the political

in the European Union. Despite the difference between the common law and civil law systems, these orders are much more homogeneous than the medieval ones.

[20] Cf. Natalino Irti *Nichilismo giuridico* (Roma & Bari: Laterza 2004) viii + 148 pp.

[21] Santi Romano (1875–1947) was an Italian jurist whose theory of the plurality of legal orders was very influential in Italy during the first half of the last century.

[22] Gustavo Zagrebelsky 'I diritti fondamentali oggi' in *Materiali per una storia della cultura giuridica* 22 (1992) 1, p. 192.

[23] Cf. Neil MacCormick *Questioning Sovereignty* Law, State, and Nation in the European Commonwealth (Oxford: Oxford University Press 1999), chs. 1–3.

authorities and has turned its attention to other sources, such as divine revelation, natural law and, more recently, human rights, and to the contexts of the civil society inside the nation (cities, regions, workers' associations), as well as to those that go beyond the national confines (*ius gentium*, *lex mercatoria*, international organizations, churches).

In short, it has become clear not only that state law and law are not the same thing, but also that the former is only a part of the law that is applied, a part which is becoming smaller and smaller. Law is not unified by a sovereign institution, but by the complex of historical institutions and by the tradition that links them to one another. In this sense it can be thought of as a corpus, a *corpus iuris*.

The "Thing-law"

In legal experience there is also another way of defining law. Now a common framework is no longer to be sought in the persistence of historical awareness, which actualizes in ever new ways principles or rules coming from the past and consolidated by tradition. One wonders whether there are not persistent reasons for law to exist in societies at all time and in all countries, and whether there are not goods or aims that can only be guaranteed by law or that it is also necessary to reach through law.[24] This does not mean that there are unchangeable legal contents nor that there are fixed structures of legality, but that there are fundamental values or general horizons of good that should be made accessible to every human being and that constitute the point of law and the reasons for its use.

In this connection the pathway of philosophical hermeneutics starts from legal discourses in which the "thing-law" is referred to, to get back to the goals that justify them. It is an inductive pathway and not a deductive one, as is suited to practical reason. The discourse is that "situatedness" of language in which comprehending and understanding are enacted. Inside this, which is first of all an event, there will then have to be rational or analytical checking, but it is not this that can qualify the event itself as 'legal'. On the contrary, it is on the specific character of the discursive situation that there depends the way in which its validity claims can be tested.

What confers relevance on legal discourse and the cooperative enterprise that it substantiates is not given by its specific conditions of practicability, but by the aims that set it going.

Practical discourses (ethical or legal) are articulated on the basis of arguments and means for examining them, in which intersubjectively there are tested out the justification of the actions or omissions and the validity claims of norms, value judgments and institutions are challenged. If we observe them in the light of what these discourses tend to enact or attain, then not only the argumentations but also the normative rules are themselves presented as "reasons" that justify the actions. These reasons can only be grasped in discursive contexts, which confer existence and operativeness on them, but they can only be evaluated and weighed up in the light of the goals that we intend to reach or that identify the social practice at issue.

For philosophical hermeneutics the discourse does not serve only to communicate

[24] On this theme cf. Francesco Viola & Giuseppe Zaccaria *Le ragioni del diritto* (Bologna: Il Mulino 2003), ch. 1.

the intentions of the participants, but above all to weave out a common form of life. This perspective precludes assimilating philosophical hermeneutics to linguistic pragmatics.[25] For the latter, intentions and beliefs are the directive principle, that is to say the state of things that confers relevance on discourse. For hermeneutics the directive principle is what is being spoken about or what is being done. This is the "thing" of the text or what the text speaks about. We are not talking about a determined meaning, as an intention can be, and instead it is a matter of submitting oneself to a normative reality, that is to say to constraints and rules striving at reaching aims. The determinacy of the meaning will instead be the result of the communicative interaction and the participative actions. Indeed law, as the "thing" which legal text speaks about, is marked by indeterminacy.

A work of art has a binding character not through the author's intention, but because it has a truth claim to be respected. Likewise, we have to obey the rules of the game, if we want to play it, and those of a culture if we want to be communicative within it. Now hermeneutics rejects the centrality of the intention precisely because it addresses all its attention to the conditions in which every intention can be formulated and acquires relevance. In short, the point to be comprehended does not come from the intention, but from something else, and at all events cannot be comprehended without it. In this connection Gadamer notes that in play, as in aesthetic enjoyment, the actor is the game itself. In a sense the players are played by the game, which has a dominant character: it dominates the players through and in their actions. As Gadamer affirms, the subject of the game is not the players, but it is the game that is performed through the players: the game plays the players more than the players play the game.

The attention of philosophical hermeneutics is addressed to those forms of common life that the discourse itself reshapes and instantiates. Its central problem is not determination of the meanings within a horizon already constituted, such as a culture or a language already existing and used. This is a matter of interpretation, which presupposes a language of interaction already constituted and moves in a world already marked by reciprocity, cooperation and an intersubjective contextual sense. So the interpreter can in some manner be guided and constrained in relation to the work of ascribing meanings. The real problem of hermeneutics is comprehension of what is unfamiliar and this is only possible insofar as a common meaning is perceived between our world and the one to which there belongs the text to be comprehended. The discovery of this common framework is not possible through purely theoretical and abstract knowledge, but only in the practical event of the discourse, in which participation in a common undertaking takes shape. What is common to the world of the text and the world of the interpreter is the practical goal, that is, the relevance of the text to the action to be performed. If we do not get into the outlook of practical knowledge, it is not possible to seize the demands of philosophical hermeneutics.

In conclusion, it has to be reemphasized that philosophical hermeneutics has as its object problems relating to the comprehension of the point of common undertakings and

[25] Cf. David C. Hoy 'Intention and the Law: Defending Hermeneutics' in *Legal Hermeneutics* History, Theory and Practice, ed. Gregory Leyh (Berkeley: University of California Press 1992), pp. 173–185 and Francesco Viola 'Intention and Legal Discourse: A Comparison between Linguistic Pragmatics and Hermeneutics' in *Ars interpretandi* 2 (1997), pp. 61–81.

believes that it cannot be found outside concrete discursive events. The "thing" which the text speaks of lives in the practice of comprehending and interpreting.

The "thing-law" is not an idea, it is not a value and it is not even a set of social procedures, but is an undertaking jointly participated in by beings that are free and autonomous but need each other in order for each to attain a very successful life. This cooperative undertaking is substantiated in activities guided by rules and serves to coordinate social actions.[26] But all this is still too generic, because it could be equally well applied to other spheres of practical life like ethics, politics and economics.

In the search for the whole set of meanings of the cultural phenomena or of "human things" the best method is not to look for the common element [*genus et differentia specifica*], because this flattens a notion downward and mortifies the possibilities and the richness of manifestation, in which there most clearly appear the reasons for common undertakings. The beautiful is perceived best in the most beautiful things and the good in the most virtuous actions. Hence it is necessary to choose as a hypothesis the emblematic cases accepted by everyone [*éndoxa*] of the cultural phenomena studied for working out the main sense of the concept that one wants to define. Peripheral cases, in turn, will appear as impoverished examples or ones lacking something or at any rate difficult to interpret. They will be clarified precisely on the basis of the significant bonds that they have with the main case. This common framework allows analogical extension of the concept, which thus shows its authentic universality. It is in the paradigmatic case that the principle or the *ratio* of the definition is most easily identifiable. If we started from hard cases, we would never succeed in grasping the fullness of the sense of human things. If there are doubtful cases, it is because there are cases which are not doubtful, and it is from these we need to start in order to clarify the others.

It is not to be believed that this method, unlike the other, is of a deductive type. On the contrary it is the most correct way of conducting an inductive investigation. Indeed, Aristotle at first applied this method to his philosophy of nature.[27] The inductive search does not proceed from the scrutiny of a great many single cases in order to abstract from them the common element through generalizations. This is only possible *a posteriori* for teaching or expository purposes, when the common element has already been found. On the contrary, in the search one proceeds from a particular case taken as hypothetically emblematic, and one verifies whether it can offer authentic universality. The important thing is carefully to choose the paradigmatic case and not to forget that it is only a hypothesis to be verified, which can and must be abandoned if it is devoid of universal scope.

The hermeneutic dimension of the method of the main case is incontestable, but it lies not so much in the investigation procedure but rather in the need for precomprehension of the horizon of meanings in which to carry out the processes of selection of the

[26] Cf. John Finnis 'Law as Co-ordination' *Ratio Juris* 2 (1989) 1, pp. 97–104. In law it is necessary to pay particular attention to that form of coordination that is called 'cooperation'. See Michael E. Bratman *Faces of Intention* Selected Essays on Intention and Agency (Cambridge: Cambridge University Press 1999), pp. 94–95; Scott J. Schapiro 'Law, Plans, and Practical Reason' Legal Theory 8 (2004) 4, pp. 387–441; Francesco Viola 'Il modello della cooperazione' in *Forme della cooperazione* Pratiche, regole, valori, ed. Francesco Viola (Bologna: Il Mulino 2004), pp. 11–58.

[27] Cf. Wolfgang Wieland *Die aristotelische Physik* Untersuchungen über die Grundlegung der Naturwissenschaft und die sprachlichen Bendingungen der Prinzipienforschung bei Aristoteles, 3. Aufl. (Göttingen: Vandenhoeck und Ruprecht 1992) 365 pp.

reflection. The real starting point is found in an indefinite universal or in approximate preliminary knowledge, but only by freeing oneself of misunderstanding is it possible to arrive at determinacy of principles and therefore to pass from interpretation to full comprehension.

It has been felt that the Rule of Law is the paradigmatic model to which we have recourse in our day and age in order to identify the general characters of the legal enterprise: taking away the exercise of power from the arbitrary will of men and achieving equal concern and respect. But these demands, though part of the general value of justice, are far from exhausting its scope. Though we cannot fault HART when he notes that the rule of law is "compatible with very great iniquity",[28] nevertheless it is also true that a just society is not compatible with systematic violation of the Rule of Law. That a legal system with its set of norms should respect given formal and procedural conditions, that it should work well and possibly be in good health are a necessary though not sufficient component of the objective of a just society seen as an ideal goal. But the value of justice requires much more if it is true—as RADBRUCH affirms—that law is that reality whose point is to serve justice.[29] The Rule of Law serves to identify the presence of the legal demand in culturally different societies.[30] However law is not present in every case in the same way, but is present in a more or less full and complete way, because its aims are more or less clear and distinct and its tools are more or less adequate.[31]

More recently, the most accredited paradigmatic model has become that of constitutionalism. This is a model that is no longer purely formal, since contemporary constitutions contain a list of rights for the defence of individuals and social groups and legitimize claims that can hardly be recomposed in a social order accepted by everybody. Contemporary constitutionalism does not identify justice with social order. It places at the centre the human person and his or her dignity and thus justifies disagreement, which nevertheless it is the task of law to resolve and overcome.[32] All this may seem paradoxical, but it is not, because the value of justice includes both the recognition of rights and the common welfare of society. Justice cannot be seen as fulfilled until satisfaction is given to the one and the other and this is the task of the legal enterprise globally considered.

However, constitutionalism too is a contingent historical model. It would be naïve to think one had finally found or constructed the perfect model of legality once and for all. We can already observe that the general orientation towards multicultural societies and towards more and more articulated legal pluralism is changing from within it the role of constitutions, freeing them from their exclusive reference to the state and transforming them into a language of world legal communication.[33]

A hermeneutic philosophy of law considers legal efforts for organizing social life as

[28] Herbert L. A. Hart *The Concept of Law* 2nd ed. (Oxford: Oxford University Press 1994), p. 207 and also Joseph Raz 'The Rule of Law and Its Virtue' [1977] in his *The Authority of Law* (Oxford: Oxford University Press 1979), pp. 210–229.

[29] Gustav Radbruch *Rechtsphilosophie* 8. Aufl. (Stuttgart: Schneider 1983) p.119.

[30] To the theme of the Rule of Law, VARGA has devoted great attention, with particular reference to different legal cultural relations and changes in cultural paradigms. Cf., e.g., Csaba Varga 'Varieties of Law and the Rule of Law' in *Archiv für Rechts- und Sozialphilosophie* 82 (1996) 1, pp. 61–72.

[31] Cf. Fred Dallmayr 'Hermeneutics and the Rule of Law' in *Legal Hermeneutics...* [note 25], pp. 3–22.

[32] Cf. Jeremy Waldron *Law and Disagreement* (Oxford: Oxford University Press 1999) 325 pp.

[33] Cf. Francesco Viola 'The Rule of Law in Legal Pluralism' in *Law and Legal Cultures in the 21st Century* Di-

more or less successful attempts to create just societies despite the dramatic denials of history. What appears unreasonable in the light of this aim is destined sooner or later to be overwhelmed and swept away because of the devastating effects of practice. Practical reason is verified from the results of its applications more than from the abstract value of its principles. We can therefore observe in conclusion that reflection on the "thing-law" starts from particularly significant historical models, which take on the role of being paradigmatic cases. They speak to us of the point of law, but this is never completely captured by a determined model nor by a particular social order. In these historical enactments the point of law is realized in a more complete way, but not in a way which is definitive and exhaustive once and for all. The sense of law constructs its own historical expression and, at the same time, it decrees its limits.

I believe not only that the pathway of "law as text" is fully compatible with that of "law as thing", but also that the former needs the latter and vice versa. Philosophical hermeneutics has tried to live without the teleological and ontological dimension, trusting in the solidity of traditions and in their compactness. But contemporary pluralism has brought disorder and confusion into the world of practices and traditions, making work of reconstruction and reinterpretation necessary in the light of the general aims of cooperative undertakings. Practical reason works in history. Dialogue and integration between different cultural worlds presuppose a society founded at one and the same time on the capacity to understand languages coming from other worlds and on convergence towards the same horizons of good. If the possibility of communicating is denied, we will also be forced to deny the possibility of cooperating.

FACULTY OF LAW
UNIVERSITY OF PALERMO, ITALY
VIOLA@UNIPA.IT

versity and Unity (23rd IVR World Congress, August 1–6, 2007, Cracow, Poland), ed. Tomasz Gizbert-Studnicki & Jerzy Stelmach (Warszawa: Oficyna 2007), pp. 105–131.

Remarks on Legal Positivism

Jan Woleński

The debate between natural law and legal positivism is an invariant in the history of legal philosophy and jurisprudence. It goes back to ancient Greece and the conflict between Antigone and Creon, described by Sophocles in his great tragedy *Antigone*, which can be considered as one of the first explicit testimonies of the problem in question. Another example is provided by well-known discussions of medieval political philosophers whether citizens have the right to rebel against bad regimes. The role of natural law as universal in the development of international law (the law of nations) is another example. Legal thought in the 19th century favoured legal positivism. This was caused by the triumph of great codifications, like the *Code Napoléon* or the *Bürgerliches Gesetzbuch*, but was also due to the general philosophical positivistic atmosphere. The positive law, relatively easily identified through its sources, was considered as fact and lawyers should not disregard facts in their practice. Hence, any appeal to religion or reason as extra-legal factors in solving the question which law is valid, was considered as metaphysical and not admissible as such. On the other hand, natural law was defended in this epoch by many authors, including Rudolf Stammler and followers of Thomas Aquinas. The actual renaissance of natural law was caused by the cruelties of the Second World War. Some authors, like Gustav Radbruch, formerly definitely sympathetic to legal positivism, argued that the positivistic legal culture essentially contributed to the success of Nazism and made German lawyers insensitive to moral values. Thus, for example, German judges, directed by the slogan "law is law", became completely blind to law violating elementary moral norms, for instance the Nuremberg statutes, and tolerated legal injustice (*gesetzliche Unrecht*). The recent defence of natural law points out its significance in the justification of human rights and their protection by international courts. Thus, it is not surprising that legal theoreticians and philosophers discuss legal positivism and natural law very frequently and fairly lively. The exchange between H. L. A. Hart and Lon L. Fuller in the late 1950s is perhaps the most famous example in the last fifty years. It is also not surprising that world congresses of legal philosophy traditionally have related points in their scientific programs. Recently (i.e., at the world congresses of the International Association for Philosophy of Law and Social Philosophy at Lund in 2003, Granada in 2005, and Cracow in 2007), natural law and legal positivism were debated by plenary speakers or panels.

My remarks in this paper are restricted to very elementary conceptual matters. Hav-

ing an opportunity to attend those debates at Lund, Granada and Cracow, I came to the conclusion that simple philosophical and methodological observations about natural law and legal positivism are in order. Although I do not believe that conceptual work essentially changes the situation and will result in the end of the discussion in question, I still maintain that we should clarify some points from time to time. First of all, let me remark that the phrase "legal positivism and natural law" (HART even uses it in the form »Natural Law and Legal Positivism«,[1] but capital letters explain nothing) is somehow absurd as expressing the main opposition. Legal positivism is a view, partly philosophical, partly legal, but natural law consists of rules, principles, etc. and constitutes a normative order. Thus, we should rather contrast positive law and natural law or legal positivism and natural law theory (doctrine, etc.). *Prima facie*, this second opposition could be expressed by the label "legal positivism and legal naturalism". Unfortunately, naturalism is a philosophical view very far from accepting natural law in its traditional sense. For example, HUME, one of the founding fathers of naturalism, radically rejected natural law in the sense used by GROTIUS, SPINOZA, LEIBNIZ or WOLFF. Although the evaluation of the opposition "legal positivism and natural law" as not quite proper is rather straightforward, it is difficult to skip it, because its second element invokes something more than a set of rules or principles. Natural law acts as a kind of legal theory or a form of thinking about law. Hence, I will follow the customary terminological standard and use the label "natural law" as simultaneously referring to specific rules and their theory.

Perhaps the most satisfactory characterization of legal positivism was given by HART.[2] According to him, legal positivism has the following main features or ingredients:

(A) Legal positivism is a theory of jurisprudence, claiming that positive law is the only subject of legal studies; this study employs a special method consisting in the "clarification of the meaning of law, the identification of characteristic structure of legal system, and the analysis of pervasive and fundamental legal notions, such as right, duty, ownership or legal personality";[3] roughly speaking, this description fits the so-called *formal-dogmatische Methode*.

(B) Legal positivism proposes a definition of law: law is the command of a sovereign; otherwise speaking, law is created by special authorities.

(C) Legal positivism is a theory of the judicial process, according to which "correct legal decisions are uniquely determined by pre-existing legal rules and that the courts either do or should reach their decisions solely by logical deduction from a conjunction of a statement of the relevant legal rules and the statements of the facts of the case".[4] Otherwise speaking, judges and other authorities undertaking legal decisions as deductive engines.

(D) Legal positivism proposes a "separation of law and morality" in order to use the main motto of the HART–FULLER exchange;

(E) Legal positivism claims that law must be strictly obeyed independently of its moral content.

[1] H. L. A. Hart *The Concept of Law* 2nd ed. (Oxford: Oxford University Press 1994), p. 185.

[2] By H. L. A. Hart, 'Legal Positivism' in *The Encyclopedia of Philosophy* ed. P. Edwards, IV (New York: Macmillan 1967), pp. 418–420 and *The Concept of Law*, passim.

[3] Hart 'Legal Positivism', p. 419.

[4] *Ibidem*.

I will not comment the points (A) to (C), although there is very much to say about them. My interest in this paper is restricted to (D) and (E), that is, the relation between law and morality as it is viewed by legal positivism.

HART in another place[5] says as follows:

> "Here we shall take Legal Positivism to mean the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so. But just because those who have taken this view have either be silent or differed very much concerning the nature of morality, it is necessary to consider two very different forms in which Legal Positivism has been rejected. One of these is expressed most clearly in the classical theories of Natural Law: that there are certain principles of human conduct, awaiting discovery by human reason, which man-made law must conform if it is to be valid. The other takes a different, less rationalist view of morality, and offers a different account of the ways in which legal validity is connected with moral values."

Thus, according to HART, legal positivism claims that

(1) there is no necessary connection between law and morality.

The word "necessary" is puzzling here. Without entering into details, probably the simplest interpretation of the necessary connection in (1) consists in considering this category as indicating the conceptual and essential link between law and morality. Accordingly, a natural law account of legal reality is to be construed as the denial (negation) of legal positivism; it must take the following form:

(2) there is a necessary connection between law and morality.

More specifically, the link between law and morality is this:

(3) law in order to deserve to be law satisfies certain specified moral requirements.

Returning to HART, (3) has the status of a necessary truth, according to natural law theorists. The concept of necessary truth is as puzzling as the notion of the necessary connection, but I must leave aside this issue. Fortunately, whatever we say about the essence of necessary truths or necessary connections, (2) or (3) (as a necessary truth) expresses the main tenet of natural law.

The theses (1) to (3) can be transformed by using elementary modal principles. In particular, (3) is equivalent to

(4) it is impossible that law is law if it does not satisfy moral requirements.

On the other hand, (1) leads to

(5) it is possible that law is law if it does not satisfy moral requirements.

Thesis (4) is the distinctive claim of natural law as legal philosophy. A natural law theorist cannot weaken it without devastating his own position. On the other hand, legal positivism is more flexible, because they can either stay with (5) or take a stronger view, namely

(6) it is necessary that law *qua* law and morality are not interconnected.

This last thesis is logically stronger than (1), because the former entails the latter, but the converse dependence does not hold. Now (1) and

(7) it is possible that law *qua* law satisfies moral requirements

[5] Hart *The Concept of Law*, pp. 185–186.

are logically consistent, but (7) and (6) are not. Thus, logical analysis justifies a well-known distinction of two kinds of legal positivism: hard (radical) and weak (that is, soft, according to a very popular terminology, recommended by HART). Inspecting the given formulas, we see that soft legal positivism is governed by (1) which is merely a negative statement or its positive variant (5). If someone denies that *A* and *B* remain in a necessary connection, he does not imply that any connection is refuted. Hard legal positivism adds to (1) (or (5) a very strong supplement asserting that there is no connection between law and morality as far as the matter concerns law *qua* law. Of course, hard legal positivists recognize that various social factors influence the content of law, but they exclude them from circumstances which are relevant for law *qua* law. Yet this view immediately falls into very serious difficulties, because its advocates should explain how it is possible to pass from a denial of conceptual connections between law and morality to rejecting all other connections as important for law *qua* law. The fate of KELSEN and his pure theory of law perfectly illustrate what is going on in this case. Now, we can much better qualify the thesis that legal positivism is more flexible than natural law. In fact, this merely concerns soft legal positivism. This position denies that there is a necessary conceptual connection between law and morality, but still accepts that they are other, perhaps even necessary (perhaps in the sense of causal necessity, but I omit this controversial issue) links between both. HART's idea of the minimal content of natural law is a good example here. Anyway, soft legal positivism does not imply that extra-legal evaluation of law *qua* law is possible. If we carefully distinguish (5) and (6) the difference between HART and FULLER becomes secondary. In particular, there is no problem with accommodating the internal (or inner) morality of law in FULLER's sense into soft legal positivism. I suspect that FULLER interpreted HART as a representative of radical legal positivism.

Let me illustrate the point by another example. RADBRUCH argues[6] that the obligation to obey arbitrary law follows from the thesis

(8) law is law.

Literally speaking, RADBRUCH's view is not admissible. Since (8) is a tautology, it cannot entail any non-tautological consequences. Since the statement

(9) law should be obeyed independently of its content,

is not a tautology, it cannot follow from (8). However, (8), according to earlier explanations, functions, at least in the light of hard legal positivism, as an abbreviation for

(10) law is law disregarding its content,

which cannot be reduced to a tautology. This raises the question how (9) and (10) are mutually related. Since (10) is either a factual statements about law or a definition (or its consequence), it, according to the HUME principle (ought does not follow from is), cannot entail (9), because the former is normative, but the latter is not. Thus, RADBRUCH is not right that legal positivism, even radical, inevitably justifies obedience to any law.

The last statement should be commented in a way. Of course, I do not deny that the discussed issue has a political or sociological dimension. Certainly, we should ask in which circumstances positivistic attitudes prevail, but natural law looks more appealing. It seems that in the time of social stabilization, like in the 19th century, legal positivism is felt as *the* proper legal philosophy. Great legal positivists like BENTHAM, AUSTIN, MILL

[6] Gustav Radbruch *Rechtsphilosophie* (Stuttgart: Koehler 1956).

or Bergbohm either acted for a good law or, at least, could not imagine the legal cruelties of Nazism. On the other hand, revolutionary times or reactions for mass murdering immediately result in a search for natural law. Thus, the popularity of this or that legal philosophy strongly depends on its broad political context. This is the main reason why the controversy between natural law and legal positivism is perennial. Soft positivism must admit that any solution of a concrete legal case in which morality is involved depends on so many factors, that a general rule, like (7), does not help. Thus, a zone of fuzziness concerning what and when should be legally approved or disapproved from the moral point of view, seems inevitable.[7]

INSTITUTE OF PHILOSOPHY
JAGIELLONIAN UNIVERSITY, CRACOW, POLAND
J.WOLENSKI@IPHILS.UJ.EDU.PL

[7] I am very happy that this essay appears in the Festschrift for Csaba Varga, my old friend. In particular, I would like to stress that Csaba was always a passionate and brave defender of legal philosophy, even when it was blamed as politically incorrect in countries like Hungary and Poland.

A paper-bound version,
printed in 145 copies,
is published as

STANDING TALL
Hommages à Csaba Varga
edited by Bjarne Melkevik
(Budapest: Pázmány Press 2012)
487 pp.

[UNIVERSITATIS CATHOLICÆ
DE PETRO PÁZMÁNY NOMINATÆ
FACULTAS IURIS ET
SCIENTIARUM POLITICARUM:
XENIA]

ISSN: 2061-9227
ISBN: 978-963-308-973-3