LAW AND REVOLUTION

PAST EXPERIENCES, FUTURE CHALLENGES

Edited by
Matej Accetto, Katja Škrubej and Joseph H. H. Weiler

ROUTLEDGE

Law and Revolution

The last one hundred years have seen a number of events that could be perceived as disruptive challenges to the normal operation of the legal order. Some have been disruptive innovations of technologies or business practices, others social changes or constitutional transformations, further buttressed by the impact of globalisation and interdependence affecting the development of international, transnational and global law. Coincidentally, this period of one hundred years has been bookended by two pandemics, themselves disruptive realities testing the resilience as well as the adaptability of the legal regimes. A hundred years ago, the founding dean of a newly established law faculty beginning its mission amid the ashes of World War I and the disintegration of the only remaining European empire gave an opening lecture exploring the role of law and judges in the face of revolutionary societal changes. Drawing upon that important text, this edited volume explores similar challenges for law brought about by various disruptive realities. The collection looks at the past as well as the future. Following the text of the opening lecture by Pitamic, the contributions are grouped under five headings, dealing with the law and revolution in 1918, the challenges posed for law by the seemingly more gradual political or technological transformations, the effects of globalisation and the changing world, with the final contributions reassessing the law, its methodologies and traditional paradigms including, in the epilogue, the challenges posed for law by the recent disruptive reality of the Covid-19 pandemic. The book will be of interest to academics, researchers and policy-makers working in the areas of legal history, jurisprudence, constitutional law, law and politics, and law and technology.

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Contents

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We conclude with a final, sad remark. The preparation of the volume largely coincided with a difficult period of the Covid-19 pandemic, a disruptive reality in its own right that tested the resilience of the law, and often of us all collectively as well as individually. For many, this was also a period marked by loss, and the *ad hoc* community of the contributors to this volume has been no exception, having lost, much prematurely, our dear colleague and friend Marko Petrak. Bringing to the light of day one of his final contributions to the academic discourse is a bittersweet way of paying to him our last tribute.

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1 Introduction

Law, Justice and (R)evolution 1920–2020

Matej Accetto, Katja Škrubej and Joseph H. H. Weiler

How does law deal with the changes and challenges posed by disruptive new realities and how do people, its agents and its addressees respond to them? That is the key theme and the common thread of the contributions to the edited volume, addressing the different sources of these disruptions: disruptive innovations of technologies or business practices, social changes or constitutional transformations, the impact of globalisation and interdependence affecting the development of international, transnational and global law. It has resulted from an international conference marking the centennial of the University of Ljubljana Faculty of Law, and many of the contributions draw inspiration from the opening lecture of the first Dean of the Faculty, Leonid Pitamic, entitled *Law and revolution*, held on 15 April 1920. We could not resist doing the same in preparing this introduction.

The period 100 years ago was certainly marked by significant disruptive, transformative moments. In 1920, the text of Pitamic provided a timely commentary on the disintegration of the Habsburg monarchy, the Versailles peace conference – at which he was a participant – and the rise of the new states and legal orders after World War I. At the time, the world was ravaged by war and a deadly influenza pandemic, infecting more than a quarter of the world's population. One hundred years later, the global order has been experiencing two similar – in type but hopefully not the scope – disruptive realities of Covid-19 and the war in Ukraine.[1] Such events, and many others explored in the contributions to this volume, have also posed a challenge for the law, for the lawmakers as well as for the judges, in crafting an appropriate response. What is the role of the law in managing, tempering or shaping these new disruptive realities? Have they, for their part, changed the way law is understood,

1 The volume includes a chapter dealing with the implications of the Covid-19 pandemic but not one on the Ukraine war. While among its many disruptive effects, the aggression has already profoundly tested the tenets and the mechanisms of the international legal order, its long-term implications for (international) law and its institutional setup still remain to be seen.

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studied and enacted?[2] Is there a need for new methodologies, and should we reconsider law's traditional paradigms?

In his text, Pitamic focuses primarily on the role of judges in the face of such societal changes, in part also as an early reaction to the developing legal theory of his former Viennese colleague and frequent interlocutor Hans Kelsen. He highlights the dualism between law as a text and law as implementation of the text, which might at times raise the possibility for a legal revolution.[3] Who is then to be entrusted with the authority to decide on the face of the law? For Pitamic, the key is an understanding, appreciation and embodiment of justice,[4] and he puts his faith in the judge as a symbol of justice from time immemorial.[5] Allow us, then, to open the volume with a brief reflection on the imagery of this symbol of justice and in so doing to turn to it yet again as a source of timeless inspiration.[6] It is the icon familiar to us all, adorning many a courthouse and pictorial depiction of the vision of law and justice: Lady Justice, Justitia, holding the scales of justice in one hand, the sword of justice in the other, usually also wearing a blindfold covering her eyes. Are these all the tools[7] she needs to dispense justice, no matter what circumstances she faces? Let us briefly revisit the significance of these symbols to evaluate how well equipped the law and the judicial system are to deal with the disruptive realities challenging the norm.

Each of the three attributes of Justitia has been attributed its own meaning(s), as well as its prehistory.[8] It invites us to reflect on the requisite qualities of justice in its own particular and by no means unequivocal way. Consider, first, the blindfold. It conveys the quality of impartiality, the lack of sight rendering any bias at least less likely if not impossible. Even there, the lack of bias comes in three possible guises: (external) independence from the

2 One element of this question, reflected in the wording "(r)evolution" used in the subtitle of this introductory chapter as well as in several subsequent chapters, is to what extent disruptive realities require the development of the legal order itself to be revolutionary rather than evolutionary.

3 For Kelsen as well as Pitamic, a legal revolution is understood in a very particular sense, as "the object of revolution, either in a technical or common understanding, can only be the constitution as the very point from which an entire order emanates". See Pitamic at 20 in this volume.

4 Ibid., at 27.

5 Ibid., at 24.

6 For a fairly comprehensive treatment of the symbol with its attributes as evolved in legal and art histories, see, e.g., Sven Behrisch, *Die Justitia. Eine Annäherung an die Allegorie der Gerechtigkeit* (Verlag und Datenbank für Geisteswissenschaften, 2008) and Otto Rudolf Kissel, *Die Justitia. Reflexionen über ein Symbol und seine Darstellung in der bildenden Kunst* (Verlag C.H. Beck, 1984).

7 On other combinations of attributes, less common, but nevertheless present, such as a law book in the Lady Justice's hand, see Kissel, n. 6, at 107–124.

8 On the different relative historic age of the three attributes as symbols of justice, separately and in conjunction, with scales being the oldest, see ibid., at 29–30; and Behrisch, n. 6, at 34.

sovereign or the government that might unduly influence the judicial decision-making;[9] (case-specific) impartiality as between the parties to the dispute; and (internal) neutrality aiming to adjudicate based on the applicable legal rules as opposed to extra-legal considerations.[10] It can also be seen as a call for prudence, requiring of Justitia caution in finding her way.[11]

In any event, there is another significance to the blindfold: the blindness of justice is not a given state of affairs but rather willingly, intentionally assumed. The blindfold can thus also be understood as an act of restraint – the ability of Justitia to resist the temptation to remove the blindfold, the temptation to look and see.[12] Robert Cover, enamoured of the myth, lauded procedure as the blindfold of Justice.[13] There is indeed a willing blindness imposed on the adjudicator by the due process safeguards, seen in the various exclusionary rules preventing the use of evidence improperly obtained, or in facts and evidence deemed non-probative for the court or the jury to consider.[14]

And yet, is the willing, self-imposed blindness not also problematic? Can a judge properly adjudicate a dispute without appreciating its factual circumstances, without understanding its context? In that sense, the blindness of Justitia may not be the physical blindness of Isaac bestowing his blessing[15] but the allegorical blindness of Moses dispensing justice without due regard paid to the positions of the people coming before him.[16] Is fairness and equal treatment to be obtained by remaining oblivious to the positions of the parties in dispute or by fully and properly appreciating them?[17] The advice of Jethro to Moses can be understood as implying the latter. So can the appreciation of Whitman's poet-judge as an "equalizer", his poetic imagination helping him appreciate the unrealised possibility of the reversal – identifying with the possibilities of the suffering – and thus promote equality.[18]

9 See, e.g., Dennis E. Curtis and Judith Resnik, Images of Justice, *Yale Law Journal* 96 (1987) 1727, at 1764–1768.

10 Such as, e.g., Alan Wolfe, Algorithmic Justice, in Drucilla Comel, Michel Rosenfeld and David Gray Carlson (eds.), *Deconstruction and the Possibility of Justice* (1992), cited in Bennett Capers, Blind Justice, *Yale Journal of Law & Humanities* 24 (2012) 179, at 183.

11 See Martin Jay, Must Justice Be Blind?, in Costas Douzinas and Lynda Nead (eds.), *Law and the Image: The Authority of Art and the Aesthetics of Law* (University of Chicago Press, 1999), at 32–33.

12 Cf. the writing of Robert Cover in Robert M. Cover, Owen M. Fiss and Judith Resnik, *Procedure* (Foundation Press, 1988), at 1231–1232.

13 Ibid., at 1232.

14 See, e.g., Bennett Capers, Blind Justice, *Yale Journal of Law & Humanities* 24 (2012) 179, at 184–187.

15 Genesis 27–28:9.

16 Exodus 18. For more on Jethro's lesson to Moses, see Joseph H. H. Weiler, *On Being a Judge – Jethro's Lesson*, Green Bag 2d (1999) 291.

17 Cf. Curtis and Resnik, n. 9, at 1756–1761.

18 See Martha C. Nussbaum, Poets as Judges: Judicial Rhetoric and the Literary Imagination, *University of Chicago Law Review* 62 (1995) 1477, at 1487.

There is thus an intrinsic tension in the imagery of the blindfold; a delicate relationship between judicial *sight* and the search for judicial *insight*, where it is not entirely certain to what extent the latter may (only) be properly obtained by limiting the former.[19] Could that also have been reflected in the duality of the rare imagery of a Janus-like Justitia with two faces, disconcerting as it may otherwise be to our modern traits of reflexive associations?[20]

The scales of justice convey a related but distinct message of the fairness required of the result. Justitia's ruling may only be given after the weighing up of all the facts and concluding what outcome they dictate. The choice of the instrument is deliberate. The ultimate use of the scales is not only in determining which of the two sides outweighs the other – whether the defendant is guilty or innocent, whether one party or the other should win in a civil dispute – but in determining what – or how much – is needed for the balance to be restored.[21] It is the symbol of justice as balance,[22] a reflection of the Rawlsian equality-based reciprocity, searching for the balance between competing claims in order to approach the ideal of a perfect harmony of interests.[23] In the antiquity, the same sentiment was already expressed by Ulpian in his view of justice as "a consistent and lasting will to award to each his due".[24] However, on a scale of the society as a whole, Solon not only embodied the seeking of justice by re-establishing the balance in a city on the brink of civil war through his reforms but later also encapsulated his own strivings towards *eunomia* in his famous exhortation elegy:[25]

> Dysnomia furnishes the most ills for the city, but Eunomia makes all things well ordered and fit, and often it shackles the feet of the unjust. It smooths the rough, puts an end to excess, diminishes hybris, causes to wither the growing flowers of ruinous behaviour. It straightens crooked judgements, and makes gentle overweening acts. It stops the works of discord, and brings to an end the anger of grievous strife; under its guidance all things among men are both fitting and in proper accord.[26]

19 Cf. Thomas P. Crocker, Envisioning the Constitution, *American University Law Review* 57, no. 1 (2007) 1, at 26.

20 Gernot Kocher, *Zeichen und Symbole des Rechts. Eine historische Ikonographie* (Verlag C.H. Beck München, l, 1992), at 25 (pict 22: Joost Damhouder, *Practycke in civile saecken*. Rotterdam 1648).

21 On these two and many other aspects and interpretation of scales, cf. William I. Miller, *Eye for an Eye* (Cambridge University Press 2006), at 1–8.

22 See, e.g., William J. Byron, Ideas and Images of Justice, *Loyola Law Review* 26 (1980) 439, at 443.

23 John Rawls, *A Theory of Justice* (rev. ed., Harvard University Press 1999), at 9 and 89–90.

24 Ulp. D. 1, 1, 10.

25 See Elizabeth Irwin, *Solon and Early Greek Poetry, The Politics of Exhortation* (Cambridge University Press, 2005).

26 From Solon's Eunomia (lines 30–9), after Irwin, ibid. at 183–184. In the Constitution of Athens, traditionally attributed to Aristotle, a further fragment with the description of the aim

In the context of judicial proceedings, the scales of justice convey the image of corrective or remedial justice, striking the right balance between damage or injury caused and damages or penalty imposed.[27] It is the image of justice reflected in the age-old law of the talion, an eye for an eye, a tooth for a tooth, established in similar fashions in Babylonian[28] and Roman law[29] as well as the Old Testament:[30] the getting even by paying or exacting one's dues.[31] Reflecting on the iconography of his times in the late 16th century, Cesare Ripa thus echoes Ulpian's precept and tells us that the scales, "used to measure quantities of material things, is a metaphor for justice, which sees that each man receives that which is due him, no more and no less".[32]

The usual understanding of *lex talionis* would seem to stress the point. Consider the significance of the reference to both the eye and the tooth. This is a meaningful distinction: while they are both parts of the body, used as vividly personal units of compensation so as to reinforce the force of the edicts of the law and bonds of trust,[33] they could hardly be more apart in terms of their traditional significance. Ever since antiquity, the eye has been vested with deep physical and cultural significance, with sight enjoying an elevated status among the senses. Short of losing life, it is as vital a part of the body as they

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of his reform, attributed to Solon, is preserved. It renders the idea of *Eunomia* as balance even more evocatively: "I have given the masses as much privilege as is sufficient, neither taking away from their honour nor adding to it. And so for those who had power and were envied for their wealth, I saw to it that they too should suffer no indignity. I stood with a mighty shield cast round both sides and did not allow either to have an unjust victory." Solon, Fragments, in *Greek Elegiac Poetry*, ed. and translated by Douglas E. Gerber (Harvard University Press, 1999), at 120–121.

27 Miller, n. 21, at 5–6.

28 See laws 196 and 200 of the Laws of Hammurabi. In the edition of Martha Roth, *Law Collections from Mesopotamia and Asia Minor* (2nd ed., Scholars Press, 1997), 121. The numbering of the laws, so unquestionable by the moderns as though copied from the bronze stele or from clay tablets, as indeed, in consequence, the implicit logic of the linear structure of laws *en tant que* written text, self-sufficient and exhaustive *per se*, was added by the scholars no earlier than in the 19th century. Among the first to have embarked on a possible deciphering of the inner logic of any cuneiform so-called codes, the Laws of the Hittites, was one of the first students, enrolled in the newly founded Faculty of Law of University of Ljubljana in 1920, also a student of Pitamic's, Viktor Korošec. Owing much to his fruitful post-graduate research and study of cuneiform laws in Leipzig, he quickly became full professor for Roman Law at Ljubljana. See his frequently cited *Sistematika prve hetitske pravne zbirke* (K Bo VI 3), Zbornik znanstvenih razprav Pravne fakultete 7 (1929/30), at 65–75. However, he is best known for his pioneering work on Hittite international treaties, *Hetitische Staatsverträge* (Weicher, 1931).

29 See Table VIII/2 of the Twelve Tables in Carolus G. Bruns, Theodori Mommseni and Otto Gradenwitz (eds.), *Fontes iuris Romani antiqui* (7th ed., Mohr, 1909), at 29.

30 Exodus 21:23–27; Leviticus 24:19–21.

31 Cf. Miller, n. 21, at 15.

32 Cesare Ripa, *Baroque and Rococo Pictorial Imagery* (Edward A. Maser ed., Dover Publications, 1971), at 120, cited in Curtis and Resnik, n. 9, at 1748–1749.

33 See Miller, n. 21, at 27–28.

come. Teeth, on the other hand, are a rather more expendable commodity. Thus the couplet "an eye for an eye, a tooth for a tooth" is also a statement of the scope of the law's commitment to balance: it stretches from the significant to the insignificant, applying to issues both large and small.

However, the usual modern understanding of *lex talionis* is tainted by one important inherent flaw. True to the modern European continental mindset, somewhat blindly (or blindfoldedly) led by the exclusivism of literacy as meaning-generating context[34] in modern continental law, it anachronistically assumes that in antiquity, the written word enjoyed the same domineering status that it does today.[35] The Roman context of the concept of *talion*, wherefrom the phenomenon in the general historical literature obtained its name, however, readily shows us that a different and seemingly unrelated trait was part and parcel of the institute of *lex talionis* – that of negotiation. The Romans stated as a condition that before *talio esto*, one should try to resolve the dispute peacefully (*ni cum eo pace*),[36] and resolving the issue peacefully always demands much to and fro between the two (or more) disputing parties. In his *Eye for an Eye*, William Ian Miller evocatively exclaims (with some paraphrasing) in order to bring the point home to his audience: "You took my eye. I want justice! How much will you pay me . . . for *my* eye? Really? No! How much will you pay me in order *not to take yours*, to which everyone knows I am entitled to!?"[37]

Nowhere in the Laws of Hammurabi is this important and inherent part of the institute of *lex talionis* expressly stated. Perhaps it was simply too obvious to write down, because it literally went without saying. However, what was put into writing was one other important condition – that of equal rank. In order for *talion* – already a significant reduction in "payback", with a tooth exacting no more than a tooth, or rather its negotiated worth, in return – to take place, the condition of equal rank had to be met. Specifically, for Babylonians it meant that taking (only) a tooth for a tooth was possible among people pertaining to the *awilu* class (*of one's own rank*). That was also clearly

34 Cf. Walter Ong, *Orality and Literacy: The Technologizing of the Word* (Routledge, 2001, cop. 1982), at 8–15.

35 At the beginning of the 20th century, the potent influence of the period of the modern continental codifications of the 18th and 19th centuries consciously devised from well-developed abstract notions and *more geometrico* transplanting the idea of a *system* from the rapidly evolving natural sciences into the realm of law, as well, was still far too strong not to anachronistically project the idea of a modern code as exhaustively valid law into the distant past. Hammurabi in his epilogue uses the self-designation for his laws *dīnāt mīšarim*, just words, and even more importantly, he calls on his subjects to continue to adhere to the customs of the land, i.e., of their different cities. Justinian, in a manner much more similar to Hammurabi than to the modern codification ideology, in his Institutes, i.e., in the first part of his famous Code (*Corpus*), would still state that (Roman) law is written and unwritten (Inst. 1, 2, 3). Okko Behrends et al., *Corpus Iuris Civilis, I. Institutionem* (F. Müller Verlag, 1996), at 3.

36 See n. 29 above.

37 See Miller, n. 21, at. 48.

substantiated in the following passage of this two-part paradigm, referring to the situation with a *muskenu* at the receiving end and with an *awilu* as the perpetrator, the extractor of the tooth. In this case, the *awilu* needed not fear the retaliation in kind since the sum for a tooth of a *muskenu* was neatly fixed in advance (*20 shekels of silver*).[38] But why was the condition of an equal rank expressly accentuated? Hazarding a guess, it may very well have been because the members of *muskenu* class, free but not equal to *awilu*, started to claim the right to equal treatment.

Securing a peaceful solution, by treating the parties involved in a dispute equally, and at the same time in a manner that would generate peace and stability for a wider community for the future, is certainly a heavy task for every judge.

It is high time now to turn to the third of the attributes of Lady Justice – the sword. It is the only one of the three attributes that Pitamic also uses as his key metaphor in his opening lecture on law and revolution, albeit without expressly stating Lady Justice as his source of inspiration.

Himself not adhering to the equation of all law with mere text, Pitamic concentrated much of his lecture on the indispensable and challenging position of a judge. Let us remind ourselves that Kelsen as well as Pitamic regarded the legal revolution as an attack on the constitution. But before we turn to the question of the significance attributed by Pitamic to the sword in the hands of a judge in his understanding of revolution, it is appropriate, as with the first two attributes, to start by reflecting on its dynamic symbolism in the hands of Lady Justice.

According to Sven Behrisch, the sword, unlike the scales that had accompanied the various depictions of justice from antiquity onwards, first started to appear in Lady Justice's hands in the 13th century and only became her standard attribute from the 15th century onwards.[39] In a condensed entry on the symbolism of a sword as such in the European legal history from the Early Middle Ages, Gernot Kocher sums up its symbolic functions roughly into two categories. His account is grounded in the fact that as a weapon, the sword was not part of one's everyday battling equipment but was rather a skillfully crafted and treasured possession of the privileged, so its symbolic and prestigious value went far beyond other weapons such as a spear or a shield (themselves not bereft of legal symbolism). Therefore, on the one hand, a sword was indispensable in rituals involving the transformation in legal status of a (free) person in the context of various legal acts, most importantly when swearing an oath. We find it also in related rituals, such as in elevating a person's rank, by attaching the sword around one's belt (a young man becoming a knight), in rituals of different kind of investiture by touching the deserving

38 See laws 200 and 201 of the Laws of Hammurabi. Cf. also a three-part paradigm in the following laws 229–231 on killing of an owner of a house, built by a careless builder. Roth, n. 28, at 125. On paradigmatic thinking and consequently structuring of cuneiform (written) laws, see Raymond Westbrook, *A History of Ancient Near Eastern Law* (Brill, 2003), Vol. 1, at 12–21.

39 See Behrisch, n. 6, at 34.

person by a sword (a free nobleman becoming a vassal), in rituals of adoption and sometimes in the emancipation of an unfree person. On the other hand, and not entirely unrelated, a sword figures most prominently as a symbol of the supreme lordly power (*potestas gladii*). That is why in the High Middle Ages, the strife between the Emperor and the Pope for supremacy in Europe was vested in the doctrine known as the battle of two swords, *gladius spiritualis* and *gladius materialis.* Its symbolism was essential for several important rituals, especially those involving the delegation of (parts) of lordly power. A transfer of a sword could symbolically spell out the passing over of (parts of) jurisdiction and possession of the land. Laying the sword down in a battle, conversely, would symbolically translate into a renouncement of any claim to the land, i.e., to a recognition of a defeat.[40]

How, then, do these symbolic traits, much older than the first depictions of Lady Justice, inform her holding of a sword in her (right) hand?[41]

From the beginning, it certainly must have evoked the symbolism of authority, of power delegated by the supreme ruler, in some instances also of God. In the depictions and accompanying descriptions of the Christian teaching on the Last Judgement, God was said to possess the Sword of the Spirit, which amounted to the Word of God.[42]

From the Early Modern Period onwards, for the duration of the legal process the judges were required to hold a baton (sceptre) or a sword.[43] Provision 82 in the famous *Constitutio criminalis Carolina* from 1532 expressly required it,[44] though the traditions of a judge holding a baton for the duration of the process, i.e., while he is vested with the power to speak with authority, are much older still.[45] It bears reminding that during the procedure, by the sheer act of authoritative speaking, by his sheer speech acts, which in the old days would be accompanied with the obligatory holding of a baton, a judge caused – and indeed to this day in the oral proceedings causes – the statuses of a number of the usual protagonists in a case, from witnesses to parties to

40 Cf. Gernot Kocher, Schwert, II. *Rechtssymbolik. Lexikon des Mittelalters*, Band 7, at 1644–1645. The practice was still followed, for instance, when the Japanese surrendered to the Allied Forces in 1945, ending World War II – see Michael Sturma, Swordplay: Lord Mountbatten, Count Terauchi and the Japanese Surrender in Southeast Asia, *The English Historical Review* 136 (2021) 580, 651–671.

41 We only mention here in passing that the researchers have established it has always been her *right* hand – see Kissel, n. 6, at 106. The swearing of an oath was always executed by a right hand as well.

42 Cf. Ursula Nilgen, Schwert, III. *Ikonographie*, n. 39 at 1645.

43 It is also worth noting in passing that the symbolism of the baton and the sword did not overlap in other usages – see Kissel, n. 6, at 108.

44 *Constitutio Criminalis Carolina*, available at <https://ra.smixx.de/media/files/Constitutio-Criminalis-Carolina-1532.pdf> (29 March 2023). See Kissel, n. 6, at 108.

45 Cf. the famous description of the shield of Achilles in *The Illiad*, Book XVIII, on the elders with the attesting scepter in their hands.

the case, to change, sometimes in fundamental ways.[46] In the proceedings, and only during the proceedings, a witness may become liable for his or her false testimony or the accuser for his or her false accusation, the defendant may be pronounced guilty or not guilty and so on.

There are those who see in Lady Justice's sword primarily a symbol of sentencing power, which includes that of a capital punishment,[47] and reserve the symbolism of a judge adjudicating, i.e., speaking with authority, to a judge's baton.[48] However, the wording of the provision in *Carolina* shows that such a neat distinction goes too far. To our mind, the sword in the hand of Lady Justice should represent both: the power of assertively yet fairly steering the legal process as well as the power to pass the final sentence.

And what now of Pitamic and the use of the symbolism of the sword in his account of legal revolution with a judge as a key protagonist? What does the sword represent for Pitamic? In a later work, *A Treatise on the State*, he sets out a somewhat guarded interpretation of its significance:[49]

> The relation between force and law is rightly expressed in an inscription on the southern gate of the Palace of Justice in Paris: "Gladius legis custos." For here it becomes clear that the sword is merely the guardian of the law, and not the law itself; and this implies also that force must not be employed contrary to law. Force may be employed only within the limits traced by law; and herein lies the distinction between lawful and unlawful force.

In his text discussing law and revolution, however, he paints a somewhat different picture: "The constitution grants *the power of interpretation* in order to protect itself; *but this sword* entrusted to the judge to protect can be turned against the constitution and used to slay it" (our emphasis). That, for Pitamic, is nothing short of "a revolution proper, legalised in advance".[50]

It is therefore the authoritative interpretation if conferred to – an apex court – judge, and his speech acts, resulting from that intellectual activity, many times razor-sharp when steering the adjudication process, which can truly amount to a sword.

46 Cf. Pierre Bourdieu, *Language and Symbolic Power* (Harvard University Press, 1982), at 107–116.

47 Admittedly, such was the general understanding and the use of a sword as a metaphor in the context of administering justice in the legal doctrine as well. Cf. Gerhard Ammerer, *Das Ende fur Schwert und Galgen? Legislativer Prozess und öffentlicher Diskurs zur Reduzierung der Todesstrafe im Ordentlichen Verfahren unter Joseph II. (1781–1787)* (StudienVerl, 2010).

48 Cf. Kocher, n. 40, 1645.

49 Leonid Pitamic, *A Treatise on the State* (originally published by J. H. Furst Company, 1933, reprinted by the Slovenian Ministry of Justice, 2008), at 5.

50 See Pitamic, at 21 in this volume.

Finally, what do we make of the operation of the three symbols in conjunction? Justitia is blind or blindfolded, and yet she is to use the scales and the sword. The blindfold seemingly renders the other two tasks more difficult: while the law of the talion expresses the significance of the scales of justice, with the eye and the sense of sight as the symbolic apex of reciprocity exacted, that very sense is denied to Justitia who is to balance the scales. Justitia cannot see, and yet she wields the sword with which she is to mete out precise, fair justice. In a sense, she is a paradox, and the challenge for law that she represents is a challenge of reconciling the irreconcilable.

How, then, do the three symbols and their virtues equip Justitia for the challenge of meeting disruptive realities? Disruptive realities may challenge the very fabric of the constitutional order that law is intended to safeguard. In his text, Pitamic highlights the significance of the constitution granting to judges the power of interpretation "in order to protect itself"; and yet, as said above, this "sword entrusted to the judge to protect it can be turned against the constitution and used to slay it".[51] In this passage, Pitamic equates the power of judicial review with the sword, but implicitly he also invokes the scales (for how else is the proper interpretation to be determined) and the blindfold (for once the sovereign adopts the constitution, the constitution is emancipated and its interpretation removed from the hands of the sovereign). In any event, the desired outcome, as also posited by Pitamic, is not one of a constitutional Armageddon every time a disruptive reality is confronted, but rather in crafting a suitable response in (and through) law.

The contributions to the present volume explore this challenge in different legal arenas and contexts, looking at the past as well as the future. Following the introductory chapter, the contributions are grouped under five headings, the first dealing with the law and revolution in 1918, the second and third with the various challenges posed for law by the seemingly more gradual political or technological transformations, the fourth with the effects of globalisation and the changing world on the law, and finally the fifth with the need to reassess the law, its methodologies and traditional paradigms, in the broader conceptual sense as well as in light of the specific disruptive challenge of the Covid-19 pandemic.

51 Ibid., at 21.

2 Law and Revolution[1]

Leonid Pitamic

Positive law and revolution are, from a logical point of view, mutually exclusive. We cannot conceive of revolution from the standpoint of positive law, and we cannot conceive of positive law from the standpoint of revolution. Law is a set of rules sanctioned in a certain way. This set of rules is called a legal order. Revolution means, however, that this order is overthrown. Revolution is a negation, indeed, of the legal order it is directed against. But revolution does not negate legal order as such; rather, it seeks to set up a *new* legal order instead of the one being challenged. The idea of revolution is therefore a negative one only in a *relative* sense; it is at the same time a *positive* and a *reformative* idea. It is anarchy that stands in contradiction to law, not revolution. Anarchism negates law as such and in its proper sense wants to establish a human society that exists without rules supported by force. It wants to establish a society living in perfect freedom. I do not wish to criticise anarchism at this point, but I must, however, call attention to the *impossibility* not only of the concept of a *state* but also of the concept of *society without rules*. A society is a group of people *associated* for a certain reason; association is the essence of society. A given collection of people can think, feel and do the same things and yet not form a society. A society emerges only when something that transcends individuality emerges, something that transcends the minds and purposes of individuals, even when their purposes coincide; something that associates and binds everyone, something to which all are subject. And this is possible only by means of *a rule or a norm*. The crux of the problem is missed if – as many believe – the essence of society is defined by its members having *identical purposes*. The purposes cannot be *identical*; the purpose must be *common to all*. Not only an identity but also a commonality of purpose must reign. The purpose must be *obligatory*, and by having become *obligatory* it is transformed into a *rule*.

1 The English translation of the Opening Lecture *Pravo in revolucija* by Dean Pitamic on 15 April 1920 at the inauguration of the first academic year 1919/1920 at the University of Ljubljana Faculty of Law, deferred due to the engagement of the law faculty professors at the Versailles Peace Conference.

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The category of a norm is what enables us to conceive of a society. I do not want to say that a society needs to have a fixed or even a written norm, nor do I mean to say that a group of people which is believed to have formed a society would have to be conscious of the norm they obey. What I want to say is that the norm is a mental precondition, a mental category which is necessary in order for a group of people, bound by rules and having some organisation, no matter how general or primitive it might be, to be considered a society. The concept of society is a *normative* problem. I do not wish to venture into a more detailed consideration of this problem, addressed here superficially for now; I only wish to underscore the point that utter freedom, that is, a freedom that knows of no boundaries, no norms, is incompatible with society. Such freedom knows of no state, of no society and of no morals; it rejects absolute validity even of the rules of *normal*, that is, of logical thinking. Boundless freedom necessarily destroys human society and Man himself. *Society and Man can only exist in a state of limited freedom. How the boundaries defining that freedom are set is a problem of logic and morality and also the problem of the state.*

I have mentioned all this since it is important to know which system of rules, which order, a revolution might be aiming at. A revolution which is essentially unintelligible according to the system it aims to remove can nevertheless be justified or even absolutely required by another system. A revolution against a positive legal order can, for example, be justified according to ethnic, religious or economic rules. The destruction of the Austrian legal system, for example, was justified according to the principle of national self-determination. In order to understand and classify a revolution logically, to satisfy a scientific mode of thought, one must always identify the norm which justifies that revolution, and which can be used to comprehend the upheaval caused to society. It is actually possible to determine a norm to justify even the most radical anarchism (a state which, in fact, can only be imagined theoretically): namely, the rule that there shall be no rules.

The concept of revolution rests on the essential principle that the rearrangement or overthrow being effected is justified by a system distinct from the one being overthrown; if the justification can be found *in the same system*, the upheaval is no longer revolution, but *evolution*. What is revolution from the standpoint of legal rules often only qualifies as evolution from the standpoint of other societal rules, e.g., ethnic rules, whereby an attempt is to set up a new legal order using new ideas.

Revolution aimed at positive law cannot be a legal concept. Social philosophers have, nevertheless, endeavoured to construct the concept of a right to revolution. But such a right can only derive from natural, and never from positive law. Sieyès, who played a major role in the French revolution of 1789, has, for example, claimed that people *always* have a right to revolution. It is interesting that Sieyès claimed for the nation, that is, for the people, the same right that has in centuries past been claimed on behalf of the absolute monarch: *solutio legibus*, [the right] of not being bound by

laws. And the realm of laws, *leges*, is the only environment in which a jurist feels comfortable. Without laws, all his science comes to nothing, as he is unable to comprehend something outside law as a value. Thank God we are not only jurists, so we can comprehend revolution from a different, that is, a non-legal point of view. It is almost a truism to state that in the course of human history a revolution driven by ethical ideas against the legal order of a certain state is sometimes necessary. A legal system may be unjust from the outset, or may become so by failing to adapt to development, so that a new growth in human society, freed from its old chains, is like a benign storm after a time of drought and rot. There is no doubt, however, that such sharp ruptures often have adverse consequences. I am not merely referring to the great human and economic sacrifices without which few revolutions are able to succeed. I am referring to the legal arrangements which must be made after the upheaval, which are – as we are experiencing right now – fraught with difficulties. The more complex human society is, the more advanced will be its industry, trade, commerce and general culture, and the more acute the need for legal order; since all these offshoots of a highly developed society prosper only in an environment marked by legal forseeability. This is why social reformers and revolutionary statesmen have often striven to avoid a complete dismantling of the legal order in spite of the revolution they have led or contributed to.

From a formal point of view, a legal order is utterly undone when its foundation, the constitution, is annulled. When this foundation is shattered all legal provisions, all norms, which depend logically on the constitution, that is all laws, all regulations, fall; and equally all judgements and all measures, even those which have gained the force of law, also fall, since their judicial existence is conditioned by the continued validity of those fallen norms from which they derived their force of law or legal force. If this were really to happen, the society would fall apart. There would be no property, no debts and no claims for repayment, state organs would cease to exist, personal security would no longer be guaranteed, all legal relations would dissolve, *bellum omnium contra omnes* would erupt. All legal systems would have to be set up anew, according to new laws.

This is why in France a doctrine would emerge, when revolution followed revolution, which maintained that the legal force of ordinary acts remains in place, notwithstanding the demise of the constitution, unless such acts are explicitly or implicitly repealed. The French doctrine furthermore claims that apart from materially constitutional norms (i.e., the form and the manner of government) the constitution entails other provisions (e.g., on administrative or criminal law) which are constitutional norms only in a formal sense, and are compatible with the new revolutionary regime as well. The validity of these provisions, being only artificially and not naturally connected to the constitution, persists. They are divested only of their constitutional power and are transformed into ordinary laws, and as such may be changed like any other law. The revolution has merely "deconstitutionalised" such laws.

Although this theory has gained recognition it cannot sustain a rigorous logical critique; I would only point out that the concept of a "constitution" in a material sense is a very general and opaque one; does the form of government entail local government, administrative courts, an electoral system? As an example of a law which survived not only one but several revolutions, I can name the French senatus-consultum of 3 May 1854, which establishes the constitution for the French colonies and is still considered valid, even though several French constitutions have been replaced by successive revolutions since it was first enacted. The only difference is that this French law retains its validity as a law and not a constitutional provision. Another example is Article V of the 1848 French constitution, which abolished the death penalty for political crimes. French theory derives this principle from that of "the continuity of the state", which claims that a state remains the same despite changes in its legal framework and without the need for explicit enactment of such a principle of continuity. That said, the French in fact did enact this principle in laws passed in 1792 and 1852. The French theory furthermore claims that despite the changed form of government, treaties contracted with other states prior to revolution must also remain valid. The same principle ought to apply to sovereign debt and other governmental undertakings.

These principles have proven to be convenient, although I believe the premise of this legal construction, i.e., that the State remains unchanged even after revolutionary change, is flawed. Aristotle seems to have been the first to maintain that a state ceases to be the same if its *system of government*, i.e., its essence, changes through revolution, even if the state in question keeps its name.

The principles of the French doctrine are by no means self-evident; the opposite seems to be the case, namely that the fall of the constitution entails the extinction of all its logical consequences, that is all laws. Therefore it was absolutely appropriate that, after a successful revolution, when we declared independence and joined with the Croats and Serbs in founding a new State,[2] Article XVII of the Decree by the National Government in Ljubljana, on the provisional administration of 14 November 1918 (Official Gazette n. 111), stated: "All laws and regulations presently (i.e., on the 14 November 1918) valid shall remain in force until their repeal or amendment unless they are contrary to this Decree". In a material sense the Austrian law continues to be valid, unless it is explicitly or implicitly derogated. Even some provisions of the Austrian constitution (i.e., basic laws) dating from 1867[3] remain valid in so far as

2 The State of Slovenes, Croats and Serbs was a short-lived entity consisting of the former Austro-Hungarian territories with predominantly Slovene, Croat or Serb populations. Never internationally recognised, it joined with the Kingdom of Serbia after a month of existence to form the Kingdom of Serbs, Croats and Slovenes on 1 December 1918 (note by the editors).

3 The set of four basic laws (*Staatsgrundgesetze*) that, together with two other ordinary laws, comprised the so-called December Constitution, proclaimed by Emperor Franz Joseph on 21 December 1867. These acts functioned as the supreme law of the land until the collapse of the Austro-Hungarian Empire in 1918 (note by the editors).

they accord with our present constitutional position. These include provisions on civil rights and some criminal law provisions from that constitution. The formal validity of these Austrian laws has changed, since the formal validity of laws or any other norm always depend on the procedure by which they may be changed or repealed, and because the Austrian component of the legislative procedure responsible for effecting such change, i.e., the Austrian Imperial Council[4] and royal assent, has become inoperative within our state. It has still not been determined who can repeal the laws in our state. This raises the question *what is the nature of the validity of such laws.* Do they have the same force as the laws adopted by the Provisional Assembly[5] and which are approved by the regent, or do they only have the force of regulations? If the latter is the case, which regulations? Those, which may be adopted by the minister and therefore made subject to his power of repeal; or those, adopted by some other authority, for example the provincial government? Without accepting any of these options, let us assume *arguendo* that the surviving Austrian laws do have the same force of law as those adopted in the Kingdom of Serbs, Croats and Slovenes (which is altogether unclear). In that case they may be amended solely through the same procedure which applies to the legislation of the Kingdom of Serbs, Croats and Slovenes. Such legislation is defined in the Regent's manifesto of 6 January 1919 (Official Gazette of the National Government for Slovenia, n. XXXIII) by the provision that the National Representation "shall have pro tempore but full legislative authority in our Kingdom". In this case only the National Representation would be empowered to change the Austrian laws in our territory. The Decree of the Ministerial Council of 25 February 1919, which extended the validity of Chapters IX and X of the Serbian Criminal Code to the whole Kingdom of Serbs, Croats and Slovenes, would therefore have been invalid. That decree would also have changed some provisions of the Austrian criminal code. In favour of the expanded validity of this code one could argue that the Manifesto, which empowers the National Representation, was issued by the Regent and countersigned by the Minister, as the Decree was, when it was issued in the name of the same Regent and by the same government. Identical authorities were therefore involved. The Decree could then be considered as a sort of *lex specialis* in relation to *lex generalis*. Indeed, there is a persuasive objection to be raised against the view that the Manifesto established only formal authority, while the Decree changed material law. Artful use of public law principles could produce many additional arguments in support of the Decree, but it seems that just as many could be adduced against it. But all such arguments, for and against, must

4 The Imperial Council was the legislature of the Austrian Empire from 1861 (note by translator).

5 In the original text, *Narodno predstavništvo.* A temporary legislature of the Kingdom of Serbs, Croats and Slovenes before the constitution was adopted in 1921. That is why, in the contemporary literature as well, it is often referred to as *Začasno narodno predstavništvo*, a Temporary National Assembly or Provisional National Assembly in English (note by the editors).

– legally speaking – be considered weak and deficient because it is unclear where authority lies and even more so because the relationship between the old Austrian law and the laws and regulations of our State remains to be determined. We are uncertain what legal force the Austrian laws still hold, so we are uncertain who has the authority to amend them. Or, conversely, since we are uncertain who has power to amend Austrian laws, we are also ignorant of their legal force. All these questions ought to be resolved by our future constitution or by an act emanating from it. I have mentioned only one example; there are surely countless more. What are courts to do, as authorised by the Judicial Authority Act, to rule on an appeal which disputes the validity of regulations? Now, in the midst of revolutionary circumstances – the only salvation lies with the new constitution – everything is uncertain, open to question, be it the validity of Austrian laws or ours, regulations and other provisions, and consequently the constitutional powers of a judge to decide on the validity of regulations and ultimately his right to judge itself. Perhaps the greatest help to a judge in such circumstances will be paragraph 7 of the General Civil Code,[6] authorising him when all other juristic means are exhausted to give judgement according to general legal rules, i.e., in the sense of this paragraph, according to natural law. "Legal case" (*Rechtsfall*) would in this case involve a collision of norms. The judge will deem natural law to be what will seem most just and proper, and thus will be able to take into account our new legal circumstances. If our wait for a constitution continues too long, all the questions raised here will have to be resolved by means of the custom-based law which emerges from the jurisprudence of the highest courts.

As far as international treaties are concerned, only international law, or more correctly, inter-state law, is applicable – to my mind at least. Whether or not a state that has undergone a revolution remains the same state in the eyes of international law is a highly topical question. A commonly accepted answer is hard to find. Bolshevik Russia, for example, has apparently asserted itself as a new state, one that is completely separate from the old Russia and free from the financial obligations assumed by the old Russia. If that were accepted as a general principle, any state could extricate itself from its international obligations. It would induce or stage a revolution and emerge as a new, innocent state, with all burdens cast off. Insofar as international treaties are concerned, the view of the other contracting party must be taken into account when determining whether the old state, which entered into the contract, continues to exist after a Revolution. There is no rule of international law governing cases such as these. To what extent must the constitution or territory of a country change in order for it to be deemed a new state? The validity of commercial treaties must be tied at least to some degree to the territory concerned, since the contracting parties surely

6 *Allgemeines bürgerliches Gesetzbuch* was the civil law code of the Austrian Empire adopted in 1811 and remained in use in Slovene territories long after the Empire collapsed (note by the translator).

wished to settle commercial relations within that particular territory. In such cases the "rebus sic stantibus" provision is usually applied, which can be perilous from the viewpoint of legal predictability, which in the case of some states would become impossible to maintain. If one state dissolves into several states, even if they are recognised by other parties to a treaty, what general rule does international law provide for such a case? The answer is: none. The task before the international organisation embodied by the League of Nations will be to create generally valid rules for such cases. It was therefore absolutely necessary that the 1919 peace treaty with Austria included provisions on the making of treaties. Apart from a host of provisions establishing new economic and other legal relations between the new Austrian republic and other newly formed states created in former Austro-Hungarian territory, and between all these states and other states, certain provisions (e.g., Article 234) of the peace treaty specify those treaties entered into by the old Austria, which will remain valid for the new Austria, but not – reasoning *a contrario* – for the states which have emerged in the former territory of Austria. For these states any conclusion of international treaties is left for the future – although the peace treaty does provide some guidelines. This treaty also determines with great precision how the debts of the old Austria will be divided among the aforementioned states. From these provisions a general principle can be deduced that the treaties concluded with the old Austria are not valid for the new states which have emerged in its territory, and that with the revolution and subsequent dissolution of the old Austria it proved necessary to introduce new contractual principles regarding international obligations and rights.

All of which makes it clear that even when a revolution retains the old legal order, in part or in its entirety, what one observes is an experiment with unpredictable consequences. In spite of all precautions, it often remains unclear which laws and which international treaties remain valid, whether they do so in full or in part, which authority can repeal them, to which authorities the previous competences devolve and so on. These are the very questions that affect our everyday legal decisions at the present time. It is therefore understandable that the legislator has sought means of bringing in changes, even far-reaching ones, through an evolutionary, lawful, normal process. Changing laws in a lawful fashion no longer presents a problem for us. Today, surely, no one would consider adopting "eternally" valid laws, as the Austrian Pragmatic Sanction purported to do, designating itself as "lex in perpetuum valitura" and employing terms such as "inseparabiliter ac indivisibiliter" and others. On the contrary, today laws and constitutions are conceived of as being as flexible as possible, so that the question of how to formulate a constitution, which can be changed in a constitutional manner, no longer really exists.

A much more interesting question, from a practical-legislative as well as from a legal-methodological standpoint, is, "How can a revolution in its true sense, i.e., a violation of the legal order, be made lawful by the legal order itself?" At first, this seems an impossibility. For how can an act that is contrary to the pre-existing constitution be effected constitutionally? How is it

possible to reconcile revolution and law, two principles which are, as I said at the outset, *logically* exclusive? But even this miracle is possible, due to an antinomy which dominates the world of law in the same way as any other scientific system. In order to understand it we have to reach further, all the way back to the first principles of our science. Any legal order has two sides, usually described as material and formal. Material law consists of those rules that define the rights and duties of individuals, regardless of the procedures conducted before legal authorities. Formal or procedural law, meanwhile, is concerned with these procedures: it establishes how material law is determined and by what authorities.

Law is, on the one hand, a text, which is – as with any other published piece of writing – open to understanding and scientific examination by anyone. This examination, which is accessible to "anyone", and the logical conclusions it draws, need not be related to consequences which must ensue from the legal text when it is considered from the perspective of formal law. It is these consequences, moreover – the wide variety of actions that may be enforced in accordance with law – that are characteristic of and essential to law, and which allow us to distinguish legal from other norms. These consequences are formally determined only by a ruling which emanates from a specific understanding and examination of the law, an interpretation reached by those authorised by legal order to do so and who thus bear the name of "authorities". Only their ruling can carry the force of law. For law without the force of law is no law. Assuredly, jurisprudential theories and the opinions of jurists may exert some influence on judicial rulings – jurisprudence is a logical science and logically correct results are hard to ignore, least of all by those who are trained and intellectually educated in the same way as legal scholars, engaging in the same logical examination of law. Still, this influence of logical thought on practitioners' thought processes cannot alter the fact that the law is only what those who areauthorised by the legal order to rule on law, determine it to be. Their interpretation of the law is the only valid one. If we take this into account, it will be easier for us to understand legal education in England and North America, where the study of decided cases, case-law takes precedence over the study of doctrinal works. An American who aspires to become a judge or a lawyer strives primarily to acquire knowledge on how to make his rulings or arguments stand. His reasoning is empirical: if a particular approach proved effective in a long line of decided cases, it is bound to be effective in the case at hand as well. I do not wish to claim that this approach, not uniformly adhered to even in the Anglo-Saxon world, is perfect. A refined legal culture can be created only by those capable of abstract thought, and of making inferences from general ideas to concrete cases. But the empirical approach has its practical uses.

Methodological cognition of a legal order, as of any normative system, executed by anorganised hierarchy, is similar to the method employed by theological sciences. In both cases we have a vast number of "lay" people, who can read and interpret texts according to their own sense of what is reasonable. But only

the interpretation given by the legal or ecclesiastical authority has legal, that is binding power. Law, therefore, presents a double face. One face proclaims rules for human action or forbearance. The other indicates those procedures and persons entrusted to enforce these rules and thereby to determine their meaning in a particular case. Furthermore, this second face of the law confers upon these persons the authority to decide whether the formal rules empower them to undertake interpretation and adjudication. Every jurisdictional ruling must address this question. A legal order therefore not only directs its authorities on how to decide cases but also empowers them to decide whether they have jurisdiction to do so. Every legal order has to determine a person to interpret and enforce it, and it thereby resembles someone who by his own free will designates somebody else to lead him, freely renouncing the exercise of his own volition. He who has the right to interpret has power *over* the law. Legal norms cannot preclude him from abusing this right and compel him to abide by logic and ethic; only other norms, e.g., religious or moral, can oblige him to do so. An oath, a promise, is not a legal, or at least not only a legal, act, but more of a religious or a moral undertaking. Even if an oath were mandated by some rule, the same result would follow, as the content of such an oath would refer to guarantees and consequences external to the legal order itself. Here we can clearly see how another, heterogeneous system overlaps with a legal system, lends it support and provides it with a way of preserving its vitality, by remaining constant amid a flow of interpretation. It might be objected that there are rules of interpretation, and sometimes explicit guidance is provided as to whether an interpretation of a logical, grammatical, historical, analogical nature, or of some other kind, is to be employed. But regardless of the fact that a judge is usually free to choose between such modes of interpretation, the rules of interpretation themselves must be interpreted. There is, however, no final rule to govern this interpretation.

Enough has been said about the shortcomings of a text and the omnipotence of interpretation. In most modern states judges and other authorities are restrained in other ways, less with regard to the interpretive approach they employ than to the object of interpretation. They can interpret the laws, but cannot invalidate them, if they have been published in due form. A question can, of course, also arise as to whether indeed an act has been published in due form. I will admit that the answer is not always easy and that subtle research will lead to an impasse. But generally satisfactory guarantees for proper publication have been established: ministerial countersignature and publication in the Official Gazette. But this question pertains to the legality of publication only and not to the legality of particular statutory provisions, which means that the judge is debarred from inquiring whether given laws conform to material provisions of the constitution. What does that mean? It means that he is precluded from *constitutional interpretation*. For the question of whether a law is congruent with the constitution of a state is the same as the question of whether a constitution is congruent with law. The logical operation is in both cases identical. There are certain constitutional provisions that are directly

applicable, since no statute of implementation has been placed between the constitution and adjudication. But the older the constitution, the fewer such cases will become, since implementation statutes are multiplying. Let me mention in passing that in truth all legislation consists of such "implementation statutes", since any statute effectuates a power given by the constitution. The immense power granted to authorities by interpretation stops with the constitution. A judge must apply the law as given by statutes, which are secondary to the constitution. On this level the law may be changed, reformed, but the constitution itself is exempt from a judge's consideration. The object of revolution, either in a technical or common understanding, can only be the constitution as the very point from which an entire legal order emanates.

There are some states, however, in which the judge's authority extends much further. In the United States of America (and, following their example, in some South American states) the judge has a right and a duty to review laws in the light of the constitution and to deny the force of law to any statutory provision if he determines that it contradicts some constitutional provision. He cannot abrogate the whole statute, but can deem it invalid for a particular case. The sole criterion is the constitution. But we would err in regarding the constitution as a fixed or permanent criterion. The constitution is a text, comprised of words and sentences. When a judge juxtaposes a statutory provision with a constitutional one, he has to ascertain the meaning of the constitution. To assess the constitutionality of a law, he must interpret the constitution *as well*. All that has been said about the reformatory power of a judge over the law applies to an American judge with regard to the constitution as well. American case-law is rife with cases in which judges (namely the highest federal court) have reached different interpretations of constitutional provisions with respect to changing social conditions. One particularly interesting example is the case-law on the constitutionality of workers' rights. Some statutes prohibited the payment of workers in kind, e.g., in provisions (the so-called "truck-system"), while others forbade the exercise of certain trades (e.g., a barber's) on certain days (e.g., on Sunday), and still others limited the working hours for adults. At first, the case-law deemed these statutes unlawful, arguing that they restricted a constitutional right to contract freely or because they applied only to a certain class of people instead of treating everyone in the same way. More recently, American courts have declared such provisions to be lawful. If we abstract accidental traits from these cases and focus on the main question that concerns us here, namely, what the role of the constitution was in each case, or what a constitutionally guaranteed freedom of contract means, we find that this freedom was at one time considered to be limitless and at another time was seen as being limited by social needs. The concept of freedom has therefore changed; and with it the constitutional provision pertaining to freedom has also changed. All this has happened by way of judicial interpretation, without any change in the language of the constitution by way of constitutional amendment. If a constitution has a particular, judicially acknowledged meaning – let us call it "official", so that no other meaning

applies – and subsequently some other meaning is ascribed to it, what else could be the case than that the constitution itself has changed? This, however, applies only under certain conditions: (1) That an individual case is at stake, in particular a case where the validity of a given provision is pertinent to such a case. A judge is granted freedom of interpretation only in connection with a particular case which falls under his jurisdiction. He is not at liberty to interpret the constitution whenever he sees fit; he has no right of initiative as parliament does. (2) That the review is undertaken by a court with jurisdiction in this sort of question; in North America, the highest federal court. It is this second condition that causes the new interpretation, the change in the meaning of the constitution, to become binding for the whole judicature, thereby bringing about a change that affects not only a particular case but causes the change [in the given provision] to acquire the force of a norm. When the Constitution flows into the locus of Judicial Power, in the United States of America, it finds the site at which its meaning is determined. An American judge is by constitutional decree positioned outside the constitution, since he is authorised to interpret it authoritatively. If the changes occur at the very head of a legal system, the constitution itself, then an antinomy of the kind described here implies a latent suicide, one committed by a norm destroying itself. The constitution grants the power of interpretation in order to protect itself; but this sword entrusted to the judge to protect it can be turned against the constitution and used to slay it, at least in the eyes of those who are not judges. This is nothing other than revolution proper, legalised in advance. Legalised, because according to the constitution the judge has full freedom of interpretation, and revolution because the judge may invest the constitution with a meaning different to the one commonly understood by people who are not officials; different even from that which emanates from previous rulings. This legal position and the practice emanating from it can help us understand the uniqueness of the American constitution in remaining unaltered since its birth in 1787, discounting minor changes (which were predominantly additions to the text). When needed, the interpretation has changed; and that has been enough for the Americans. This is only possible in a country where the constitution and all legal life rest on two *moral* forces: (1) on the limitless trust placed in judges and (2) on the high moral integrity of those judges, which justifies such trust.

It could be objected here that the problem of interpreting laws and the problem of applying them must be the same regardless of where they are interpreted or applied; an argument which denies the deep divide I have pointed out between the American and the Continental legal systems. And yet the divide exists. Every modern legal system operates on different levels. The highest is occupied by the constitution, from which ordinary laws emanate; and from them, regulations. This emanation, in my judgment, occurs in *essentially the same fashion*, whether through a judgment or an individual measure, all the way down to the material act of execution. A *crucial* question, to my mind, with regard to the relationship between a legal order and its application,

or, what amounts to the same thing, the text of the law and the authoritative decision, is the *point* within the legal system at which the allowed or mandated interpretation is delimited; or whether, indeed, it is limited at all. In the continental system, this line is drawn very clearly with the statutes – a judge is not allowed to employ interpretation beyond the scope of a prescribed statute, and an administrative official may not even stray beyond regulations. The judge's power of interpretation does not stretch to encompass *the whole* of the legal order; its apex, the constitution, from which all its validity derives, remains beyond his reach. He stands below the constitution, not only in a moral sense, because he swore an oath to it, but also because he cannot interpret it beyond an ordinary statute, which is an immanently logical impediment. The interpretative powers of an American judge stretch to the apex, so that *logically* the entirety of the legal order is subject to him. That is to say, the European judge possesses *something*; the American *everything*. A European judge's interpretation has logical limits, an American judge's has none. In logic, though, the difference between something finite and something infinite is *infinity*. Herein lies the crucial difference, opening up the possibility of revolution, which an American judge can implement, since he is authorised to do so by the constitution itself. It is an antinomy, something logically contradictory, incomprehensible, that on the one hand you have a valid text, and on the other hand, the application of that text, which is reserved to certain persons, who may assign the text this or that meaning. "A" ought to apply, but "not-A" might also possibly apply; at least when the matter is viewed through the eyes or logical reasoning of an observer who is not affiliated to the state authorities. If this relationship ascends all the way to the apex of the legal order, it is possible to have a binding constitution with either of the two meanings. This is logically inconceivable; here we run out of logical steam, as it were. The relationship between the legal order and its application is – if we pursue this line of reasoning to its logical conclusion – like a symbol used in ancient India for philosophy in general, the image of a snake biting its own tail. We need to apply logic to all realms of the human mind, however difficult this might be. It is more difficult still to discern the point at which logic is exhausted and to examine this inner contradiction, this logical imperfection, which is revealed through more profound reflection whenever the human mind wants to conquer something. It is a stroke of genius to use this inner contradiction, this ineradicable imperfection, in a way that actually prevents social, intellectual or moral destruction or the dissolution of humanity. The American Founding Fathers, for example George Washington, achieved just that, to a certain extent. By entrusting judges with revolutionary powers, the American constitution has probably prevented many other revolutions by *others*. By legalising revolution in an orderly way, even one that goes against the very nature of a legal order, the American Constitution has prevented revolution taking place against *society*. It is a testament to the wisdom of the American Founding Fathers that having realised the logical necessity of bestowing this great sovereign power to one branch of government – i.e., to the legislative, executive or judicial powers

– they chose to entrust it to the judicial branch, the one which is politically weakest because of its constitution and competences, which is least prone to undertaking reckless or politically motivated experiments and, finally, the one which is able to effect constitutional change only gradually, by deciding discrete cases. The North-American state thus tends towards – much more than any of the European states, in any event – the *Platonic* ideal of a judge ruling or a king adjudicating. Plato, of course, had only one kingly judge in mind. According to the *Platonic* ideal, the laws themselves would be redundant if the will of a kingly judge is to be decisive. He, being the most just and wise of citizens, would find the right solution in each case. You can find a faint parallel to America here as well. They have laws, but much fewer than we. They have a constitution, but as constitutions in Europe changed, theirs has remained *one and unaltered*, barring a few changes, from the day it was adopted 130 years ago. This is an excellent example of an important difference between a revolution waged by official interpretation and a revolution that destroys the body of a state. In the former case, legal continuity is preserved and the state remains *the same* from the standpoint of public law; and in the latter, the previous state is extinguished and a *new* state emerges.

In Europe only the legislator, i.e., the parliamentary assembly, has the power of authentic interpretation (leaving aside the sanction of a monarch or a president of a republic, whose acts must be countersigned by ministers, who are themselves members of parliament in so-called parliamentary systems). When statutes are concerned it is a parliament which makes a final decision on: (1) whether the statute observes the formal requirements set out by the constitution; (2) whether the statute violates some substantive constitutional provision. If it declares the law to be in conformity with the constitution or that the constitution has been changed as required by the constitution, such a declaration is binding on all other state authorities. I overlook here the royal or presidential assent, which is becoming a mere formality. In the internal procedures of a parliament, even that formality is absent. If, for example, a parliament or its speaker announces the result of the vote, this announcement is binding, regardless of whether it is mathematically correct or not. From the legal point of view it stands. The same applies if an assembly determines that the rules pertaining to "quorum" have been observed.

In the European system, no check is envisaged to ascertain whether parliament has adhered to the constitution. Scholars can establish that the constitution has been violated. But such determination has no legal power. A statute adopted by the parliament will remain valid irrespective of its conformity with the constitution. Parliament is morally bound by the constitution – members of parliament have sworn an oath – but it is not bound legally if its decisions are not reviewed by a constitutional court. How many unconstitutional statutes have been adopted by parliaments! We indulge in an innocent pastime if we speak of unconstitutional statutes, since only a legislature can assess their unconstitutionality in a binding way. The antinomy, which accompanies the application of every legal order, leads to the inevitable conclusion that from a *logico-juridical*

standpoint the difference between a constitution and a statute exists only for those authorities that are precluded from interpreting the constitution. In Europe, that is true for the executive and judicial power, but not for the legislative power. In its obligation to the constitution, parliament can be compared to a prisoner possessing the keys to the prison. The obligation to the constitution that a parliament and other crucial authorities have is from a legal standpoint utterly dependent on how those authorities choose to interpret the constitution. They are only morally obligated to interpret it according to their own consciences. In Europe, it is a parliament which decides in the course of legislative procedure whether the statute to be adopted is constitutional; whereas in America it is the judge, after the statute has been adopted, who makes this determination. In Europe, having the right of initiative as it does, a parliament can always state its views on the constitutionality of statues; an American judge can do so only when called upon so to do it in a particular case. European parliaments are judges in their own causes – they are entitled to interpret the constitution and therefore have power over it; they can even change it, in a way which contradicts the constitution, since there is no one to declare this unconstitutional. They are authorised to revolutionise the constitution, whereas parliamentary assemblies in America are subject to judges who are empowered to review the legislation adopted and declare it void if unconstitutional. In Europe, if a judge interprets a statute or a constitution in a way that seems unconstitutional to parliament, it has a right to employ authentic interpretation to ensure that its views prevail. If a parliament tried this in America, it would gain very little by doing so, as the judge can override such authentic interpretation as unconstitutional. In Europe, it is the parliament that has the last word on constitutional interpretation; in America, it is the judge.

The *psychological* difference between these two systems seems clear. A parliament will be composed of politicians, who are by virtue of their profession closely tied to their parties and will rarely exercise their powers in constitutional matters in an objective manner, but rather in a party-political fashion. This has been shown in the majority of European states. In America, this great power is entrusted to an independent, irremovable, well-chosen, well-trained and sufficiently remunerated judge, who is by virtue of his education and profession accustomed to deciding in an objective and sober manner, and who cares more about the good of the state and mankind than the advancement of political parties. In the end, the people will decide to whom they will entrust this great power, which can – in the most extreme of cases – prove to be a right to make determinations with full legal discretion. I wish to avoid discussing the European character – we are all familiar with it. But it seems to me an expression of great culture of mind, heart and will if a people entrusts a judge – as a symbol of justice from time immemorial – with this great power; and a sign of an equally great culture if the judge indeed honours that trust, which all those intimately familiar with North America will admit to be the case. In countries with strict parliamentary systems and, in particular, in countries composed of regions that lack a common political tradition and where bitter

political conflict can occur, I believe that in addition to administrative courts, a *constitutional court* should be introduced, to exercise control over parliament; or at least an independent Council of State, following Serbia's example, but with more extensive powers.

As I have tried to show earlier, the establishment and examination of every legal order leads back to some law-applying authority, which is entrusted with interpretation of the foundations of such legal order and acts *legibus solutus*. This is perhaps the deepest reason why social philosophers established the concept of "the division of powers", "séparation des pouvoirs", so that this "solutio legibus", which implies the absence of constraints and – when possessed by a single power – a threat to liberty be divided among several authorities. The "legislative power" which applies the constitution has been separated both from the "judicial power" which applies ordinary statutes of special character and from the "executive power" which applies other statutes. The principle of the division of powers is aimed less at limiting the *abuse* of legitimate power by state authorities and more at *limiting* the legitimate right to revolution by such authorities (even though those who invented this principle might have been unaware of this). This division of powers, which cannot be implemented thoroughly and which nowhere has been implemented fully, can mitigate the antinomy to which we have repeatedly returned as a feature of a legal order, but it cannot dissolve it. One of these authorities, in spite of all division of powers, must be granted the power of constitutional interpretation. The whole legal nature of a state is determined by *who* has that power or *where* such power lies. When a monarch possesses it, we have absolute monarchy; when a monarch *and* parliament share it, we have a constitutional monarchy; if a parliament alone has it, parliamentary monarchy or parliamentary republic. If this power is held by courts – what do we have then? We lack an expression to describe it. The United States' system is usually defined negatively – that it is not a parliamentary republic. Sometimes it is described as a democracy with shared powers. Such statements are all true, but miss the point. According to our previously established *principium divisionis*, the United States should have been described as a judicial republic with shared powers.

Alongside the American and the European systems, a special place is occupied by English law. The English have avoided the tedious problems of constitutional establishment, change and interpretation in a very simple way: by not having a constitution. Cromwell, a revolutionary, adopted a constitution in 1653[7] called "The Instrument of Government". But this constitution did not last long and was unable to break with the previous tradition. It is interesting, though, that Cromwell's "Instrument of Government" influenced the drafting of the constitution of the North-American United States. The English, who are more inclined to follow tradition and customary law, dislike fixed, written constitutions. Therefore, the difference between constitutional and ordinary

7 The original has mistakenly placed the event in 1633 (note by the editors).

acts is unknown to them. Every act adopted by both chambers and assented to by the monarch is an "ordinary act". What is covered by the constitution in European countries is addressed in England either by an unwritten tradition or regulated by an ordinary act, which can also be amended by means of an ordinary act. The constitution of the lower chamber (the House of Commons) can be altered and the upper Chamber (the House of Lords) may be abolished by an ordinary act. By that procedure, Parliament has transferred the British crowns from one family to another and even changed the provisions on the Union between Scotland, Ireland and England. The power of parliament is limitless, because there is no constitution. It is therefore impossible to speak of a revolution of parliament against constitution: whatever the parliament decides is a general norm; in individual cases whatever a judge in the final instance decides is binding. From a formal point of view, a judge is bound by all statutes enacted in parliament. He cannot review them, as there is no constitution to which he may refer. From a material point of view, a judge has complete freedom of interpretation. He can, therefore, decide individual cases quite unconstitutionally and – benefitting from the principle of finality – without the risk of being challenged. The power of an English judge is that much greater since he is guided by customary law, not originating from parliament, and by precedents, which have much greater authority than they do in our system. Parliament does not control judges and judges do not control parliament. The problem of revolution does not arise, since there is nothing against which a revolution could be directed, as there is no constitution. This system, simple in itself, is even simpler than it appears, because there is no division of powers in England, as there is no separation between private and public law. Such a system is only possible if a great degree of trust exists between judge and parliament, which, in turn, is only possible where neither power violates generally recognised principles of justice that are deeply rooted in the people. The distinctions between constitutional and ordinary acts, between public and private law, the whole system of the division of powers, the power of judges to exercise judicial review – all these are a reflection of fear and distrust. In Europe no branch of government is trusted: not the executive (hence administrative courts); not the judicial (hence the prohibition of judicial review and the division between public and private law); and not the legislative (hence constitutional acts, even though they are ineffective in this respect). In America one power is trusted: the judicial one. In England two are trusted: the legislative and the judicial. And more important still, the branches of government trust each other. This trust cannot be codified or shackled by laws; it is a *moral* force. Now we can better understand that English saying: *Men not measures!* Perhaps this highly flexible English system will not only enable but also carry out future social revolutions without blood being spilt.

To recap: an antinomy lies at the heart of any legal system. It is caused by a dualism between law as a text and law as the process of interpretation and the application of such texts. Because of this antinomy we must conclude that every legal order will at a certain point negate itself; accordingly, we reach

one law-applying authority which, by virtue of having the right to interpret a formal question, possesses the right to revolutionise the foundations of positive law. Moral law, which I do not address here, might condemn such a revolution, but it might also approve of it. As a result of our deliberations, the concept of Roman and medieval legal philosophy, "solutio legibus", acquires a new and theoretically more refined meaning. This antinomy is employed by political actors to promote their political ideas within the state. The form of government depends on which branch of government implements the crucial antinomy. This authority's ethical attributes and moral sense shall determine whether or not it will use this immense power to protect the formal continuity of legal order that is invaluable to the steady development of a nation. The moral qualities of all citizens, however, will determine who is entrusted to exercise this right and what sacrifices they are prepared to suffer in order to ensure the continuity of law in general. Now, as a new legal framework for our great, liberated and united motherland is to be constructed, it needs to be said: *Justice will not be established, nor will it be dispensed or obtained, unless it already exists within us!*

Part I

Law and Revolution Before and After 1918

3 The Idea of Revolution in 1918 (Kelsen's Circle)

Thomas G. Olechowski

Introduction

Kelsen's Circle, which is also known as the "Viennese School of Legal Theory" or of the "Pure Theory of Law", was formed in the last years before World War I, soon after Kelsen's habilitation at the University of Vienna in 1911. In 1918, shortly before the collapse of the monarchy, Hans Kelsen became an associate professor at the University of Vienna; in 1919, not long after the proclamation of the new republic, he was appointed full professor at the same university.[1] As early as 1915, another member of this circle, Leonid Pitamic, had been able to complete his habilitation; after 1918, he continued his career in the Kingdom of Serbs, Croats and Slovenes and was significantly involved in the establishment of the University of Ljubljana.[2] In Vienna, however, no fewer than eight other students of Kelsen's gained their habilitations between 1919 and 1922, including Alfred Verdross, Adolf Merkl and Fritz Sander. For this reason, the Vienna School had a great influence on Austrian jurisprudence in the inter-war period.[3] The Pure Theory also became well-known in the Kingdom of SHS via Pitamic. And due to the close contacts between Kelsen's Vienna School and the Brno School of František Weyr, similar teachings were also prevalent in Czechoslovakia.[4]

The great success of the Pure Theory is not only a result of these personal factors. It was a theory that was particularly well suited to interpreting the

1 See for all details of Kelsen's biography: Thomas G. Olechowski, *Hans Kelsen: Biographie eines Rechtswissenschaftlers.* 2nd ed. Tübingen, 2021.

2 Marijan Pavčnik, Leonid Pitamic, in: Robert Walter, Clemens Jabloner, Klaus Zeleny (eds.): *Der Kreis um Hans Kelsen*, in: Schriftenreihe des Hans Kelsen-Instituts 30 (2008), pp. 325–350.

3 Thomas G. Olechowski, Tamara Ehs, Kamila Staudigl-Ciechowicz: Die Wiener Rechts- und Staatswissenschaftliche Fakultät 1918–1938, in: *Schriften des Archivs der Universität Wien* 20 (2014), pp. 484ff.

4 Vladimir Kubeš, Ota Weinberger (eds.): Die Brünner rechtstheoretische Schule, in: *Schriftenreihe ddes Hans Kelsen-Institus* 5 (1989); Tanja Domej: František Wey und Hans Kelsen – eine biographische Skizze, in: Robert Walter, Clemens Jabloner, Klaus Zeleny (eds.): Hans Kelsens stete Aktualität, in: *Schriftenreihe des Hans Kelsen-Instituts* 25 (2003), pp. 45–56.

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fundamental events of 1918, the collapse of the monarchy and the emergence of new states, the development of democratic structures in these states and, above all, the increasing importance of international law. The opponents of Pure Theory have often criticised this doctrine as abstract, as unworldly, claiming it were unsuitable for explaining real life, whatever that might be. In fact, the representatives of Pure Theory were no quixotic professors who lived in an ivory tower. Verdroß, for example, joined the diplomatic service in 1918 and worked there for seven years before he was appointed professor of international law at the University of Vienna. Pitamic was a member of the Yugoslav peace delegation in St. Germain in 1919; later, he joined the Slovenian government; in 1929, he became Yugoslav ambassador to the United States. Finally, Kelsen was a legal advisor to the last Austro-Hungarian minister of war and immediately after the foundation of the State of German Austria, he became a legal advisor to the State Chancellor Karl Renner.[5] In this function, he wrote the preliminary draft of the federal constitution that is still valid in Austria today. From these activities in legal practice, both Kelsen and his disciples kept getting new ideas for their theories.

First Considerations (Before 1918)

Already in 1917,[6] during the war, Adolf Merkl had published an extensive article in the "Archiv des Öffentlichen Rechts", entitled "Die Rechtseinheit des österreichischen Staates [The legal unity of the Austrian state]". For the first time, a member of Kelsen's Circle dealt with the phenomenon of the revolution. It is not apparent that events in Russia had inspired Merkl in this essay; almost all of the examples he chose to illustrate his theses concerned Austria, a few also Germany, but none Russia. On the other hand, it is no coincidence that Merkl was the first to deal with the problem of revolution, because he was also the one who enriched the Pure Theory with one of its most important elements, namely the doctrine of the hierarchical structure of the legal system. In the early stages of the Pure Theory, Kelsen took only a static point of view on the legal system. He ignored the question of the emergence of norms, initially even rejecting it as a non-legal question.[7] Merkl, on the other hand, added a

5 Olechowski, Ehs, Staudigl-Ciechowicz: Fakultät, pp. 534f; Pavčnik, Pitamic, p. 326; Olechowski, Kelsen, pp. 195ff, 229ff.

6 Adolf Merkl: *Die Rechtseinheit des österreichischen Staates. Eine staatsrechtliche Untersuchung auf Grund der Lehre von der lex posterior*, in: Archiv des Öffentlichen Rechts 37 (1917/18), pp. 56–121, reprinted in: Dorothea Mayer-Maly et al. (eds.): Adolf Julius Merkl, *Gesammelte Schriften* (MGS) I/1, pp. 169–225. The 37th volume of the AöR has been published in 1918, but there are still cover pages from the first issue of this year (in which Merkl's article appeared), showing the year 1917. See also the dating of this article in Merkl: Verfassung (1919) 2.

7 See Hans Kelsen: *Hauptprobleme der Staatsrechtslehre*. Tübingen 1912, pp. 10, 100, reprinted in: Matthias Jestaedt (ed.): *Hans Kelsen Werke* (HKW) II, pp. 89, 195.

dynamic perspective to the static one and dealt in detail with the question of how the law regulates its own enactment. Each norm derives its validity from the validity of another norm, which can therefore be described as a "higher order norm". The norm of the highest order is the constitution of a state, from which all other norms directly or indirectly derive their validity.[8]

It is therefore the constitution that constitutes the legal unity of the state. This legal unity would be lost if the constitution were broken, if a new order was established, the norms of which can no longer be derived from the old order, but would apply from somewhere else. And Merkl explained that in all of these cases of legal change, a new "state in the legal sense of the term" would arise.[9]

To understand this thesis, it is necessary to take into account that the constitutional law doctrine of that time was strongly influenced by Georg Jellinek, who in his book *Allgemeine Staatslehre* had put forward the thesis that the state was seen on the one hand as a legal entity, and on the other hand as a social construct. Kelsen later rejected this thesis and declared that the state and the legal system were identical, that the state could not be captured other than by using legal methods. Merkl, on the other hand, affirmed Jellinek's two-sided thesis in his essay from 1918. He distinguished between a "state in the legal sense" on the one hand and a "state in the historical-political sense" on the other. The state of Austria, he explained, had existed for centuries in a historical-political sense.[10]

However, legally, Austria's history only went back to the year 1865. In September 1865, Emperor Franz Joseph overturned the February constitution of 1861 with the so-called Suspension Patent and seized legislative power for the state as a whole by means of a coup d'état.[11]

Similar steps the emperor had already taken in 1849 and 1851.[12] In all of these cases, the law had been violated, thus the subsequent events could not be explained by the previous constitutional situation. In all of these cases, a new

8 The fundamental steps of the emergence of this doctrine are: Adolf Merkl: Das doppelte Rechtsantlitz, in: *Juristische Blätter* 47 (1918), pp. 425–427, 444–447, 463–465, reprinted in MGS I/1, 227–252; Adolf Merkl: Die Lehre von der Rechtskraft, entwickelt aus dem Rechsbegriff, in: *Wiener staatswissenschaftliche Studien* 15/2. Leipzig, Wien 1923; Adolf Merkl: Prolegomena einer Theorie des rechtlichen Stufenbaues, in: Alfred Verdross (ed.): *Gesellschaft, Staat und Recht*. Wien, 1931, pp. 252–294, reprinted in: MGS I/1, pp. 437–492.

9 Merkl: Rechtseinheit 62 = MGS I/1, p. 175.

10 Merkl: Rechtseinheit 58 = MGS I/1, p. 171.

11 Kaiserliches Patent vom 20. 9. 1865 womit die Wirksamkeit des durch das kaiserliche Patent vom 26. 2. 1861 kundgemachten Grundsatzes [*sic!* recte: Grundgesetzes] über die Reichsvertretung sistirt wird, Reichsgesetzblatt Nr. 89/1865.

12 On 4 March 1849, Emperor Francis Joseph removed the formally upright Constitution of 15 April 1848 with a coup d'état and unilaterally enacted a new constitution ("Oktroyierte Märzverfassung"): Reichsgesetzblatt Nr. 150/1849. On 31 December 1851, he overturned this constitution with a second coup d'état and returned to an (neo-)absolutist mode of government: Reichsgesetzblatt Nr. 2/1852. See Merkl, Rechtseinheit 94 = MGS I/1, pp. 201f.

state had emerged. However profound subsequent developments might be, if they took place in the form prescribed by the new constitution, the legal unity was given. Therefore, neither with the Austro-Hungarian settlement nor with the December Constitution of 1867 was a new state founded, because they were both covered by the Suspension Patent of 1865.[13]

The Collapse of the Monarchy

A few months later, political events provided rich material to exemplify Merkl's theses again. On 28 October 1918, the Czechoslovak National Committee in Prague declared that the Czechoslovak state came into being.[14] On the next day, 29 October, the "State of the Slovenes, Croats and Serbs" was proclaimed in Ljubljana as well as in Zagreb. And another day later, 30 October, the Provisional National Assembly in Vienna decided to found the state of German Austria.[15]

These events have been seen very differently by historians. There is broad agreement, however, that both Czechoslovakia and the SHS state were new types of state, founded by a revolutionary act. They fully originated on the territory of the Habsburg monarchy, and all of their citizens had previously been citizens of either the Cisleithanian or Transleithanian or Bosnian part of the monarchy. Nevertheless, neither of the two states could be regarded as a legal successor to the Habsburg monarchy. This became particularly clear when Czechoslovakia was recognised as one of the Allied Powers and took part in the Paris peace negotiations on the side of the victors. The state of the Slovenes, Croats and Serbs was a short-lived entity; already on 1 December, it united with the Kingdoms of Serbia and Montenegro to form the Kingdom of Serbs, Croats and Slovenes; this fact hides the revolutionary founding act of 29 October. Nevertheless, similar observations can be made in regard of Czechoslovakia.[16]

In 1927, Hans Kelsen dealt with the emergence of Czechoslovakia in an expert opinion commissioned by the Czechoslovak government. In this

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Merkl does not reproduce the historical events completely correctly, but this is not important in the given context.

13 Leonid Pitamic: Opening Lecture, in this book [page 12]: "If the justification can be found in the same system, the upheaval is no longer revolution, but evolution. What is revolution from the standpoint of legal rules often only qualifies as evolution from the standpoint of other societal rules," and vice versa.

14 See Hans Kelsen: *Gutachten zur Entstehung des Čechoslovakischen Staates und der čechoslovakischen Staatsbürgerschaft*. Prag, 1927, p. 17; Ludwig Adamovich: *Grundriß des tschechoslowakischen Staatsrechtes*. Wien, 1929, p. 17.

15 Walter Lukan: Die slowenische Politik und Kaiser Karl, in: Andreas Gottsmann (ed.): Karl I (IV.), *der Erste Weltkrieg und das Ende der Donaumonarchie*. Publikationen des Historischen Instituts beim Österreichischen Kulturforum in Rom 14, Wien 2007, pp. 159–186, 183.

16 See Leonidas Pitamic: Die Verfassung des Königreiches der Serben, Kroaten und Slowenen, in: *Zeitschrift für Öffentliches Recht* 3 (1922/23), pp. 85–95.

document, he named the law of 28 October 1918, the "first constitution of the new state", and declared that this state had been founded in a revolutionary act.[17]

From the very beginning, it had been intended that the sovereignty of Czechoslovakia would extend to Bohemia, Moravia and Silesia, as well as to the Slovak-speaking regions of Hungary, and by February 1919 an effective rule could be established in this area.[18] With the existence of the three elements – state territory, state people, state power – Czechoslovakia was formed, as a formal recognition by other states was not required. In particular, it did not arise out of the Paris peace treaties, as was occasionally claimed, because only an existing state can sign a treaty.

But what applies to Czechoslovakia must also apply to German Austria. Hans Kelsen also wrote an expert opinion on the establishment of the State of German Austria, already in November 1918. And here too, he explained that the decision of the Provisional National Assembly on 30 October 1918, had created a new state that was not a legal successor to the Habsburg monarchy, no more than the Czechoslovak or the South Slavic states.[19]

> The foundation of the state of German Austria is purely revolutionary in nature, because the constitution in which the legal existence of the new state is expressed has no legal connection with the constitution of the old Austria. The continuity between the legal and state order of the old Austria and German Austria is interrupted.[20]

These statements are difficult to understand for non-jurists. The "Austrian Revolution" was not a bloody revolution like the French Revolution of 1789 or the Russian Revolution of 1917. When the Austrian Republic was proclaimed in front of the Parliament in Vienna, there were riots in which two people were killed. Apart from that, the violence in Vienna was low – even if compared to the riots in Munich or Berlin at the same time. A revolution did not take place in this sense, but only in the legal sense: by breaking legal continuity, in Vienna as well as in Zagreb, in Ljubljana as well as in Prague.[21]

This break in the law was hardly noticed in everyday life in German Austria, in the SHS state or in Czechoslovakia, because in all three states, the new rulers immediately declared that all previous laws should continue to apply and all institutions should continue to exist, provided they were not incompatible

17 Kelsen, Čechoslovakei-Gutachten, pp. 17f.
18 Kelsen, Čechoslovakei-Gutachten, pp. 23, 25.
19 Hans Kelsen: Gutachten über die völkerrechtliche Stellung Deutschösterreichs, 29. 11. 1918, published in: HKW V, pp. 61–64.
20 Hans Kelsen: Die Verfassungsgesetze der Republik Deutschösterreich. Wien, Leipzig 1919, 10, reprinted in: HKW V, pp. 24–129, 37.
21 See Fritz Sander: Das Faktum der Revolution und die Kontinuität der Rechtsordnung, in: *Zeitschrift für Öffentliches Recht* 1 (1919), pp. 13–164, 135.

with the new order.[22] Therefore, in Vienna, Prague and Ljubljana, sales contracts were still concluded according to the General Civil Code of 1811, and the purchase price was paid in "Kronen", the old Austrian currency with the portrait of the emperor. However, this material continuity was regularly made possible by special reconciliation provisions. The legal basis for the validity of the General Civil Code was not the patent of Emperor Franz I from 1811, but the respective decisions of the German-Austrian, Czechoslovak and Yugoslavian parliaments. According to Merkl, those old laws were "foreign laws"; only for practical reasons, they were adopted into the new legal systems.[23]

On 15 April 1920, Leonid Pitamic, who was then the first dean of the Law Faculty of the new University of Ljubljana, held his Opening Lecture "Pravo in revolucija [Law and Revolution]".[24] In this lecture, he confirmed the theses, which were also represented by Merkl and Kelsen. And he contradicted the so-called French doctrine "that the legal force of ordinary acts remains in place, notwithstanding the demise of the constitution, unless such acts are explicitly or implicitly repealed".[25] This doctrine emerged in France in the 18th and 19th centuries, "when revolution followed revolution", but it was not compatible with the principle of the Pure Theory that all law in a legal system should form a legal unit.

There is no doubt that both the French doctrine as well as the doctrine of the Pure Theory also involved political goals.[26] In particular, Kelsen and Merkl emphasised that World War I had been started by the monarchy, and only by it. German Austria did not go as far as Czechoslovakia that joined the Entente powers, but it declared its neutrality in this war and argued it could not sign a peace treaty because it had not been at war. For this reason, the Treaty of St. Germain is even today not seen as a "peace treaty" in Austria but as a "state treaty".[27] The Allied and Associated Powers, of course, did not share German Austria's view; they argued that German Austria was the legal successor to the Austrian Empire. In contrast, Czechoslovakia and the Kingdom of Serbs, Croats and Slovenes signed on the side of the Allied and Associated Powers.[28]

22 See article 2 of the Czechoslovakian law of 28 October 1918, Sbírka zákonů a předpisů, Číslo 11; paragraphe 16 of the German-Austrian law of October 30, 1918, Staatsgesetzblatt Nr. 1, article XVII of the Decree by the National Government in Ljubljana, on the provisional administration of 14 November 1918, Official Gazette no. 111. Cf. Pitamic, Opening lecture [page 14].

23 Merkl: Verfassung, pp. 4f.

24 All my references to this text refer to its English translation found in Chapter 2.

25 Pitamic: Opening lecture [page 13].

26 See the critic by Fritz Sander: [book review of:] Hans Kelsen, *Die Verfassungsgesetze der Republik Deutschösterreich* [and] Adolf Merkl, Die Verfassung der Republik Deutschösterreich, in: *Zeitschrift für Öffentliches Recht* 1 (1919/20), pp. 312–318, 313.

27 Thomas G. Olechowski: Der Vertrag von St. Germain und die österreichische Bundesverfassung, in: *Beiträge zur Rechtsgeschichte Österreichs* 9 (2019), pp. 374–383, 376.

28 Treaty of Peace between the Allied and Associated Powers and Austria, St. Germain-en-Laye, 10. 9. 1919, League of Nations Treaty Series No. 37; cf. the publication in the Austrian official Law Gazette as "Vertrag von Saint Germain-en-Laye zwischen der Republik Österreich

However, at the same time as they signed the Treaty of Peace in St. Germain, on 10 September 1919, the Allied and Associated Powers also signed an agreement with the Czecho-Slovak State and the Serb-Croat-Slovene State as well as with Poland and Romania with regard to their contributions to the cost of liberation of the territories of the former Austro-Hungarian Monarchy.[29] In this, the states mentioned agreed to pay up to 1.5 billion Gulden. These amounts were to be offset against the share of the reparation costs that Austria had to pay. Although the states mentioned were not legal successors to the monarchy, they were in economic terms. However, this only had theoretical significance. Since Austria never made reparations, there were never any offsets.[30]

Implications for Legal Theory

If the new law that emerged from the revolution does not owe its emergence to pre-revolutionary law, the question arises as to where it comes from. The German Austrian founding act indicated that the members of the Provisional National Assembly had been democratically elected;[31] this argument can be countered by the fact that the constitution under which they had been elected did not authorize them to form a state, thus they exceeded their mandate. The Czechoslovak state founding act contained no justification at all.

As early as 1914, Kelsen pointed out that any consideration of the law must begin at some point, more or less arbitrarily chosen.[32] This basic assumption, which cannot be questioned here in more detail, was described by him as the basic norm, in German: the Grundnorm. Theoretically, it is possible to formulate the basic norm in such a way that it says: The founding act of Austrian Monarchy of September 1865 should be valid. It can also say: The German Austrian state founding act of October 1918 should be valid. There is only one problem: The basic norm cannot say both at the same time. And Merkl's statement that no "bridge" can be built between the law of the old and the

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und den Alliierten und Assoziierten Mächten" (which avoids the term "Friedensvertrag"), Staatsgesetzblatt 1920/303.

29 Agreement between the Allied and Associated Powers with regard to the Contributions to the Cost of Liberation of the Territories of the Former Austro-Hungarian Monarchy, St. Germain-en-Laye, 10. 9. 1919, League of Nations Treaty Series No. 44; see also the Agreement between the Allied and Associated Powers with regard to the Italian Reparation Payments, St. Germain-en-Laye, 10. 9. 1919, League of Nations Treaty Series No. 42.

30 Laura Rathmanner: Die Reparationskommission nach dem Staatsvertrag von St. Germain, in: *Beiträge zur Rechtsgeschichte Österreichs* 6 (2016), pp. 74–98.

31 "Vorbehaltlich der Beschlüsse der konstituierenden Nationalversammlung wird einstweilen die oberste Gewalt des Staates Deutschösterreich durch die auf Grund des gleichen Wahlrechtes aller Bürger gewählte Provisorische Nationalversammlung ausgeübt": Paragraph 1 State Founding Act, Staatsgesetzblatt 1918/1.

32 Hans Kelsen: Reichsgesetz und Landesgesetz nach österreichischer Verfassung, in: *Archiv des öffentlichen Rechts* 32 (1914), pp. 202–245 and 390–438, 413f., reprinted in: HKW III, pp. 359–425, 408.

law of the new Austria cannot be correct the way he put it: From the point of view of German-Austrian constitutional law, there was not even another bank to which a bridge could have been built. This was a very serious critique that Fritz Sander made of Merkl's theory.[33]

"Positive law and revolution are, from a logical point of view, mutually exclusive", were the first words of Pitamic in his Opening Lecture.[34] If we take these words seriously, this means that a revolution cannot be examined using legal methods at all. It is outside the law, and also Kelsen emphasised (in his opinion considering the emergence of Czechoslovakia) that it is impossible to talk about the emergence of a state from the standpoint of the legal order of this state. This would be a "*petitio principii*".[35]

The solution to this problem is hidden behind the state founding act of the State of the Slovenes, Croats and Serbs of 29 October 1918, which refers to the "full right to national self-determination that has already been recognized by all belligerents", thus to international law, which was not considered by Merkl nor by Sander. Based on the Pure Theory, Alfred Verdross argued for the unity of the whole legal world, according to which the laws of all states derive their validity from international law.[36] According to customary international law, a state is established when a state authority has effectively established itself over a certain area and a certain population. This was true in all three cases – German Austria, Czechoslovakia, Yugoslavia. In each of these states, power had actually passed on to the new rulers. All three states thus did not derive their existence from the legal system of the defeated Habsburg monarchy, but from international law.

33 See Sander: book review, p. 314.
34 Pitamic: Opening lecture [page 11].
35 Kelsen: Čechoslovakei-Gutachten, p. 71.
36 Alfred Verdross: Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung. Tübingen, 1923.

4 Ivan Žolger, a Forgotten (R)evolutionary in the Constitutional Processes of Two Successive Polities in 1918?

Katja Škrubej

Ivan Žolger, Hans Kelsen and Leonid Pitamic on Austro-Hungarian Constitutionalism[1]

Page ten of the program for the Academic year 1915/1916 at the Vienna University Faculty of Law[2] reveals that in the winter semester, the lectures on the famous Austro-Hungarian Compromise (*Österreichisch-Ungarischer Ausgleich*), i.e., on the partition of the Austrian Empire into two halves in 1867, surely the most significant constitutional change of the Habsburg monarchy in the decades before its collapse in 1918, were given in separate classes by two *Privatdozenten* and one full professor.[3] The first two were Ivan Žolger and Hans Kelsen, whereas the one already enjoying full professorship was Ernst Seidler. Two years later, Seidler became the Minister-President of the last Austrian so-called technical

1 The reproductions of the majority of the archival documents, that I was lucky to unearth in the recent years in the Austrian State Archives in Vienna and in the Slovene State Archives in Ljubljana, and on which my present work is based, I have already published in Katja Škrubej: Ivan Žolger in zadnji poskus revizije ustave v Habsburški monarhiji: povezave s snovanjem ustavnih podlag za novo politično skupnost? [Ivan Žolger and the Last Revision attempt of the Constitution of the Habsburg Monarchy: Possible Ties to Conceiving the Constitutional Foundations for the New Polity?], in: Jure Gašparič, Katja Škrubej (eds.): *Slovenski pravniki in začetki slovenske državnosti, Prispevki za novejšo zgodovino, tematska številka* [Contributions to Contemporary History, A theme issue] Vol. 59, No. 2 (2019), 130–156; the online version accessible at https://ojs.inz.si/pnz/article/view/658 (accessed on October 12, 2020). Further, in April 2019, I was invited to present the documents, known to me at the time, to my colleagues at the Department for Legal and Constitutional history of the University of Vienna Faculty of Law in a form of a public lecture, entitled *Ivan Žolger as an actor of the constitutional stability and change from 1908 to 1918*.

2 At that time, the faculty's official name was Rechts- und Staatwissenschaftliche Fakultät der Universität Wien (today Rechtswissenschaftliche Fakultät der Universität Wien).

3 "Öffentliche Vorlesungen an der k. k. Universität zu Wien, Winter Semester 1915/1916, B. Rechts-und Staatwissenschaftliche Fakultät; IX. Staats-und Verwaltung", *Vorlesungsverzeichnis 1914/1915–1921/1922*, 10. Accessible at Univ.-Archiv Wien, Z 84 L. The photograph of the relevant page from the faculty program mentioned, is available from the internet link given in the online version of Škrubej, 2019.

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government,[4] in which Ivan Žolger was appointed Minister *sans portfeuille*. Yet at the same time and in the scope of his new duty, Ivan Žolger was secretly entrusted by Emperor Karl I also with the task of participating in preparing what turned out to be the last attempt at revising the constitution of the old monarchy with the aim to enable the monarchy's survival. Hans Kelsen, on the other hand, the only one of the three who later achieved the highest recognitions in his field in the international academic legal arena, was in 1915 already developing elements of his future Pure Theory of law,[5] a theory that later marked him out as the most important legal philosopher of the so-called Viennese School of legal thought.[6] However, right around the break-up of the Habsburg monarchy, Kelsen, too, became deeply immersed in the work on the constitution, only on the one, already for the new Republic, the so-called German-Austria. In the years that followed, Kelsen dedicated most of his efforts to work on its different drafts, in fact, so much so, that this work earned him the nickname of "Verfassungsmacher." It is well known that the first version of the draft constitution for the new Republic was prepared with a view of Austria's joining the German Reich as its integral part,[7] but to which later, at the Paris peace conference, the Allies were strongly opposed and prevented it from occurring.[8]

It is fair to say that nowadays, outside of Austria, Kelsen is much more known for his legal philosophical works than for his important contributions to the Austrian constitutional (r)evolution[9] and its history. In this light, it should not come as a major surprise that the works and contribution to the Austrian

4 Cf. Christine Kosnetter, Ministerpräsident Dr. Ernst Ritter v. Seidler (Dissertation). Universität Wien, Wien 1963.

5 In 1911, Kelsen earned his "Habilitiation" at the Vienna Law Faculty with a work Hauptprobleme der Staatsrechtsrechtlehre, entwickelt aus der Lehre vom Rechtssätze. Thomas G. Olechowski, *Hans Kelsen. Biographie eines Rechtswissenschaftlers.* Mohr Siebeck 2020, 141–144; in what aspects his early thoughts did not precede the later main elements of his Pure Theory, see ibid., 143.

6 Olechowski, 2020, 303.

7 The Article 2 of the Law of 12 November 1918 (StGBl Nr.5) on the Form of the State stated:

> "Deutschösterreich ist ein Bestandteil des Deutschen Reiches". Hans Kelsen: Österreichisches Staatsrecht. Ein Grundriss entwicklungsgeschichtlich dargestellt. Mohr Siebeck 1923, 147.

8 Cf. Kelsen, 1923, 96–97 and the footnote on the page 96, on the relevant article of the draft constitution (*provisorische Verfassung*), which was superseded by the Law of 21 October 1919 (StGBl Nr. 484) on the Form of the State (Staatsform), which in turn was based on the article 3 of the State Treaty of St. Germain (*Staatsvertrag von St. Germain*). As it is well known, following the latter, the new state had to adopt the frontiers, decided at the peace conference, change its official name from German Austria to Republic of Austria and was prevented from joining the German Reich. For a very vivid historical context, reconstructed on the basis of the everyday life in Vienna in the year 1919, see Gerhard Jelinek, *Neue Zeit 1919 (Ein Jahr zwischen Hoffnung und Entsetzen)*. Amalthea Verlag 2019.

9 How curiously uneventful, in the sense of non-revolutionary, the passing of the power from the Monarchical to the Republican form of government in German Austria in the last days of October and the first days of November 1918 *de facto* was, is described very evocatively

constitutional history of his fellow Privatdozent in 1915, Ivan Žolger have been until the centenary almost forgotten. The fact that Žolger was Slovene and due to a strange though nonetheless true tendency of the past decades in the historiography to "nationalize" important personalities and ascribe their achievements to the tradition of only one "national" (hi)story while almost erasing them from the other,[10] no one in Austria in the last hundred years paid to Žolger much-deserved attention. The matters were also not helped by the fact that the Austrian Biographic Lexicon 1815–1950 (*Österreichisches Biographisches Lexicon 1815–1950*) had not covered the entries beginning with the letter Z until very recently.[11] In Slovene historiography,[12] things were not substantially better.[13] The endlessly reiterated apparent highlight of his life

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by Thomas G. Olechowski in his monography on Hans Kelsen, where he cites an autobiographical article by Kelsen's pupil and later also a successor at the Vienna Faculty of Law, Adolf Merkl. Merkl points out a singularity ("ein einzigartiger staatsrechtlicher Tatbestand") of his having been summoned from the old post at the Staatsrechtliches Departament, established in the scope of k. k. Ministerratspräsidium, to the new German-Austrian Staatskanzlei in the face of later adopted full state and legal discontinuity between the two. Olechowski, 2020, 229. Cf. Merkl Adolf Julius: Adolf Julius Merkl, in: Grass Nikolaus (ed.), *Österreichische Rechts- und Staatswissenschaften der Gegenwart in Selbstdarstellungen*. Wagner Universitätsverlag 1952, 137–159. More on Merkl, see *infra*.

10 I have touched on that problem of the parallel shift from legal pluralism to legal monism to that of reducing the multilevel pre-1848 identities to that of the modern idea of a nation in the course of the 19th century in Katja Škrubej, Austrian General Code (1812) and the Slovenes: the blinding legacy of legal monism, in: *Zbornik Pravnog fakulteta u Zagrebu*, Vol. 63 (2013), 1063–1080.

11 Josef Pauser, Žolger Ivan, Ritter von (1867–1925), in: *Österreichisches Biographisches Lexikon 1815–1950*, 73. Lfg: Zeman Antonín – Zycha Marianne Emilie, Wien 2022, 575–576. Accessible at https://biographien.ac.at/ID-184.6858115834164-1 (accessed 4 January 2024)

12 Let me give a few facts from *Slovene Bibliographical Lexcion* on Žolger's life and work until 1918, which later will not be mentioned in the main text. In 1888, Žolger finishes gymnasium in Maribor as top of all classes. He studies law in Graz and Paris and in 1895, he earns his doctorate in Graz sub *auspiciis imperatoris*. In 1898, Žolger publishes his first and very much acclaimed work *Österreichisches Verordnungsrecht* that earns him summons to the Ministry of Education in Vienna and at the same time opens up the path for him to the private "Dozentur" at the University of Vienna (from 1900–1917). Soon after, Žolger is also appointed as a member of the committee on the state exams in law. In 1902, he is summoned to the presidency of the ministerial council (*Ministerratspräsidium*), i.e., government. There, in 1905, he starts off as ministerial secretary, in 1908 reaches the post of a sections councillor, in 1915 he becomes ministerial councillor and then finally obtains the highest administrative position, which is that of a section's head (one of five). On 10 March 1918, Žolger is granted full professorship at the University of Vienna by the Emperor Karl I, and only a few months earlier he also becomes a member of the Emperor's Secret council (*Geheim Rat*). Miloš Rybář, Žolger, Ivan, vitez (1867–1925). Slovenska biografija. Slovenska akademija znanosti in umetnosti, Znanstvenoraziskovalni center SAZU, Ljubljana 2013, www.slovenska-biografija.si/oseba/sbi909172/#slovenski-biografski-leksikon (accessed 12 March 2021).

In this context, it is not to be overlooked that before the war, Žolger is close to the circle of Archduke Franz Ferdinand.

13 The only exception of the last decade is the work of Andrej Rahten, a historian and a specialist in the history of the diplomatic service that Slovenes took part in. On Žolger he wrote last

and work in different Slovene historical overviews was that Žolger was the only Slovene (and South Slav) who became a minister in any of the Austrian governments. However, that always read as a mere concession by the Emperor to the South Slavs, i.e., Yugoslavs, as a part of his political juggling of multinational political reality, in danger to precipitate the dissolution of the monarchy, with Žolger himself in it being almost tantamount to an accidental figure with no previous credit to his name nor any real expectations from him while on the government.[14]

However, due to my archival research in Vienna over the last three years, I can safely say that even in comparison to Kelsen, Žolger's contribution to the research and understanding of the Austrian constitutional development on the one hand and to the administrative and constitutional practice at the highest state level on the other *before* 1918 was considerably greater. Why?

Of the three academics who lectured on Austro-Hungarian Compromise in 1915, Žolger was the only one who dedicated an entire monograph to the complex issue of the Compromise, i.e., *Das staatsrechtliche Ausgleich zwischen Österreich und Ungarn* (1911).[15] For the purpose of studying the versions of the Compromise in both languages, German and Hungarian, in detail, Žolger took upon himself the task of learning Hungarian. Consequently, his book became the first (and the only one) with the two parallel texts of the Compromise – actually named Gesetz von 21. Dezember 1867 in German and Gesetzartikel XII (*XII. Törvényezikk*, in Hungarian) vom Jahre 1867 – running alongside, with the Hungarian version rendered in German for the wider public for the first time.[16] These are preceded by the main part of the work, i.e., the original Hungarian text (i.e., Gesetzartikel XII vom Jahre 1867) and the text of Žolger's German translation, also running parallel. The latter is equipped with Žolger's abundant commentary on the substantial differences between the Hungarian and German texts.[17] However, the work commences in a true legal historical fashion with the history of the events and preceding documents that led to the Compromise of 1867 (*Entstehungsgeschichte der Ausgleichgesetze vom Jahre 1867*). Žolger's next book was also dedicated to the constitutional issues, only with even stronger legal-historical perspective.

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in Andrej Rahten: *Slovenski pravniki na diplomatskem parketu do mednarodnega priznanja nove države* [Slovenian Lawyers as Diplomats Until the International Recognition of the New State, in: Gašparič, Škrubej, 2019, 115–129; the online version accessible at https://ojs.inz.si/pnz/article/view/334/924.

14 Lukan Walter, Die slowenische Politik und Kaiser Karl, in: Andreas Gottsmann (ed.), Karl I (IV.). *Die erste Weltkrieg und das Ende der Donaumonarchie*, Verlag der Österreichischen Akademie der Wissenschaften 2007, 168. To his mind, Žolger at his post as a minister, was of use only as an informant to the Slovene politicians.

15 Ivan Žolger, *Das staatsrechtliche Ausgleich zwischen Österreich und Ungarn*, Duncker & Humblot, Leipzig 1911.

16 Ibid., 307–346.

17 Ibid., 43–297.

Namely, six years later, in 1917, Žolger published *Der Hofstaat des Hauses Österreich*,[18] a detailed study on the constitutional position of the Habsburg imperial court in the dualistic system, analysed right back to the Austrian Pragmatic Sanction of 1713. However, how widely Žolger's academic interests and pragmatic commitment in this field really ran was shown in his professional and political support for the work of his fellow academic colleague, historian Gustav Turba, who after almost two centuries since the events, was the first to delve into the Archives in order to try and reconstruct what on 19 April 1713, the "founding date" of the Austrian monarchy, the so-called Austrian Pragmatic sanction, really occurred. That entailed not only the reconstruction of the events and documents that led to the occasion, but also those that helped to its *ex post facto* securing of its international validity. In 1913, for the bicentennial of the event, celebrated also as a national holiday, Turba published the authentic documents that he had painstakingly unearthed and recovered from the Archives,[19] for the first time. Yet, in the preface, Carl Graf von Stürgkh, Minister-President at the time, and officially the commissioner of the work, thanked – in addition to Turba – none other than Ivan Žolger, in his role as a Head of the *Staatsrechtliches Departament*, for his valuable support in bringing the work about.[20]

Not only was Žolger's academic and theoretical work in the last half a century almost completely overlooked, so was also his dedicated leading of the already mentioned *Staatsrechtliches Deptartament*[21] in the scope of the so-called *Ministerratspräsidium* from 1908 until 1917, the very department that

18 Ivan Žolger, *Der Hofstaat des Hauses Österreich*, Franz Deuticke 1917.

I would like to draw from my experience, researching in the Haus und Hof Archiv of the Austrian State Archives in Vienna, that to many archivists there, the name Žolger stands for this very work which, they say, is still of major practical use to them due to the amount of useful archival details on one hand and excellent overview of the matter on the other.

19 It is certainly of interest to note that at least what the participation of the provincial Diets of respective historical provinces is concerned, what Turba could recover were the drafts for the actual acts. The latter were namely performed orally with the assistance of the so called Augen- und Ohrenzeugen. This certainly played the part later in different narratives of what at these Diets really happened, i.e., if the Diets in the respective provinces merely acquiesced to the ruler's words or could their posture and attitude be interpreted as something akin to consent.

On this complex issue, see Katja Škrubej, Avstrijska sanctio pragmatica in francoska lex salica: prestiž poznoantične forme za novoveško vsebino (o dinastičnem nasledstvenem redu z ženskami in brez njih), in: Miha Preinfalk (ed.): *Leto 1713 in njegovi odmevi v slovenskem prostoru. Slovensko društvo za preučevanje 18.* stoletja, ZRC SAZU 2015, http://ezb.ijs.si/fedora/get/ezmono:sd18z15/VIEW/#head1:Avstrijska_sanctio_pragmatica_in_francoska_lex_salica_prestiž_po (accessed 27 August 2021).

20 See Carl Graf Stürgkh (Accompanying word), in: Gustav Turba, *Die Pragmatische Sanktion (Authentische Texte samt Erläuterungen und Übersetzungen)*. Kaiserlich-Königliche Schulbücher-Verlag 1913, IV.

21 Department for state, i.e., constitutional, issues. In the mémoires of Adolf Merkl, we also find the name *Staatsrechtliches Burreau* (though never as a self-denomination in the archival documents I was lucky to unearth in Vienna, produced by the Departament), Merkl, 138.

today's Austrian *Verfassungsdienst* counts as its predecessor. However, its short description in the major work on the Austrian justice and administration system lacks the name of the head of the department from its beginning to almost its end, i.e., omits Ivan Žolger entirely, and even gives the wrong interval of the *Departament's* existence.[22] This can partly be explained by the fact that hardly any archival research has been undertaken until now. The only account on the founding of the Department and the reasons behind it, known to me, is that by Janko Polec, a jurist, a high official, first at the Austrian Supreme Court and just before the break-up in the Austrian administration[23] as well, while also a committed researcher in the field of legal history. After the break-up of the monarchy, Polec became one of the first professors at the University of Ljubljana Faculty of Law (alongside Ivan Žolger and Leonid Pitamic) for the field of legal history. This is what Polec writes:

> Upon Žolger joining the *Ministerratspräsidium*, the institution consisted, apart from an accounting department, of two main departments: a presidential and a press department. At the start, Žolger was assigned to the latter. But between the Austrian and the Hungarian part, a new Compromise was being negotiated at the time; on the whole, the relations between the two stately halves were characterised by an ongoing tension and development. Naturally, in the *Ministerratspräsidium* the stately affairs were being accumulated. And to their solving, Žolger was asked to join . . . [to this end] he formed for himself a new Staatsrechtlichen Departament, which he chaired (my translation).[24]

My research showed that there in the Austrian State Archives, unfortunately no special archival fond exists for the Department. However, with the reconstruction of Žolger's special tasks as its head, as described by Polec, I was able to trace some of the relevant material, i.e., documents with the Department given as the place of their issue.[25] Even if such a fond ever existed, now it seems to be completely dispersed. Further, having looked closely to the

22 See Adam Wandruszka, *Peter Urbanitsch: Die Habsburgermonarchie 1848–1918: Verwaltung und Rechtswesen. Band 2 von Österreichische Akademie der Wissenschaften: Die Habsburgermonarchie 1848–1918*. Verlag der Österreichischen Akademie der Wissenschaften 1975, 110.

23 For his knowledge and experience, in 1917 Polec was summoned to the newly founded ministry for social affairs in the Austrian government (one of the first of its kind in Europe). On one other important member of the Vienna circle of Hans Kelsen, Adolf Julius Merkl, first being called to the same ministry, and later joining the Staatsrechtliches Departament, see *infra*.

24 Janko Polec, Slovenski pravni znanstveniki pretekle dobe v tujini [Slovene legal academics of the past period abroad], in: Rudolf Sajovic (ed.): *Pol stoletja društva "Pravnik" (spominska knjiga)* [Half a century of "Pravnik [Jurist]" Society; a memory book]. Društvo "Pravnik" 1939, 197.

25 In my previous study, I have published a photo of one such document on the affairs of Bosna and Herzegowina, reviewed and sent "ad acta" by Žolger, where "Staatsrechtliches Departament" appears as a subtitle in its head, which I succeeded to unearth in the Austrian State

Kaiser's explanation for having granted the first of honours of many more to come, to Žolger in 1910, it was revealed that it was presented to Žolger for his excellent chairing of the Staatsrechtliches Departament and, within its scope, for having successfully completed a demanding legal and administrative task in helping to conceptualise the appropriate legal ways for incorporating Bosna and Herzegovina (BIH),[26] which, to the dual monarchy, it had been annexed only recently, i.e., in 1908. The matter was highly sensitive, since BIH was a common prerogative of both the Austrian and Hungarian halves. This realisation brought me to a hypothesis on the true function and position of the Staatsrechtliches Departament, which was unmistakably rooted in Polec's observation.[27] What seemed to be actually at the very core of the tasks and even of the reasons for the Department's existence must have been the Austro-Hungarian relations. To put it simply: Within the Department, it must have been one of Žolger's main tasks to envisage the course of the ongoing negotiations and to help with preparing the necessary strategies for them.

In the university program mentioned at the beginning, it is certainly of interest for the present study that the entry on Hans Kelsen is followed by that of another colleague of both, Hans Kelsen and Ivan Žolger – by that of Leonid Pitamic, in 1915 also Privatdozent. Later, in 1920, Pitamic became the first Dean of the University of Ljubljana Law School, by giving his inaugural speech, *Law and Revolution*, from which this volume takes its cues. Not surprisingly, in 1915, at the University of Vienna, the title of his announced lectures was *Systeme von Staatenverbindungen*. Even though not directly addressing the Austro-Hungarian Compromise in the lectures' title itself, as Žolger and Kelsen did, Pitamic's chosen topic had a lot in common with fundamental questions of the constitutional law, which as a separate field had only just begun to emerge (in German at the time called *Staatslehre*, only later *Verfassungslehre*). On lasting and fruitful academic ties between Pitamic and Kelsen[28] and the whole of the so-called Viennese School, it was Marijan Pavčnik, a co-contributor to this volume, who conducted the most intense research.

At the end of this chapter, let me just briefly outline the close ties between Pitamic and Žolger, the two founding fathers of University of Ljubljana Faculty of Law, on their parallel academic and high administrative tasks in the old monarchy as well as in the new polity. Apart from being colleagues in the university lecture

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Archives (AT-ÖSta/AVA Inneres MRP Präs. A 347 Österreich-ungarischer Augsleich, 1916, Protokoll Nr. 1362/1916, 14. März). Škrubej, 2019.

26 AT ÖStA/AVA, Inneres, MRP-Präs. A 96 Ministerratspräsidium, Akten 1–150; Zl.: i-200, Protokoll Nr. 42/1910 (4. Jänner). Škrubej, 2019.

27 Polec himself tackled the complex international legal status of BIH in an article published in the same year of the Annextion, in 1908. Janko Polec, Die völkerrechtliche Stellung von Bosnien und Herzeowina vor der Annexation? Excerpt from Laibacher Zeitung. Im Verlage des Verfassers 1908.

28 The most encompassing and detailed work on Hans Kelsen is by a Viennese colleague legal historian, another co-contributor to this volume, Thomas G. Olechowski.

rooms in Vienna, Pitamic was invited by Žolger to join him at the Staatsrechtlichen Departament shortly after its founding. It is one of my surmises yet to be proven, that it was Pitamic who upon Žolger becoming a Minister and leaving the Department, stayed purposely on upon Žolger's wish in order not to let it be fully overtaken by the other "camp" (i.e., German-Austrian). At this point, let me just say that in view of later developments in the political (international) arena, as well as in the field of legal philosophy, it is not unimportant to note, that in April 1918, Adolf Julius Merkl, a pupil of Kelsen, was summoned from the newly established ministry for social justice[29] to the very Staatsrechtliches Department, where he remained right until its dissolution on 2 November 1918.[30] That means that for the next four months, Pitamic and Merkl, who would later both be partners to Kelsen in discussing with him aspects of his Pure Theory, spent the time, marked by the gradual constitutional dissolving of the monarchy in the same high office, dedicated to constitutional issues.

On the other hand, it goes without saying that Pitamic must have formed part of the circle of high administrative and judicial officers of Slovene descent that in spring of 1918 gathered around Žolger with a purpose to collect all the available statistical, economic and socio-geographic, etc. data in their respective high administrative offices in order to research, analyse in depth and consequently appraise whether the territory, where the Slovenes were in a majority, was in fact capable of economic, social and political survival in the case of the monarchy's dissolution.[31]

After the demise of the monarchy, a Slovene provisional National Government was formed on 29 October 1918. Both Žolger and Pitamic were invited to join, only not to the top echelons, which were reserved for the Slovene political parties' members. At one point indeed envisaged by some as the possible Head of the Provisional Government, Žolger was in the end entrusted with leading the so-called Administrative Committee, to which not surprisingly he invited Pitamic to join. Already appointed professors at the newly founded University of Ljubljana School of Law, both were soon invited to join the Yugoslav delegation at the Paris peace conference, with Žolger being

29 The question is how well Adolf Merkl knew Janko Polec who, accidently, was also the one who left us his valuable observations on how Žolger founded the Staatsrechtlichen Departament, cited above in the text, since in 1917 both were called to the newly established ministry for social justice, has to be left to the future research. More on Polec see *supra*, on Merkl *supra* and *infra*.

30 For Adolf Julius Merkl's own account on this point, see Merkl, 138. In this autobiographical text, Merkl tells us in his own words, how on 2 November 1918 he was summoned by Karl Renner from Staatsrechtliches Departament to the newly established Verfassungsdienst of the new "Staatskanzlei" and how by this act the first ceased to exist. Before having been summoned to the ministry for social justice, Merkl had spent a short period of time in the ministry for trade (Handelsministerium). He counts as a pupil of Edmund Bernartzik, Adolf Menzel and Hans Kelsen. On his life and work, see also Herbert Schambeck: Merkl, Adolf Julius, in: *Neue Deutsche Biographie, Band 17*. Duncker & Humblot 1994, p. 157, https://daten.digitale-sammlungen.de/0001/bsb00016335/images/index.html?seite=173 (accessed 12 March 2021).

31 More on that topic, cf. *infra* the work by Rudolf Andrejka.

one of only four Yugoslav plenipotentiaries. The last post that they both held, even if consecutively, was that of a member of the Arbitration Tribunal of the League of Nations (Permanent Court of Arbitration; 1920–1925).

Pitamic's Inaugural Lecture, His Ideas on Revolution and Ivan Žolger

Every member of the Slovene provisional national government and all of them collectively viewed themselves proudly as revolutionaries (slov. *prevratniki* 'revolutionaries';[32] *prevratniška vlada* 'revolutionary government'), and the process that was underway during the last weeks of the monarchy and that ended with the establishing of the State of Slovenes, Croats and Serbs as a provisional polity on 29 October 1918, was termed *prevrat* ('revolution'). At the time, the term was commonly applied for denoting such view of things in the Official Gazette of the Provisional National Government and in the daily newspapers, as well as in the memoirs and history books.

However, following the research question that I have structured a second part of my contribution around, i.e., can Žolger be seen as a (r)evolutionary in the sense of Pitamic's inaugural lecture due to his roles in the constitutional reform processes of the two consecutive political entities, I will go straight to the heart of a very particular idea of revolution developed by Pitamic in the said lecture. But just before I embark on this quest, I would very much like to draw attention to one question, which at the time being is impossible to answer but which should be to my mind at least posed.

Given the strong professional ties between Žolger and Pitamic, one cannot but wonder how much Pitamic's inaugural lecture might have been inspired by observing the political daily life that Žolger, as his senior and as a person holding one of the highest administrative ranks, was responsible to frame: first, in the scope of the Staatsrechtliches Departament, afterwards, in the context of the Administrative Committee of the Slovene Provisional Government and finally during the preparatory work for the Paris Peace Conference?

I would like to start my quest by diverting attention to two ideas on revolution by Pitamic, advanced in his inaugural lecture, as I understand them.

According to the first one, "*the object of revolution, either in a technical or common understanding can only be the constitution as the very point from which an entire legal order emanates*" (my emphasis).[33] It is important to note that a few sentences before that Pitamic highlighted the "shortcomings of a text" (i.e., of understanding law as text) "and the omnipotence of interpretation".

32 The term *revolucionar* (revolutionary), borrowed also into Slovene, was at least in the historiography adopted and established later as a term only for the partakers in the social revolution(s). However, both terms were borrowed into Slovene in the 19th century (*revolucionar* from German and *prevratnik* from Czech).

33 Pitamic, *Law and Revolution*, see Chapter 2, p. 20.

Let me immediately clarify that Pitamic's adamant conviction that the object of revolution can only be the constitution goes hand in hand with the position of the circle Pitamic had left behind in Vienna, especially of Merkl, Sander and Kelsen. As Fritz Sander explains, such stanza was fundamentally different from the conceptual constructions of "le contrat social" and their illustrious authors of the Enlightenment.[34] I would also like to stress that this conviction, i.e., "Lehre", was something that Žolger, too, ascribed to, and who alongside Pitamic applied it after 1918 on several occasions to the case of the Kingdom of Serbs, Croats and Slovenes, in his own writings.[35]

If the first idea on revolution and constitution was being shared with the whole of the Viennese circle, then the second one, however, is something, at least to my knowledge, particular to Pitamic's own thought. For the sake of an easier differentiation, I would like to call the first one "the outer type of revolution" and the one that I am about to describe "the inner type" – because this other type of revolution, as it will be shown, according to Pitamic, germinates from within the constitution itself.

Pitamic introduced the depicting of the "inner type" of revolution with his appraisal of the position of the American judge in comparison to the European one, where the first one "is by constitutional decree positioned outside the constitution, since he is authorised to interpret it authoritatively". That, in Pitamic's view, amounts to an antinomy, which "*implies a latent suicide, one committed by a norm destroying itself* (my emphasis)". He goes on by saying that:

> *The constitution grants the power of interpretation in order to protect itself; but this sword entrusted to the judge to protect can be turned against the constitution and used to slay it, at least in the eyes of those who are not judges* (my emphasis).

That, in Pitamic's understanding, is nothing short of "*a revolution proper, legalised in advance*" (my emphasis). The example which Pitamic gives us to illustrate his position with is the changed concept of the right to contract

34 Cf. Sanders Fritz, Das Faktum der Revolution und die Kontinuität der Rechtsordnung, in: Zeitschrift für öffentliches Recht, 1, (1919), 13–164, here 140–141.

35 Ivan Žolger, Da li je naša kraljevina nova ili stara država, in: *Slovenski pravnik*, Vol. 37, No. 3–4 (1923), 68–85.

Cf. Mirjam Škrk, Profesorji Ivan Žolger, Ivan Tomšič in Stanko Peterin ter njihovi prispevki k nastanku slovenske države [Professors Ivan Žolger, Ivan Tomšič and Stanko Peterin and their contributions to the creation of the Slovenian Statehood], in: Gašparič, Škrubej, 2019, 95–114. Accessible at View of Professors Ivan Žolger, Ivan Tomšič and Stanko Peterin and their Contributions to the Creation of the Slovenian Statehood | Contributions to Contemporary History, inz.si (accessed 14 April 2021).

freely in the light and context at the time of the newly adopted legislation, protecting the workers. Pitamic explains:

> At first, the case-law deemed these statutes unlawful, arguing that they restricted a constitutional right to contract freely or because they applied only to a certain class of people [i.e., workers, K.Š.] instead of treating everyone in the same way. More recently, American courts have declared such provisions to be lawful.

Pitamic concludes:

> If we abstract accidental traits from these cases and focus on the main question that concerns us here, namely, *what the role of the constitution was in each case*, or what a constitutionally guaranteed freedom of contract means, we find that this freedom was at one time considered to be limitless and at another time was seen as being limited by social needs. *The concept of freedom has therefore changed*; *and with it the constitutional provision pertaining to freedom has also changed. All this has happened by way of judicial interpretation, without any change in the language of the constitution by way of constitutional amendment* (my emphasis).

Žolger and the Last Revision Attempt of the Constitution of the Austrian Part of the Habsburg Monarchy in 1917/1918

Following the conceptualisation of the two types of revolution in the inaugural lecture by Pitamic, the endeavour by Žolger that I am about to describe in this chapter can certainly be seen as contributing to the *evolution* in order to avoid that the "the object of revolution, either in a technical or common understanding" would become a constitution "as the very point from which an entire legal order emanates".[36] Let me now give you two accounts on what turned out to have been the last revision attempt of the constitution of the Austrian part of the Habsburg monarchy in 1917/1918 and the role of Ivan Žolger in it.

The first account is by Rudolf Andrejka, Žolger's chief of the ministerial cabinet, who before that was a high functionary in the Ministry of the Interior. Andrejka later became professor for administrative law at University of Ljubljana Faculty of Law. His account is short but to the point. In 1939, in his contribution on Žolger and other Slovene jurists, experts in the field of administrative law, Andrejka remembers Žolger's appointment as Minister as follows:

> The Austrian government wanted to make a gesture towards the Yugoslavs and therefore on Aug. 30 1917 appointed dr. Žolger as a minister *sans*

36 Leonid Pitamic, *Law and Revolution*, see Chapter 2, p. 20.

> *portefeuille* with *a special mission to prepare a constitutional reform in the direction of the federalisation of the state on the national basis* (my emphasis).[37]

The second account is of quite a different nature, also much later in time, and by a professor of constitutional law at the University of Vienna Faculty of Law, Felix Ermacora. His account does not mention directly any of the names of the administrative high officials that he had found or thought to be responsible for carrying out the envisaged reform. His most important contribution to the field has certainly been the enormous compendium of five volumes of all the Austrian constitutions. But in addition and quite apart from that, in a short article published in 1986, Ermacora revealed a surprising archival discovery. In the course of his research, aimed at shedding more light on the genesis of the Austrian Federal constitution of 1920 in the Austrian State Archives, specifically in the Allgemeinen Verwaltungsarchiv (AVA), he had stumbled across archival materials from 1918, which according to his first appraisal, had dealt with plans for the restructuring of the Austrian-Hungarian monarchy (*mit dem Umbau des österreichisch-ungarischen Monarchie*), i.e., the preparatory documents for the constitutional revision.[38] In his article, Ermacora admitted that he ventured no guess as to the specific context of the drafting of the documents, i.e., to specific department or persons as their authors. He only attempted a guess at the possible time of their drafting. He maintained that they must have been drafted after – and in connection to – the US president Woodrow Wilson's famous Fourteen Points in January 1918. The lucky circumstance for us was that Ermacora decided to give one of the two versions of the documents in his article in full transcription, while noting that the second one is only a very similar version of the first and that they had both been marked "top secret" (*streng vertraulich*). In the conclusion of his short contribution, Ermacora left it to future researchers to complete the enquiry. However, in this respect, the unlucky circumstance was that for some reason Ermacora omitted the citation of the archival fond he had found them in, so that the only information I could go by was that the documents were found in the AVA. At this point I would first like to stress that the full description of the documents on the draft proposal for a constitutional reform, those found by Ermacora and those which I had the enormous luck to discover during the past two years of research, is given in my previous study, mentioned and cited at the very beginning, together with their scanned reproductions.[39] Here, I

37 Rudolf Andrejka, Zaslužni slovenski upravni juristi [Deserving Slovene administrative jurists], in: Rudolf Sajovic (ed.), Pol stoletja društva "Pravnik" (spominska knjiga) [Half a century of "Pravnik [Jurist]" Society; a memory book] (Društvo "Pravnik" 1939), 130.

38 Felix Ermacora, Österreich als Staatenbund und zum Volksstämme-Regionalismus am Ende des Ersten Weltkrieges, in: Theodor Veiter (ed.): *Bürgen – Regionen – Völker. Festschrift für Franz H. Riedl.* Ethnos, Band 27, 1986, 107–121.

39 Škrubej, 2019.

would just like to give a quick summary with emphasis on the role of Ivan Žolger as I see it, in it.[40]

The most important hypothesis that I have already formulated in my previous study is that to my understanding among the found documents on the draft proposal, there is one, the content of which must have represented the true reason why Žolger at the beginning of May 1918 decided to step down from the government, led by Ernst Seidler, his academic colleague but political opponent. I believe that among the documents that in the continuation I will describe only briefly, the crucial role has to be attributed to the so-called Supplement A (Beilage A), a document that Felix Ermacora also guided his readers' attention to by referring to it as a supplement, that was missing ("Wo ist die Beilage A?").[41]

To put a longer story on the complex archival search and final discovery as short as possible, let me point out only two facts.

First, the Supplement entailed a very detailed description and delimitation of the so-called national administrative circles into which each of the old historic provinces, many of them multi-ethnic, would have been divided, should the reform have succeeded. The important change that such division would enable was that the representative assemblies would no longer exist at the level of each historic province, but at the new (lower) levels of each "national circle" within provinces. This was the formula according to which one would not have to abolish the historical provinces, while giving (the representative) voice to different nationalities within a province, with which one aimed at finally solving the most difficult dilemma of the Austrian federalism – in retrospect, and with the unsolved problem causing the monarchy's demise, with all the attributes of the proverbial "squaring of the circle". The core reform idea was certainly not new. In 1917, following the so-called *Rundfrage*,[42] it was the most supported idea *in principle* by the academics, and among them, Ivan Žolger, as well. However, its practical application was a far more complicated matter, for it touched directly on the sensitive relations among various nations

40 I would like to extend my deepest thanks to Roman Hans Gröger, archivist, fellow-researcher and now director of the AVA, for his expert and friendly help in navigating around the archival labyrinth. Cf. his work on the prehistory and historical context of the famous October Manifest of Emperor Karl I to his nations, wonderfully rooted in the rich archival material, Roman Hans Gröger, *Oktober 1918. Vorgeschichte und Folgen (ein Beitrag zum 100. Jahrestag des Volkermanifests)*. Verlag Berger 2018.

41 Felix Ermacora, Österreich als Staatenbund, 109.

42 Ivan Žolger, [Die Antwort], in Hans Kelsen (ed.): Länderautonomie. Die Stellung der Kronländer im Gefüge der österreichischen Verfassung. Eine Rundfrage. Sonderheft der Österreichischen Zeitschrift für öffentliches Recht. Manzsche k.u k. Hof Verlags-und Universitätsbuchhandlung 1919, 198–l99. On this important special issue of the *Journal of Public Law* (Zeitschrift für öffentliches Recht) and commentary on the views and arguments of its contributors, Žolger included, see Ewald Wiederin, Die Diskussion über die Stellung der Länder in der Zeitschfrift für öffentliches Recht, *ZÖR* 4 (2014) 875–891. I would like to thank Josef Pauser to have alerted me to it.

of the Austrian part of the Empire. Judging from the newly found documents, it must have been Ivan Žolger who was entrusted with precisely marking out these national circles. It is the second fact, which I am about to present, that brings me to such a hypothesis.

After unfruitful initial search in Vienna at the AVA, I found the missing Supplement A among the documents of the Žolger Estate in the Slovene State Archives. Sometime later, upon my repeated request in AVA and with the Supplement A already in my hands, Hans Roman Gröger found one other version of the draft that also entailed the Supplement A (dating from 18 April 1918). Alas, the two drafts that Ermacora had described in his article, and according to whom, they were the first two ones (dating from 28 February and 11 April 1918), have not yet been found.

It is important to note that the most encompassing set of documents of all four known drafts is Žolger's, which is also chronologically the last (with documents marked from 25 April until 29 April 1918). It encompasses:

- Legal grounds for considering a constitutional revision (*Grundlagen für die Erörterung einer Verfassungsrevision*) (in 12 points)
- Supplement B (*Beispiel für eine Fassung des Grundgesetzes womit das Grundgesetz über die Reichsvertretung ergänzt und abgeändert wird*)

Further, it also entails sets of documents that are found only in Žolger's Estate:[43]

- *Erläuterungen zu den Grundlagen für die Erörterung einer Verfassungsreform* (dated with 25 April 1918)
- *Anträge wegen Abänderung einzelner Stellen in den Grundlagen* (dated 29 April 1918)

But crucially, it also entails the missing Supplement (Beilage) A entitled *Beispiel für eine Festsetzung der Siedlungsgebiete*, an attempt at repartition of all provinces of the Austrian half of the monarchy into "linguistic territories" (and consequently into the "national circles"), according to one of the following categories, with the existing judicial circles (*Gerichtskreisen*) serving as their respective bases:

A. an enclosed linguistic territory (*ein geschlossenes Sprachgebiet*)
B. a particular linguistic territory (*Sondersprachgebiet*)

However, there are further two important items that the set of documents, found in Žolger's Estate, does not entail (this is also true for the two drafts, described by Felix Ermacora). In a version of the draft documents of 18 April 1918 that upon my request in AVA, Roman Hans Gröger later unearthed, not only encompassed the missing Supplement A, but it also pointed to a very

43 SI AS 1061 fond Ivan Žolger.

important file of 25 September (!) 1918, in which a telling map, corresponding to the content of the missing Supplement A, was found. It was commissioned around 18 April 1918 by the Military Institute.[44] For the time being, it can only be my informed guess that the one who commissioned it must have been Ivan Žolger or one of his close collaborators. One who could fit that description was also the person who was in charge of preparing the so-called language laws in the scope of the revision, and in whose Estate the second important item was found – Johann Andreas Freiherr von Eichhoff, high official from the Ministry of the Interior, also the author of the famous Kaiser's October Manifest.[45] To my knowledge, there is a single-page document from his Estate, which seems to give us the overview of the planned reform in a form of a draft that was to be kept secret.[46]

Žolger and the Constitution for the New Polity (the Slovene Part of the State of Slovene, Croats and Serbs)

In the beginning of May 1918, due to the obviously insurmountable differences, Ivan Žolger left the government, led by Ernst Seidler, and focused his efforts on drafting preparatory documents of the draft text of the constitution for a Slovene part of the future polity, which of course in May 1918, no one could really envisage with certainty if it would ever be constituted and what it

44 AT-ÖStA/AVA Inneres, Präs des k.k. Ministerium des Inneren, Protokoll Nr. 21713 ex 1918, 25 September 1918. Škrubej, 2019.

45 Cf. Gröger, 2018,145–148, drawing the material from the Estate of von Eichhoff, ÖStA, KA Militärische Nachlässe, NL, Eichhof, Mape 29. I would like to note that Rudolf Andrejka, a chief of Žolger's ministerial cabinet, came from the Ministry of the Interior. My surmise is that Andrejka could have played a part in the communication between Eichhoff and Žolger, while both working on the draft documents for the envisaged constitutional revision.

46 Let me give it literally, and only in its original form. Please note, that the designation of the Supplements (A, B) in this document do not correspond to the ones discussed in the main text (which in its entirety fall under the point 2 of here enumerated parts of the envisaged reform).

Grundlagen für die Erörterung einer Verfassungsrevision (vom Ministerrate im Herbste 1917 angenommen) dürften in der vorliegenden vagen Fassung derzeit nicht mehr in Betracht kommen und bei allen Parteien Mißtrauen erregen.

Materiale für die Verfassungsreform bilden:

1.) Abänderung des Grundgesetzes über die Reichsvertretung (Beilage A) (*vom Ministerrate in Herbste 1917 angenommen*); *Alternativfassungen in Ministerium des Innern vorbereitet.*

2.) Nationale Abgrenzung, und zwar:

a.) Festsetzung der Siedlungsgebiete (Beilage B) (vom Ministerrate in Herbste 1917 angenommen)

b.) Gebietseinteilung nach national abgegrenzten Gerichtsbezirken und Kreisen (Beilage C)

(im wesentlichen übereinstimmend mit dem bei der Kreiseinteilung in Böhmen eingehaltenen Systeme).

3.) Sprachgengesetz nach der Grundsätzen der Gleichberechtigung mit Vorrang der deutschen Sprache "zur Wahrung gesamtstaatlichen Interessen" (Beilage D)
(*zahlreiche Alternativfassungen im Ministerium des Innern vorbereitet*).

would be like. In the months that followed up until 29 October 1918, Žolger was thus working actively in opposition to the valid Austrian constitution. In this sense, his actions turned from the ones, following the logic of the "inner revolution", to preparing all the necessary legal grounds for the "outer revolution", which took the valid constitution – in terms of Pitamic's inaugural lecture – as its "object", "as the very point from which an entire legal order [Austrian, my clarification] emanated".

It is again Rudolf Andrejka who gives us a detailed insight into the work of Ivan Žolger, his superior, and into that of a group of Slovene officials, placed high in the Austrian administration, that Žolger gathered around him in spring of 1918:

> The Heinrichshof Palace on Kärntnerring, opposite of Staatsoper, where on the 5th Floorthe cabinet of Minister Žolger was located, became the centre of the Yugoslav political movement in Vienna, alongside the Yugoslav Club [in the Parliament, my clarification]. Here the maps were being drawn and the statistical data on the Yugoslav territory of the old monarchy assembled, in order to study the options whether this territory was economically self-sustained. Here, the materials on persecutions of the Yugoslavs at the beginning of the I. WW, that became the basis for several interpellations of the Yugoslav club, were being redacted, as well. Upon the explicit demand by dr. Žolger, a special Imperial committee was established to delve into the allegations of violence against the Slovenes. These materials still bear considerable importance nowadays as well, since they are vital to understand the puzzling question, why – to the surprise of Europe – the Slovenes parted with the Austrian State. As long as the plans on the common "frame" of the monarchy were still being considered, Žolger posed a dangerous threat to the German strivings. That is why it was the united (Austrian) German front, upon their having gained the majority in the government of Seidler in spring of 1918, that caused the demission of Žolger. That was accepted on 6 May 1918.
>
> *Dr. Žolger clearly saw the upcoming events. That is why several months before the upheaval, Žolger, with the help of high officials from different ministries of Slovene descent, worked out a plan for a provisional constitution and administration for Slovenia; the very one which the new Slovene National Government at the time of upheaval, issued almost completely unaltered in a form of a provisional constitutional Decree on November 14, 1918. Offical Gazzette, No.111/11 (the so called 'Žolger's Constitutional Decree').* (my emphasis)[47]

47 Andrejka, 1939, 130–131.

To end this short chapter, let me only give the first of the final provisions of the *Decree on provisional administration on the territories under the jurisdiction of the National Government SHS in Ljubljana*, so familiar in its wording with anyone studying the evolution of modern constitutions, especially those created after the breakup of larger polities:

> As long as they do not contravene the provisions of this Act, all statutes and decrees valid today remain in force until they are repealed or amended.

Conclusion: Žolger – A Silent (R)evolutionary With Pitamic's Sword?

I would like to summarise my concluding thoughts on Žolger as a (r)evoloutionary on two levels: first by commenting on his endeavours in the constitutional legal life of the two consecutive polities he actively participated in, and second, on the two "types" of revolutions, as they can be understood from the inaugural lecture *Law and Revolution* by his close colleague in several high administrative offices and fellow academic at the same time, Leonid Pitamic.

It is safe to say that in the old monarchy, until the end of April 1918, Ivan Žolger was a meaningful agent of constitutional stability. One would hope that from now on, he will finally be credited with having been the main *persona* of Staatsrechtlichen Departament – his actual embodiment. In this role, Žolger, at least to my mind, comes across as an industrious, loyal, but above all, creative and far-seeing high official and academic, assigned with some of the most difficult tasks already in the scope of his work as the founder and the head of the department. Therefore, there should not be any real surprise anymore for anyone in the fact that Žolger was one of those, who in 1917/1918 were not only entrusted by the Emperor to make an attempt at revising the constitution, but who actually made a considerable effort in this direction, as the materials, found in the Austrian State Archives, have shown. In the Austrian as well as in the Slovene historiography, the appraisal of the latter has long been ovedrue.

However, at the same time, Žolger can also be seen as an agent of constitutional change, a revolutionary. It has been my main surmise for some time now that Žolger, so used to envisaging different versions of future constitutional developments, for which his in-depth study of its complex past must have been of an immeasurable help – to which his *Haus und Hof* is proof enough – and having been with his Department involved in the ongoing negotiations with the Hungarian part in the scope of the Compromise of 1867, had no difficulties in 1917/1918 to prepare constitutional draft-plans for at least two different future options: (1) for a federal Austria with national autonomy in the scope of the "national administrative circles" as its basis on one hand, and (2) for a break-up of the monarchy and for forming a new polity on the other. In fact, the drawing of the political maps on the basis of the statistical data gathered, to which Rudolf

Andrejka testifies, could easily have served both aims at the same time. After the formal rejection of the trialistic reform plan of the South Slav politicians by the Emperor at the end of May 1918 at the latest, Žolger concentrated solely on the draft for the constitutional text of the new envisaged polity. In this sense, his actions would in hindsight start to correspond snugly to what Pitamic (along with Kelsen's circle) viewed as a "revolution" – for they were aimed against a valid text(s) of the constitution of a still existing old polity. These actions came in the form of a very well-thought-out and structured draft of a constitutional text, adopted by the "National Government of SHS for Slovenia" for the territory it claimed it held the jurisdiction over (dated 18 November 1918), at the time very often referred to as simply Žolger's decree or even Žolger's constitution.[48] Albeit a torso of what would have been a proper constitution, it nevertheless provided the legal basis for the functioning of the National Government and for all of the administrative and judicial institutions – i.e., for the whole of the legal framework, *de facto* maintained in force according to the principle, enshrined in the decree's final provision, cited earlier. It certainly also represented a crucial legal basis for the imminent union with the Kingdom of Montenegro and the Kingdom of Serbia into the Kingdom of Serbs, Croats and Slovenes, as well as for the expected Peace Conference. In fact, from its preamble it is clear that the text was prepared – i.e., Žolger prepared it – with the negotiations at the Peace Conference in view. It was not a coincidence that Žolger was later chosen as one of four plenipotentiaries for the new Yugoslav polity (and as a representative of Slovenes).[49] Who better than the one person who had all of the statistical and economic data for the Slovene territory at the tip of his fingers – and taking into account the newly found documents and a map, probably thoroughly internalised, as well. All of this speaks clearly that Ivan Žolger was – in the sense of Pitamic and his inaugural lecture – a revolutionary proper, a *prevratnik*.

However, this "outer type" of the revolution aiming at the constitution as a text (law as text) is far less interesting than the other, "inner type" that, in my view, was specifically developed by Pitamic.

In conclusion, I would like to argue that practically the whole of Žolger's adult life and work corresponded much more to this one, and that in fact, it is this Pitamic's "inner type" that the bracketed *r* in my title *(r)evolutionary*, encases best.

In light of the concluding argument, one has to ask whether Žolger at any point of his life and work, be it before or after 1918, i.e., the formal break-up of the monarchy, contributed to what Pitamic termed "an antinomy, which implies a latent suicide, once committed by a norm destroying itself"? And further, could any of Žolger's work or positions he held, be tied to what Pitamic a few sentences afterwards succinctly encapsulated by a phrase: "*revolution proper, legalised in advance*"? Or to put it even more plainly: Has Žolger,

48 Let us just remind ourselves that the draft constitution for the Republic of German Austria was adopted for a short period in practically around the same time.

49 Cf. Rahten, 2019.

by virtue of his functions as well as an academic (indeed the interweaving of both), lived and operated not only within but also outside, or better beyond, the existing constitution in Austro-Hungary? Could we go even a bit further and with not much paraphrasing, ask ourselves whether he had not been given – at least twice, and by none other than the Emperor – the Pitamic's "sword" to wield at the existing constitution?

I would detect the first such occasion in his role of the Head of the Staatsrechtlichen Departament, tasked with the ongoing negotiations in the context of the compromise between both halves, together with the incorporation of the annexed BIH into a conceptually novel constitutional framework. In my view, the second such occasion was the Emperor Karl's secret task to collaborate in the last revision process of the old constitution, attempting to finally introduce the old solution with the national circles with their respective parliaments at its core.

At the very end, let me evoke a wonderful passage by James Boyd White, which captures the utter need for such a dynamic position of our best jurists and intellectuals in the following way:

> The lawyer and judge live constantly at the edge of language, the edge of meaning, where *the world can be, must be, imagined anew*; to do this well is an enormous achievement; to do it badly, a disaster of real importance, not only for the lawyer or judge but for the social world of which they are a part, including the particular people whose lives they affect.[50]

Žolger, in his role as the Head of the Staatsrechtliches Departament as well as an academic, certainly lived "at the edge of meaning", by envisaging and creating many possible parallel worlds, legal spaces[51] and variants of them. That, I believe, was the red thread of his endeavours throughout his mature life as a jurist. For that role, he prepared himself with his two books on the constitutional development and history, as well as with his life as a high official, intimately familiar with the practical functioning of the legal and political framework of one of the oldest polities in Europe. In 1918, the State of Slovene, Croats and Serbs was the realisation of one of his possible visions, and when the time came, Žolger took a really good and timely care that it did not take the people of this territory entirely by surprise. "Be prepared" as his life motto ran.

50 James Boyd White, *The Edge of Meaning*. The University of Chicago Press, Chicago 2001, 223.

51 Cf. Katja Škrubej, Rechtsräume als (Fragestellungs-)Konzept und Versuch einer Rechtsraumtypologie im Rahmen der slowenischen Rechtsgeschichte, in: Sašo Jerše, Kristina Lahl (eds.): Endpunkte. Und Neuanfänge. – Geisteswissenschaftliche Annäherungen an die Dynamik von Zeitläuften. Böhlau, 51–65.

5 *Ius et Vis* – Two Understandings of the Origins of Law

Marko Petrak

Introduction

The aim of this chapter is to compare Jhering's and Bogišić's understandings of the origins of law. Baldo Bogišić (1834–1908), famous historian of Slavic law and creator of the *General Property Code for the Principality of Montenegro* (*Opšti imovinski zakonik za Knjaževinu Crnu Goru* – OIZ) (1888), attended as a student as early as 1862 the lectures of the great German scholar of Roman law and legal philosopher Rudolph von Jhering (1818–1892) in Giessen, where he met Jhering in person.[1] In his introductory lecture at the University of Odessa entitled *О научной разработке истории славянского права* (*On the Scientific Elaboration of the History of Slavic Law*) held in 1870, Bogišić repeatedly referred to Jhering's celebrated work *Der Geist des römischen Rechts* (*The Spirit of Roman Law*), leaning on it in his critique of the legal history science of his time.[2] Therefore, he must have undoubtedly been well acquainted with Jhering's understanding of the genesis of law, i.e., the latter's thesis on force and violence (*vis*) as origins of law (*ius*). In spite of this, Bogišić underlines a completely opposite understanding: "pravdi je nasilje najgori protivnik" ("Violence is justice's worst enemy").[3] Starting from the mentioned opposites, the following reflections will be focused on the identification of their causes and effects.

Jhering: The Force (*Vis*) as the Origin of Law (*Ius*)

In modern times, Jhering was the first legal scholar who presented a theory on physical force and violence as the origins of law. The elaboration of this theory is contained in the first part of Jhering's famous work *Der Geist des römischen*

1 See Valtazar Bogišić: *Izabrana djela. Tom IV. Studije i članci* (Selected Works, vol. IV. Studies and Articles). Podgorica, Beograd 2004, p. 428.
2 Ibid., pp. 282ff.
3 OIZ, Art. 1011.

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Rechts.[4] According to Jhering, the primary source of law resided neither in divine revelation nor in the will of the state but was to be sought in primordial physical force, in the force of the individual.[5] "*Die Thatkraft, die Gewalt also ist die Mutter des Rechts*".[6] In the pre-state era an individual had only those rights that he could obtain and maintain through the strength of his own body (Faustrecht). In these archaic times, only from force and violence (*vis*) could law (*ius*) emerge. Therefore, self-help (*Selbsthilfe*) is the primordial form of the law (*Urform des Rechtes*).[7] The described theory on the genesis of the law is named over time the theory of self-help (*Selbsthilfetheorie*).[8]

Jhering elaborated his *Selbsthilfetheorie* in the context of his profound insights on the "spirit of Roman law". However, it is evident that Jhering's reflections on the genesis of the law had the ambition to discover the (pre)historic reality much older than the founding of Rome. Not "Roma anno zero", but the hypothetical "zero point" of history as such, was the starting point of his reflections.[9]

As we have seen, Jhering's *Selbsthilfetheorie* was based on the presumption that, in the pre-state era, there existed a situation of struggle of all against all, unhindered by any rules.[10] Therefore, the only law that could exist in these circumstances was the law of the stronger (*Recht des Stärkeren*). This theory is the very foundation of all Jhering's reflections on the genesis of Roman civil procedure. With the formation of the oldest procedure started the transcending of the primordial state of "struggle of all against all" (*bellum omnium in omnes*), the procedure is the continuation of the "struggle for law" (*der Kampf ums Recht*) by other means and forms. These basic Jhering conceptions on the relation between self-help and the genesis of the procedure as such had taken profoundly deep roots. The theory that *Selbsthilfe* is the primordial form of the protection of rights and the oldest civil procedure, some kind of continuation of prehistoric *bellum omnium in omnes* by other means and forms, remained up until today an unquestionable theoretical starting point of the numerous subsequent attempts of Roman law scholars to reconstruct the archaic procedural structures and functions.[11]

4 See Rudolf von Jhering: *Geist des römischen Rechts auf den verschiednen Stufen seiner Entwicklung, vierte Auflage, vol. I*. Leipzig 1878, pp. 108ff, 167ff.

5 See Jhering, 1878, pp. 107ff.

6 Cit. Jhering, 1878, p. 114.

7 Jhering, 1878, pp. 107ff; see also Gerardo Broggini: Vindex und Iudex, in: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistiche Abteilung* 76 (1959), pp. 113ff.

8 See Max Kaser, Karl Hackl: *Das römische Zivilprozeßrecht*. München 1996, pp. 28ff, with further references.

9 See Broggini, 1959, pp. 114ff.

10 Jhering, 1878, pp. 107ff.

11 During the last century, *Selbsthilfetheorie* was followed by the Roman law scholars as Wlassak, Betti, Weiss, Juncker, Düll, Kaser, Luzzatto, Wieacker etc.; for more details on the relevant works of these authors in the context of that Jhering's theory, see Kaser, Hackl, 1996, p. 28, n. 21. In the more recent romanistic scholarship, the adherents of *Selbsthilfetheorie* are, for

Jhering emphasised that his overview of the genesis of law represented only a hypothetical construction of legal prehistory (*eine hypotetische Construction der Urzeit*).[12] Hence the question arises: do his insights really correspond to the (pre-)Roman archaic reality? In other words, is *Selbsthilfetheorie* as the "hypothetical construction" compatible with the original view of Romans on the law and legal procedure? In order to answer these questions, we have to briefly analyse the philosophical foundations of *Selbsthilfetheorie*.

First, it must be emphasised that Jhering's construction of the "zero point" of history when there was a state of struggle of all against all and the (physical) force of the stronger represented the sole law obviously drew upon the naturalistic theories of the second half of the 19th century, primarily on Darwinist evolutionary hypotheses. Jhering transferred Darwin's principle of selection, i.e., the idea that only the fittest survived in a merciless and continual struggle for life, into the sphere of law (*Kampf ums Recht*), taking it as one of the basic starting points for his philosophical and legal observations. His legal thinking thus took on the contours of a sort of "social Darwinism". In this respect, Jhering's theses on the genesis of the law and legal procedure, as presented in his work *Der Geist des römischen Rechts*, obviously stemmed from the aforementioned Darwinist paradigm.[13] However, by projecting the conclusions of natural science onto social reality, Jhering simultaneously lent a new form to some much older philosophical concepts containing analogous ideas. Here we are referring primarily to the ideas of the English philosopher Thomas Hobbes (1588–1679), according to whom the primary, i.e., natural human state (*status naturalis*), was a struggle of all against all (*bellum omnium in omnes*).[14] He abandoned in the radical way the traditional understanding – rooted in the medieval theology – that human beings in its original and natural state, i.e., prior to the original sin (*peccatum originale*), lived in absolute peace with

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example, Alfons Bürge: *Römisches Privatrecht, Rechtdenken und gesellschaftliche Verankerung*. Darmstadt 199, pp. 45ff; Laura Gutiérrez Masson: *La ritualización de la violencia en el derecho romano arcaico*. Index. Quaderni camerti di studi romanistici, 2000 (28), pp. 253ff; for detailed critique of the possibility to use *Selbsthilfetheorie* as the interpretative paradigm for the reconstruction of the origins of the archaic Roman civil procedure, see Marko Petrak: *Kritika teorije o samopomoći kao prvobitnom obliku pravne zaštite (Selbsthilfetheorie)* (Criticism of the Theory of Self-Help as a Primal Form of Legal Protection /Selbsthilfetheorie/). Zbornik Pravnog fakulteta u Zagrebu 56 (2006), pp. 1249ff.

12 Jhering, 1878, p. 169, n. 71.

13 On Jhering's social Darwinism see, for example, Franz Wieacker: *Privatrechtsgeschichte der Neuzeit (unter besonderer Berücksichtigung der deutschen Entwicklung)*. Göttingen 1967, pp. 450ff; Franz Wieacker: *Rudolph von Ihering. Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, Romanistiche Abteilung 1969 (86), pp. 9ff, 25ff; Franz Wieacker: Ihering und der "Darwinismus", in: Gotthard Paulus, Uwe Diederichsen, Claus-Wilhelm Canaris (eds.): *Festschrift für Karl Larenz* zum 70. Geburstag, München 1973, pp. 63ff.

14 Hobbes used the expression *bellum omnium in omnes* for the first time in his work *De cive* (1, 12) from 1642: *Negari non potest, quin status hominum antequam in societatem coiretur, bellum fuerit; neque hoc simpliciter, sed bellum omnium in omnes.*

God, world and other human beings.[15] As opposite to that traditional doctrine, Hobbes understood the natural human state (*status naturalis*), prior to the emergence of the state, as the age in which reigned only the law of self-preservation and egoism. Every individual had a natural right to all things, which obviously resulted in numerous conflicts. However, the fear of death and destruction gradually forced individuals to end this struggle. Hobbes was of the opinion that it was a basic law of nature and a general rule of the mind that everyone would strive for peace. However, this state of peace could only be achieved by creating state authority. Therefore, reason itself demanded the creation of the state, which came into being on the basis of a social contract in which all individuals renounced a certain part of their natural rights and transferred them to the sovereign authority.[16] Even this slight reference to some of Hobbes' basic ideas on the origin of the state will suffice to show how Jhering's thoughts on the origin of law had been influenced by such philosopheme to a considerable degree. It seems obvious that the *Selbsthilfetheorie* is only one theoretical variation on the thesis of the natural human condition as "a struggle of all against all".[17] Moreover, Jhering's thesis that the Romans, unlike other peoples, had transcended the stage of self-help in a rational way, i.e., by contractually settling disputes ("*vertragsmäßige Entscheidung der Rechtsstreitigkeiten*"),[18] is obviously nothing other than an application of the concept of the social contract to a discussion of the genesis of Roman civil procedure.[19]

On the basis of a detailed analysis, conducted on another occasion, we have already concluded that the latter thesis on the rational overcoming of the stage of self-help in a rational way does not correspond to historical reality.[20] What then is the status of the other tenets of which the theory of self-help consists?

15 On this Christian teaching in the context of medieval natural law doctrine, see, e.g., Alfred Verdroß: *Abendländische Rechtsphilosophie*. Wien 1958, pp. 66ff, with further references.

16 On Hobbes' philosophical and political ideas see, for example, Crawford Brough McPherson: Introduction, in: Thomas Hobbes: *Leviathan*. Harmondsworth 1986, pp. 9–64, and the bibliography listed on page 65. Especially on his doctrine of social contract, see John Wiedhofft Gough: *The Social Contract. A Critical Study of its Development*. Oxford 1957, pp. 105ff; Wolfgang Kersting: *Die politische Philosophie des Gesellschaftsvertrags*. Darmstadt 1994, pp. 59ff, with further references.

17 On Hobbes' philosophical and political concepts as the forerunners of Jhering's *Selbsthilfetheorie*, see Michał Staszkow: *Vim dicere im altrömischen Prozeß. Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, Romanistiche Abteilung 80 (1963), pp. 86ff; cf. also Max Kaser: Vom Ursprung des römischen Rechtsgedankens, in: Giuscardo Moschetti (ed.): *Atti del Congresso internazionale di diritto romano e di storia del diritto in Verona* (1948), vol. II. Milano 1951, pp. 27ff.

18 Jhering, 1878, p. 167.

19 In support of this statement, we must mention that in his *Der Geist des römishen Rechts*, Jhering also advocated the view that a social contract had been the basis for the creation of the state; Jhering, 1878, pp. 209ff, 216ff.

20 See Marko Petrak: Private or Public Justice? Modern Dispute on the Origin of Civil Procedure in Roman Law, in: Remco van Rhee, Alan Uzelac (eds.): *Public and Private Justice. Dispute Resolution in Modern Societies*. Antwerpen, Oxford 2007, pp. 87ff; Petrak, 2006, pp. 1259ff.

Leaving aside the most recent scientific insights that completely challenge the Darwinist paradigm,[21] as well as the question of whether such a paradigm may be applied to an analysis of interpersonal relations,[22] we shall confine ourselves to the conclusion that this picture of the hypothetical "zero point" of history where total chaos and anarchy reign and wild individuals wander around brandishing sticks, desperately struggling for survival, is utterly ahistorical. There are simply no sources and no evidence on the basis of which one might establish that even in prehistory such primordial and "natural" conditions existed, characterised by the absence of any community, authority or rules, or in which naked physical force was the only law, and self-help the only protection. For example, already Eisenhart, in his work *Statum naturalem Hobbesii ex corpore iuris civilis profligatum et profligandum* from 1744, categorically stated in connection with Hobbes' idea of the natural conditions that *statum illum generis humani quem Hobbesius fingit nunquam fuisse* ("the state of the human race which Hobbes imagined never existed") and that *Hobbesi doctrina veterum iurisconsultorum philosophiae plane contraria* ("Hobbes' doctrine is completely contrary to the philosophy of the ancient lawyers").[23] The same statements are completely applicable to Jhering's theory of *self-help*. Thus, for example, Behrends, in his work *La mancipatio nelle XII Tavole* from 1982, noted that the mentioned theory was *una construzione puramente astorica*.[24] These critical observations are today confirmed by many prehistoric discoveries, which provide a totally different picture of the "primordial age" from Hobbes' or Jhering's imagination. The evidence we possess on Palaeolithic peoples, thanks primarily to the discovery of their cave drawings, has shown that prehistoric man lived in organised communities bound by numerous commands and religious precepts. In addition, contemporary ethnological discoveries regarding "primitive" cultures have resulted in similar findings.[25] These facts undeniably speak in favour of the thesis that Hobbes' *status naturalis* or Jhering's stage of self-help were only rationalist speculations devoid of any essential compatibility with (pre)historic reality.[26]

21 See, for example, Martin Lings: *Ancient Beliefs and Modern Superstitions.* Cambridge 1991.

22 Having analysed the (in)applicability of the Darwinist paradigm in analysing the oldest Roman legal rules, the Roman and civil law scholar from Göttingen, Okko Behrends, rightly emphasised that "the legal rules valid among people are something completely different from the stereotypes of animal behaviour acquired by natural selection"; cit. Okko Behrends: La mancipatio nelle XII Tavole. Iura. *Rivista internazionale di diritto romano e antico* 1982 (33), p. 73, n. 57.

23 Cit. according to Michał Staszków: *Vim dicere im altrömischen Prozeß. Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, Romanistiche Abteilung 80 (1963), p. 87.

24 See Behrends, 1982, p. 75; cf. also Broggini, 1959, pp. 113ff; Kaser, Hackl, 1996, pp. 28 ff.

25 See, for example, Theo Mayer-Maly: Die Natürlichen Rechtsgrundsätze als Teil des geltenden österreichischen Rechts, in: Dorothea Mayer-Maly, Peter Simons (eds.): *Das Naturrechtsdenken heute und morgen. Gedächtnisschrift für Rene Marcic.* Berlin 1985, pp. 9ff.

26 It may be correct to say, as has often been emphasised, that Hobbes' construction of "the state of nature" (*status naturalis*) was only a speculative reflection of the England of his era, which

Having in mind all of these facts, it should be concluded without any doubt that Jhering projected the basic elements of *Selbsthilfetheorie* on the reconstruction of the genesis of the law and procedure in the (pre-)Roman world. Paraphrasing Kantian insight that "we know *a priori* of things only what we have ourselves put into them",[27] one might say that Jhering knew of archaic law and its primordial source only what he himself – on the basis of *Selbsthilfetheorie* – "put into them".

Bogišić: The Nature (*Natura*) as the Origin of Law (*Ius*)

In his fundamental work *Method and System of Property Law Codification in Montenegro* (*Metod i sistem kodifikacije imovinskog prava u Crnoj Gori*), published for the first time posthumously in 1967, Bogišić is explicitly emphasising that he recognises himself "one and only source of the law, namely the source *quod natura*, although not *omnia animalia*, but at least *omnes homines docuit* . . . or the law which is born together with us, that is *justice and equity*".[28]

In the quoted important passage, Bogišić paraphrases the famous definition of natural law (*ius naturale*), whose author is classical jurist Ulpian. This definition, included in the first title of the first book of Justinian's *Digesta*, determines that three fundamental institutions of natural law are marriage (*matrimonium*) as the union of man and woman, the procreation of children (*liberorum procreatio*), and their rearing (*educatio*).[29]

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was torn by the civil war (1642–1649) and general anarchy and lawlessness; cf., for example, Jean Hampton: *Hobbes and the Social Contract Tradition*. Cambridge 1986, p. 5. If we accept this view, we might draw the conclusion that the *status naturalis* was by no means man's primary condition but rather that the very opposite, i.e., the "anti-evolutionist" view, according to which "there have been no barbaric conditions which did not result from some collapsed culture", was correct; cit. Friedrich Wilhelm Joseph von Schelling: *Philosophie und Religion*, Sämtliche Werke, I, 6. Stuttgart, Augsburg 1860, p. 12.

27 "wir nämlich von den Dingen nur das *a priori* erkennen, was wir selbst in sie legen"; cit. Immanuel Kant: Kritik der reinen Vernunft. Zweite Auflage von 1787. Berlin 2016, p. 13.

28 "jedan jedini izvor prava, a to je taj izvor *quod natura*, iako ne *omnia animalia*, ali barem *omnes homines docuit*, ili što veliki njemački pjesnik nazivlje pravo koje se ujedno s nama rodilo, tj. *pravda i pravica*"; cit. Bogišić, 2004, p. 250.

29 Usp. D. 1, 1, 1, 3 (Ulp. 1 inst.) *Ius naturale est, quod natura omnia animalia docuit: nam ius istud non humani generis proprium, sed omnium animalium, quae in terra, quae in mari nascuntur, avium quoque commune est. hinc descendit maris atque feminae coniunctio, quam nos matrimonium appellamus, hinc liberorum procreatio, hinc educatio: videmus etenim cetera quoque animalia, feras etiam istius iuris peritia censeri.* There is an intensive discussion of the modern Roman law scholarship on the philosophical origins and significance of quoted Ulpian's definition of natural law (*ius naturale*). There exist different or opposite hypotheses on Stoic [e.g., Gabrio Lombardi: *Sul concetto di "ius gentium"*. Roma 1947, p. 191, n. 1; Martin Joseph Schermaier: Ulpian als "wahrer Philosoph". Notizen zum Selbstverständnis eines römischen Juristen, in Martin Josef Schermaier, Zoltán Végh (eds.): *Ars boni et aequi. Festschrift für Wolfgang Waldstein* zum 65. Geburtstag. Stuttgart 1993, p. 322], Neoplatonic [e.g., Paolo Frezza: La cultura di Ulpiano. *Studia et documenta historiae et iuris* 34 (1968), p. 369] or Peripatetic [Laurens Clarus Winkel: Einige Bemerkungen über ius naturale

As we have seen, Bogišić concludes that the nature (*natura*) is the origin of law. The nature reveals itself in the sphere of human relations as "justice and equity" ("pravda i pravica"). According to his understanding, the rules of "justice and equity" manifest themselves "in the external world in the two main groups, i.e., in the form of written law and in the form of custom" ("u formi zakona i u obliku običaja"). However, Bogišić adds that neither the written law nor the costum are the special sources of law, but only "two main forms of the norms" ("dva glavna oblika pravila").[30] It should be repeated that one and only source of law is *natura*. It is "the main source of all law from which all the norms of written law, custom and theory as well as of interpretation are drawn" ("glavni izvor svakog prava iz kojega crpi svoja pravila i pisani zakon i običaj i teorija, a i interpretacija").[31]

It is worth noting in the aforementioned context that Bogišić emphasises – undoubtedly as a positive example – that Austrian General Civil Code (*Allgemeines bürgerliches Gesetzbuch* – ABGB) explicitly provided the application of the natural law as subsidiary source of law in the cases of *lacunae legis* (§ 7 ABGB).[32] Namely, § 7 ABGB contains the following norm:

> If a case cannot be decided either from the language or from the natural sense of the statute, then consideration must be given to similar cases decided with certainty in the statutes and to the basis of other statutes related to the statute in question. Should the case still remain doubtful, then it must be decided with reference to the carefully compiled and well-considered circumstances, this in accordance with the principles of natural law.

As we have seen, § 7 ABGB defines that "the natural law principles" (*natürliche Rechtsgrundsätze*) should be applied as a source of law in all the situations in which a certain legal case cannot be solved by the mere application of positive legal regulations or methods (e.g., by analogy). Bearing in mind the fact that the mentioned paragraph is still applied in the Austrian private law system, it is necessary to determine what are "the principles of natural law" in their substance.[33]

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und ius gentium, in: Martin Josef Schermaier, Zoltán Végh (eds.): *Ars boni et aequi. Festschrift für Wolfgang Waldstein* zum 65. Geburtstag. Stuttgart 1993, pp. 44ff.] origins of that famous definition; cf. also Max Kaser: *Ius gentium*. Köln, Weimar, Wien 1993, pp. 67ff; Mario Bretone: Storia del diritto romano. Roma, Bari 1999, pp. 348ff; there is also direct reference of Bogišić on Ulpian's definition in the same context; see Bogišić, 2004, p. 257.

30 Bogišić, 2004, p. 250.

31 Cit. Bogišić, 2004, p. 257.

32 Bogišić, 2004, p. 250.

33 ABGB, § 7: *Läßt sich ein Rechtsfall weder aus den Worten, noch aus dem natürlichen Sinne eines Gesetzes entscheiden, so muß auf ähnliche, in den Gesetzen bestimmt entschiedene Fälle, und auf die Gründe anderer damit verwandten Gesetze Rücksicht genommen werden. Bleibt*

According to the older Austrian doctrine, the principles in question are largely contained in Roman law[34]: *ius gentium* of the Romans actually represents natural law as such.[35] Such an opinion was embraced, for instance, by the Croatian doctrine until World War II. Thus, according to Ivan Maurović, professor of Civil Law at the Faculty of Law in Zagreb and one of the main authors of the *Preliminary Draft of the Civil Code for the Kingdom of Yugoslavia* (*Predosnova Građanskog zakonika za Kraljevinu Jugoslaviju*) from 1934,[36] the ABGB codifiers understood natural law as "*ratio naturalis*, which they considered as the immutable foundation of Roman Law and Austrian code".[37] It is not difficult to comprehend that Maurović took into consideration a well-known Gai's concept of *ius gentium*: "the law that natural reason (*naturalis ratio*) establishes among all mankind is followed by all peoples alike, and is called *ius gentium* as being the law observed by all mankind".[38] The understanding that "natürliche Rechtsgrundsätze" from § 7 ABGB are primarily natural law principles formed on the basis of the *ius gentium* rules in the ancient times and *ius commune* rules in the medieval and modern continental Europe, was once again – thus ending a long period of the domination of

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der Rechtsfall noch zweifelhaft; so muß solcher mit Hinsicht auf die sorgfältig gesammelten und reiflich erwogenen Umstände nach den natürlichen Rechtsgrundsätzen entschieden werden; on the creation and formulation of § 7 ABGB in the context of the late 18th-century theory of natural law, see, e.g., Katja Škrubej: Austrian General Civil Code (1812) and the Slovenes: The Blinding Legacy of Legal Monism, in: *Zbornik Pravnog fakulteta u Zagrebu* 2013 (63), pp. 1067ff, with further references; on the application of § 7 ABGB in the contemporary Austrian legal system, see, e.g., Theo Mayer-Maly: *Gedanken über das Recht*. Wien, Köln, Salzburg 1983, pp. 853ff, with further references.

34 See, e.g., Leopold Pfaff, Franz Hofmann: *Commentar zum österreichischen allgemeinen bürgerlichen Gesetzbuche*, Bd. I, Wien 1877, pp. 206ff: "überhaupt ist das röm Recht größentheils ein in seinen Folgerungen dargestelltes Naturrecht".

35 Cf. Joseph Unger: *System des österreichischen allgemeinen Privatrechts*, Leipzig 1876, pp. 67ff.

36 On the life and work of Ivan Maurović (1873–1952), see Nikola Gavella et al.: *Hrvatsko građanskopravno uređenje i kontinentalnoeuropski pravni krug* (Croatian Civil Law Order and Continental European Legal Family), Zagreb 1994, pp. 46ff; on the *Preliminary Draft of the Civil Code for the Kingdom of Yugoslavia*, which was never adopted as law in force see, e.g., Giannantonio Benacchio: *La circolazione dei modelli giuridici tra gli Slavi del sud*, Padova 1995, pp. 155ff, with further references.

37 "*ratio naturalis*, koju smatrahu nepromjenjivom bazom rimskog prava i austrijskog zakona"; cit. Ivan Maurović: Nacrt predavanja o općem privatnom pravu. Prva knjiga: opći dio (An Outline of a Lectures on General Private Law, Book One: General part), Zagreb 1919, p. 13.

38 Gai. Inst. 1, 1: *quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur*; on the Gaius' notion of *ius gentium*, see, e.g., Herbert Wagner: *Studien zur allgemeinen Rechtslehre des Gaius. Ius gentium und ius naturale in ihrem Verhältnis zum ius civile*, Zutphen 1978, pp. 1ff; Kaser, 1993, pp. 20ff, with further references; especially on the notion of *ratio naturalis* in classical Roman law, see, e.g., Peter Stein: The Development of the Notion of *naturalis ratio*, in: Alan Watson (ed.): *Daube noster. Essays in Legal History for David Daube*. Edinburgh, London 1974, pp. 305ff; on the significance of Roman *ius gentium* for the contemporary European legal system, see Wolfgang Waldstein: Ius gentium und das Europäische ius commune. Index. *Quaderni camerti di studi romanistici*, 1998 (26), pp. 453ff.

one-dimensional positivistic legal approach in the interpretation of the principle in question – convincingly advocated by Wolfgang Waldstein, one of the greatest contemporary central European scholars of Roman law.[39] As we have seen, the described understanding of the role and significance of the natural law in ABGB is to a great extent in accordance with Bogišić's understanding of nature (*natura*) as the origin of law.

Therefore, Bogišić also took over to a great extent the norm of the § 7 ABGB in his famous Montenegrian codification (OIZ). Accordingly, Article 3 of the OIZ has the following content:

> if a particular issue or case should not be solved either by the rules determined by statute or custom, one should act by analogy according to other similar rules or solve the case according to the general foundations of justice and equity.[40]

In other words, according to Bogišić's code, the legal cases that cannot be resolved through the application of written law, customary law or analogy should be solved by the application of "the general foundations of justice and equity". Despite the fact that "principles of natural law" are not explicitly mentioned in OIZ, Bogišić's described understanding of nature (*natura*) as the origin of law undoubtedly lead to the conclusion that "general foundations of justice and equity", contained in Article 3 of the OIZ, have completely *jusnaturalistic* roots.[41]

By the way, in the direct context of international conference commemorating 100 years of the University of Ljubljana Faculty of Law, entitled *Law and (R)evolution 1920–2020*, which title and overarching theme is inspired by the Opening Lecture of the first Dean of the Faculty, Leonid Pitamic (1885–1971), it is interesting to note that Pitamic as the pupil of the famous Hans

39 See, e.g., Wolfgang Waldstein: *Vorpositive Ordnungselemente im Römischen Recht. Österreichische Zeitschrift für öffenliches Recht* 17 (1967), pp. 1ff; Wolfgang Waldstein: Naturrecht bei den klassichen römischen Juristen, in: Dorothea Mayer-Maly, Peter Simons (eds.): *Das Naturrechtsdenken heute und morgen. Gedächtnisschrift für Rene Marcic*, Berlin 1983, pp. 250ff; Wolfgang Waldstein: Naturrechtliche Grundlagen des österreichischen ABGB von 1811, in: Danilo Castellano (ed.): *L'Europa e la codificazione*, Napoli 2005, pp. 41ff.

40 OIZ, Art. 3: "Ako za neki osobiti posao ili slučaj ne bude ni u zakonima ni u običajima određena pravila, red se je vladati po podobju drugih sličnih pravila, ili pak riješiti slučaj po opštim osnovama pravde i pravice".

41 On OIZ, Art. 3., see Jasminka Hasanbegović: Pravne izreke Valtazara Bogišića skraja OIZ = katalog narodnjačkih opštih pravnih toposa? (Legal Maxims of Valtazar Bogišić at the end of OIZ = The Catalogue of Folk General Legal Topoi?), in: Luka Breneselović (ed.): *Spomenica Valtazara Bogišića o stogodišnjici njegove smrti*, Knjiga 1. (Hypomnemata Valtazar Bogišić anno centesimo obitus eius dedicata, vol. I), Beograd 2011. However, Hasanbegović is eliminating any possibility of "jusnaturalisation of Bogišić's position" (ibid., p. 341), despite the multiple and explicit references made by Bogišić on the nature (*natura*) "as the one and only source of law".

Kelsen, over time, "transcended the Pure Theory of Law and set out to find a common substantial denominator between positive and natural law. He sought this common denominator in the nature of law".[42] According to Pitamic, natural law is the superordinate source of law and the framework for the positive law and the customary law.[43] Moreover, in his lecture *Law and Revolution*, he is encouraging the application of "principles of natural law" from § 7 ABGB as some kind of *aequum et bonum* ("najbolj pravično in najbolj primerno") in the context of revolutionary crisis or collapse of legal certainty.[44] It is not hard to conclude that reflections of Bogišić and Pitamic on the "first and last questions of law" manifest the high level of unanimity.

Concluding Remarks

In the context of a concluding comparison between Jhering's understanding that force and violence (*vis*) are the origins of law (*ius*) and Bogišić's understanding that nature (*natura*) is the origin of law (*ius*), it is important to point out that one of the best-known legal maxims at the end of OIZ has the following content: "pravdi je nasilje najgori protivnik" ("Violence is justice's worst enemy") (Art. 1011 of the OIZ). Already in his first and groundbreaking book *Slavic Customary Law* (*Pravni običaji u Slovena*), published in 1867, Bogišić quoted some ten variations of the mentioned maxim in Greek, Latin, Italian, French and German language as well as in various Slavic languages, which witnesses the deep-rooted common understanding of European people that the violence is the complete negation of the justice and law.[45] Especially the Latin regula *vis legibus inimica* ("violence is the enemy of the laws") stands out among them for its brevity and clarity.[46]

42 Cit. Marijan Pavčnik: Methodological Clarity or the Substantial Purity of Law? Notes on the Discussion between Kelsen and Pitamic. Ratio iuris. *International Journal of Jurisprudence and Philosophy of Law*, 2014 (27), p. 177.

43 Leonid Pitamic: O ideji prava (On the Idea of Law), in: *Zbornik znanstvenih razprav* 19 (1943), pp. 199ff.

44 Leonid Pitamic: Pravo in revolucija (Law and Revolution). Ljubljana 1920, reprinted in: *Časopis za kritiko znanosti* 18 (1990), pp. 23ff. See Chapter 2, p. 16.

45 See Valtazar Bogišić: Pravni običaji u Slovena. Privatno pravo (Slavic Costumary Law. Private Law). *Zagreb* 1867, p. 15, especially n. 4.

46 According to the relevant scholarship (Dragomir Stojčević, Ante Romac: *Dicta et regulae iuris*, Beograd 1971, p. 523; Nevenka Bogojević-Gluščević: Rimska pravna pravila u zakonjačama Opšteg imovinskog zakonika za Knjaževinu Crnu Goru (Roman legal rules in the "zakonjače" of General Property Code for the Principality of Montenegro), in: *Istorijski zapisi* (78) 2005, p. 22; Zoran Rašović: Bogišićeve pravne izreke. Skladnosti između rimskopravnog i crnogorskog narodnog vrela (Bogišić's legal maxims. The parallels between Roman law and Montenegrian folk law), *Podgorica* 2016, p. 335), the quoted proverb (OIZ, Art. 1011) is directly based on the Roman maxim *vis legibus inimica*, the origins of which are to be found in Cicero, *Pro Caecina*, 11, 33: *nec iuri quicquam tam inimicum quam vis nec aequitati quicquam tam infestum est quam convocati homines et armati.*

Following the logic of Bogišić's reflections, especially the fundamental insight that *natura* is the same as justice, it is necessary to conclude that the violence is unnatural in its very essence. In other words, the violence is the absolute negation of "one and only source of the law". As we have seen, Bogišić's understanding is the complete opposite of Jhering's thesis on force and violence as the "mother of law" (*Mutter des Rechts*).

Jhering's and Bogišić's mentioned completely opposite concepts of the origins of law find their cause *in ultima linea* in differing understandings of nature (*natura*). What is it exactly about? In one passage of his work *Method and System of Property Law Codification in Montenegro*, Bogišić states that *natura* is such a source of the law which is everytime, everywhere and by everyone obeyed: *quod semper, quod ubique, quod ab omnibus observatur*.[47] It is very important to notice that Bogišić's quoted expression is actually the paraphrase of the famous theological definition of the Sacred Tradition (*traditio sacra*) formulated by St. Vincent of Lérins († 450): *quod ubique, quod semper, quod ab omnibus creditum est*.[48] Beside the things already mentioned, this expression is also the evidence of the fact that Bogišić's understanding of nature (*natura*) was firmly rooted in classical ancient culture and Christian tradition, and therefore diametrically opposite to Hobbes' conception of the natural human state (*status naturalis*) as a struggle of all against all (*bellum omnium in omnes*) or Jhering's construction of the "law of the stronger" (*Recht des Stärkeren/Faustrecht*) as the primordial natural law. All things considered, the cited facts shed rather unknown and curious light on the lawyer and polymath from Cavtat (*Ragusa Vecchia*): as an adherent of the historical school of law firmly anchored in classical natural law tradition.[49] Was Bogišić some kind of anti-Jhering?

47 Cit. Valtazar Bogišić: *Izabrana djela. Tom IV. Studije i članci* (Selected Works, vol. IV. Studies and Articles). Podgorica, Beograd 2004, p. 257.

48 St. Vincent of Lérins, *Commonitorium adversos haereticos*, II, 5. Moreover, it is interesting to mention that Bogišić obviously took over the Latin expression *quod ab omnibus observatur* from the text of The Statute of Dubrovnik of 1272 (*Liber statutorum Civitatis Ragusii*), lib. II, cap. 3. He edited the first critical edition of the Statute, published in 1904., together with well-known Czech historian Konstantin Jireček.

49 Generally on the legal-theoretical and methodological positions of Bogišić, see, e.g., Werner Gabriel Zimmermann: *Valtazar Bogišić 1834–1908. Ein Beitrag zur südslavischen Geistes- und Rechtsgeschichte in 19.* Jahrhundert. Wiesbaden 1962, pp. 214ff; Dalibor Čepulo: West to East – East to West: Baltazar Bogišić and the English School of Historical and Comparative Jurisprudence (H.S. Maine, F. Pollock, P. Vinogradoff), in: Zoran Pokrovac (ed.): *Rechtswissenschaft in Osteuropa. Studien zum 19. und frühen 20. Jahrhundert.* Frankfurt am Main 2010, pp. 71ff; Stephan Meder: Valtazar Bogišić und die Historische Rechtsschule, in: Luka Breneselović (ed.): *Spomenica Valtazara Bogišića o stogodišnjici njegove smrti, knjiga 1.* (Hypomnemata Valtazar Bogišić anno centesimo obitus eius dedicata, vol. I), Beograd 2011, pp. 517ff; Luka Breneselović: Fortführung und Facetten der Savigny-Schule bei ihrem Anhänger Valtazar Bogisic (1834–1908). Ein Beitrag zum rechtsrealistischen (Selbst-)Verständnis der Historischen Rechtsschule, in: Stephan Meder, Christoph-Eric Mecke (eds.): *Savigny global 1814–2014. "Vom Beruf unsrer Zeit" zum transnationalen Recht des 21.* Jahrhunderts. Göttingen, 2016, pp. 173ff, with further references.

6 Understanding Law

Reaction to the Challenge of Leonid Pitamic

Marijan Pavčnik

Pitamic's Range of Research

Pitamic's contribution to the understanding of law* ranges between a purely normative approach and a synthetic[1] understanding of law, which unites "order" and "humane behaviour" into a uniform concept of law. The fundamental articles along this way are *Denkökonomische Voraussetzungen der Rechtswissenschaft* (*Cognitive Economy as a Precondition of Legal Science*, 1917) and *Naturrecht und Natur des Rechtes* (*Natural Law and Nature of Law*, 1956). A common denominator is also a responsible pursuit (creation) of law and state order enabling coexistence in the society:

> Boundless freedom necessarily destroys human society and Man himself. *Society and Man can only exist in a state of limited freedom. How the boundaries defining that freedom are set is a problem of logic and morality and also a problem of the state.*[2]

Newness of Pure Theory of Law

At about the same time as *Pravo in revolucija* (*Law and Revolution*, 1920) Pitamic's article *Nove smeri v filozofiji prava* (*New Directions in Philosophy of Law*, 1921) was also written. In it he presented the "epistemological science of law" called Pure Theory of Law. The intention of this science is to know "the concept, i.e., the form of law, which remains the same irrespective of its changing content".[3]

* The author of this chapter has addressed Pitamic's thought several times. Thus, one cannot avoid some repetitions. The underlying paper is the plenary lecture given by the author at the World IVR Congress in Frankfurt/Main in 2011. See Marijan Pavčnik: Methodologische Klarheit oder gegenständliche Reinheit des Rechts? Anmerkungen zur Diskussion Kelsen – Pitamic. *Archiv für Rechts- und Sozialphilosophie*, Beiheft 136 (2013), pp. 105–129.

1 Cf. Leonid Pitamic: Država (The State). *Družba sv. Mohorja*, Celje 1927, pp. 2ff., where he discusses the synthetic view of the concept of the state.

2 Leonid Pitamic: *Pravo in revolucija (Law and Revolution)*. Tiskovna zadruga, Ljubljana 1920, p. 6.

3 Leonid Pitamic: Nove smeri v pravni filozofiji (New Directions of Thought in Legal Philosophy), in: *Zbornik znanstvenih razprav* (Ljubljana) 1 (1921), p. 243.

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> He continues that the *ratio per quam* the law is valid, cannot be
>
> proven by any fact because the question about the validity of something that should be cannot be answered by something that is or was. The sources of legal norms can only be norms again and not some facts. Therefore only law and nothing else can be known by juridical method.[4]

The method by which we cognize law is "only normative". It enables us to understand all legal concepts "only from the normative point of view".[5] From this viewing angle, he then analyses and explains concepts such as legal will, state, juristic person and sovereignty. He concludes the article with the statement that Kelsen in his work *Das Problem der Souveränität und die Theorie des Völkerrechts* (*The Problem of Sovereignty and the Theory of International Law*, 1920) borrowed the thought Pitamic had developed in his paper *Denkökonomische Voraussetzungen der Rechtswissenschaft* (*Cognitive Economy as a Precondition of Legal Science*, 1917).[6]

The Range of "Cognitive Economy"

The idea of "cognitive economy" followed Pitamic all of his life, and it is also important for his relation to Kelsen and the Pure Theory of Law. Pitamic also refers to the "principle of economy" in the letter he wrote to Hans Kelsen in August 1957.[7] A characteristic standpoint in the letter is that neither the *principle of economy* nor Kelsen's *hypothetical basic norm* "come up with a satisfactory solution":

> The principle of economy is at best a thinking device for a quantity comparison between ought and being in a given area at a given moment. This comparison or measurement may show – though rather vaguely – which norms are actually effective, yet it cannot convincingly explain their binding qualities, it cannot conclusively show the being as legally obligatory.[8]

4 Ibid., p. 246.
5 Ibid., p. 241.
6 Ibid., p. 257–258, fn. 4: Kelsen is supposed to have borrowed, so Pitamic, his idea on pp. 99 and 241 of the mentioned book about sovereignty.
7 Pitamic's letter is a reply to Kelsen's letter of 27 March 1957. I have not been able to find Kelsen's letter either with Pitamic's heir or at Hans Kelsen Institut in Vienna. It follows from Pitamic's letter that Kelsen reacted to some thoughts in Pitamic's paper Naturrecht und Natur des Rechtes (1956) that was published on the occasion of Pitamic's 70th birthday. See Marijan Pavčnik: 2009a.
8 Leonid Pitamic: *Die Frage der rechtlichen Grundnorm (Pitamic' Brief an Hans Kelsen)*. Archiv für Rechts- und Sozialphilosophie 1, pp. 87–103. – Reprint in: Pavčnik, 2015. RR als Anregung 2010, pp. 92–93.

Methodological Dualism

The Range of the Normative Method

At this point one has to turn back the clock to the time when Pitamic argued that just by the normative method one cannot arrive at the point of origin of any concrete law as it was the first starting point of Kelsen's Pure Theory of Law. In 1917, Pitamic published the article *Denkökonomische Voraussetzungen der Rechtswissenschaft* (*Cognitive Economy as a Precondition of Legal Science*), which played a key role in this quest. Pitamic was particularly interested in the question of whether and how Kelsen's purity could be justified. He advocated the scientific principle that an investigation of the process of normative deduction must take into account the development of events as it occurs according to another (causal) method. As he himself states,

> in this choice concerning past as well as present law, a certain *principle of economy* has to be considered; this principle does not consider the *subjective political* conviction in any way and amounts to nothing more than *objectively* establishing the material conditions for constructing such legal norms that will conform in the highest possible manner with effective preconditions for what ought to be done, i.e., with those ideas about what ought to be done that really motivate the people in the territory and time period whose law we want to know.[9]

Regarding the nature of this principle, he quotes the philosopher and physicist Ernst Mach:

> This tendency to obtain a survey of a given province with the least expenditure of thought and to represent its facts with *one* single mental process, may be justly termed an economical one.[10]

9 Leonid Pitamic: Denkökonomische Voraussetzungen der Rechtswissenschaft, in: *Österreichische Zeitschrift für öffentliches Recht* 3 (1917), pp. 339–367. – Reprint in: Leonid Pitamic, 2009. An den Grenzen der RR, p. 366. See also Leonid Pitamic: Buchbesprechung: Hans Kelsen: Reine Rechtslehre. Leipzig, Wien 1934, in: *Zeitschrift für öffentliches Recht* 15 (1935), p. 414.

10 Ernst Mach: *Die ökonomische Natur der physikalischen Forschung*. Allmanach der Kaiserlichen Akademie der Wissenschaften (Wien) 32 (1882), p. 302. See also 301, 303, 305, 306, and 316. Cf. Pitamic, 1917, pp. 336–367. See also Ernst Mach: Erkenntnis und Irrtum. Verlag von Johann Ambrosius Barth, Leipzig 1905, p. 232: "Eine vorläufige versuchsweise Annahme zum Zwecke des leichteren Verständnisses von Tatsachen, welche aber dem tatsächlichen Nachweis sich noch entzieht, nennen wir eine Hypothese." – See and cf. also Stanley L. Paulson: A Role for Herman Cohen in Hans Kelsen's Pure Theory of Law? In: Frank Saliger et alt. (eds.): *Rechsstaatliches Strafrecht. Festschrift für Ulfrid Neumann* zum 70. Geburtstag. C.F. Müller, Heidelberg 2018, p. 284, fn. 7.

Methodological Clarity and Purity of the Theory of Law

A special merit of Pitamic's paper is that he proposed *methodological* clarity in legal theory without altogether reducing the object *law* as *a priori* to its normativity, and without completely divesting the concept of all its non-normative elements. Pitamic sharply distinguishes between the deductive-normative and the inductive-causal methods. The first one only provides a way of thinking which enables us "to identify without contradiction the norms of a *given* legal material in their relations to one another, as well as to apply them in the face of factual events".[11] The core of this method is normative imputation (Germ. *Zurechnung*), which is nothing but "the conjunction of normative constituent elements with relevant factual elements on the basis of a norm".[12] It is a characteristic feature that a user of the deductive-normative method presupposes the starting point of his research, whereas the starting point itself (i.e., legal material as the object of research) can only be defined by the inductive-causal method. The latter looks for a concrete starting point, i.e., such legal order that can be found "in its concrete *contents* determined by time and place".[13]

This methodological dualism, which legal science is unable to avoid, is illustrated by Pitamic in a metaphorical way:

> When *Kelsen* starts from a standpoint he presupposes as given – a complex of norms, and from this formal condition (which permits any contents) derives consequences in a purely deductive manner, he is, so to speak, on the top of a mountain from which he descends normatively fighting his way down; yet Kelsen does not ask himself *how* to reach the top. "Others" who try first to achieve the material conditions, the starting point of the norms, look first for the top of a certain mountain; they fight their way to it, which is only possible by the method of induction and causality because this means . . . establishing the psychological effects of ideas about "ought" (Germ. *Sollen*), which belong to the area of the knowledge of "is" (Germ. *Sein*).[14]

Pitamic convincingly explains that in a series of ideas produced according to a certain method, one can never escape from an infinite series unless one commands a halt by means of ideas produced according to another method.[15] Pitamic calls this "a *jump* (italics added by M.P.) over an abyss, whose endless depth *logically* separates the world of 'is' (Germ. *Sein*) from

11 Pitamic, 1917, pp. 365–366. See also pp. 366–367: "In dem hier dargelegten Sinne ist die Erkenntnis des Rechtes von der richtigen Anwendung beider Methoden, der deduktiv-normativen wie der induktiv-kausalen bedingt. Letztere hat die materiellen Voraussetzungen für die Rechtskonstruktion zu beschaffen, erstere diese Konstruktion ausschließlich mit juristischen Begriffen durchzuführen."

12 Pitamic, 1917, pp. 342.

13 Pitamic, 1917, p. 344.

14 Ibid., p. 344.

15 Ibid., p. 355.

the world of 'ought' (Germ. *Sollen*)".[16] In short: It is an unsolved, possibly even an insoluble epistemological problem that can be bridged by man's value jump (the word "value" added by M. P.) in such a way that "the normatively running deduction is interrupted by the fact of 'is' (Germ. *Seinstatsache*)".[17]

The Object and Method of Research

The questions posed by Pitamic are anything but unimportant. They concern at least some of the points that are of key importance for the Pure Theory of Law, and they have been and still are often discussed. The central question refers to the relation between the object and the method or between the method and the object of research.[18] Pitamic finds Kelsen's point of view that "a specific method determines a specific object"[19] unacceptable and rejects it with a more reflective counterstatement that a specific object co-creates the specific method by which we study it. Pitamic expressly states that "something must be decisive for the choice of the method".[20] Put even more clearly:

> The object must be somehow given from the beginning, which means that it is decisive for the choice of the method since the choice already presupposes some "knowledge" or "cognition".[21]

The fact that the deductive-normative method is used means that the norm already exists. The object to be researched somehow offers itself to the researcher and he is not the one creating this object:

> It is not necessary that I construct or presuppose this norm because in such a case it would be just my or some other researcher's manner of treatment i.e. a method, but it has to be present in the ideas of other people if this is a group connected by norms.[22]

16 Ibid., p. 356.
17 Ibid., p. 356.
18 In more recent literature, see especially Günther Winkler: *Rechtstheorie und Erkenntnislehre*. Springer, Wien, New York 1990, pp. 175 ff.
19 See Hans Kelsen: *Der soziologische und der juristische Staatsbegriff*. J.C.B. Mohr (Paul Siebeck), Tübingen 1922, p. 106.
20 Leonid Pitamic: Kritische Bemerkungen zum Gesellschafts-, Staats- und Gottesbegriff bei Kelsen, in: *Zeitschrift für öffentliches Recht* 3 (1922), pp. 531–544. – Reprint in: Pitamic. 2009. An den Grenzen der RR 1922a, p. 535.
21 Ibid.
22 Ibid.

Of equal weight is the question why a researcher deals with a certain object and not with some other one. Pitamic asks himself:

> Why do I presuppose that just this norm is valid, why do I permit that this norm has an ideal existence, why do I judge the duty of this concrete man just in light of this norm and not some other one?[23]

It is in the nature of scientific research that the answer to this question cannot be arbitrary. For Pitamic "the psychological facts of 'is' that are given in the area of the social" determine "that just this norm and not other ones are presupposed as valid".[24] And this is also the reason for the inductive-causal method being inevitable for the cognition of law. Its task is simply to create "material preconditions for the legal construction".[25]

Pitamic's research showed that the inductive-causal method is necessary whenever "the normative world of law" (law as "ought"/*Sollen*) depends and is based on the corresponding facts of "is" (*Seinstatsachen*). In the paper *Kritische Bemerkungen zum Gesellschafts-, Staats- und Gottesbegriff bei Kelsen* (*Critical Remarks to the Kelsen's Notion of Society, State and God*, 1922), Pitamic also included the question of language among these facts: "The norm consists of linguistic or written signs, their meaning is conventional and has to be researched and established as a *fact of 'is'*" (italics added by M.P.).[26]

In this sense the conflict concerning the method is "*a completely sterile conflict*" (italics added by M.P.), which is already sterile because it does not distinguish between the starting points of research and the normative (legal) research itself.[27] The key question is not whether it is "permissible" to use also the inductive-causal method, and the key issue is not to mutually "confound" both methods.[28] It is about methodological clarity and purity and not about the purity of the object which could be researched just by the deductive-normative method. If legal science should renounce the inductive-causal method, this would mean that it would, at least within a certain scope, overlook the law as given in time and place. Pitamic says that it is unavoidable "to consider the non-normative in the choice of the

23 Ibid., p. 539.
24 Ibid.
25 Pitamic, 1917, p. 367.
26 Pitamic, 1922, p. 546. Cf. also p. 547: "Der Bedeutungswandel in der Sprache hängt nun wieder vom Wandel in den gesellschaftlichen Anschauungen, also von sozialen Tatsachen ab." In this connection, see also Leonid Pitamic: Interpretation und Wortbedeutungswandel, in: *Zeitschrift für öffentliches Recht*, 18 (1938), pp. 426–437. – Reprint in: Pitamic, 2009. An den Grenzen der RR, pp. 426ff.
27 Pitamic, 1917, p. 345.
28 Pitamic, 1917, p. 367.

basic norms as well as in the interpretation of the basic norms; are these circumstances not the most decisive ones?"[29]

Back to the Nature of Law

Pitamic also had reservations in connection with the hollowness of the Pure Theory of Law as to its contents. Already at the beginning of his theoretical development, he saw that law is not and cannot be just a social *technique* because the technique thereof has to be *social* if it wants to be legal.[30] He was not interested in law as just a refined and finely finished normative technique, because he saw in it also a socially effective legal order that was entitled to be called law if it protected the humane behaviour of men in general and especially fundamental (human) rights (humanity as the criterion of lawfulness).

It is a characteristic thought that

> "fundamental (human) rights and natural law . . . have not lost their importance as an important *condition* for the continued existence of positive law. For law which comes in conflict with the urgent needs of the material and spiritual life of man cannot hope to survive very long (italics added by M.P.).[31]

But the "conditions" of positive law are not only outside it, at the same time they are also "*another, heterogeneous* system (italics added by M.P.)" reaching into the legal one, giving it vitality and support in the interpretation of legal norms. The dependence on this "other, heterogeneous system" is most sensitive and also evident in the interpretation of the constitution, which is at the top of the hierarchy of state law.[32]

From here it was a short step for Pitamic to finally "settle the score" with self-satisfied "legal deduction".[33] The starting point of "legal deduction" is the basic norm, which is neither given nor objectively valid, but is just presupposed. It is true that its fictitiousness is reduced if it refers to an effective legal order, but it is again true that also "in this construction it remains unexplained

29 Pitamic, 1922, p. 548. See also the reviews of the following works by Kelsen: (1) Das Problem der Souveränität und die Theorie des Völkerrechts and (2) Der soziologische und der juristische Staatsbegriff, in: *ZÖR*, 7 (1928), pp. 641ff., and (3) Reine Rechtslehre, in: *ZÖR* 15 (1935), pp. 413ff.

30 Leonid Pitamic: Čista pravna teorija in naravno pravo (Pure Theory of Law and Natural Law), in: *Razprave pravnega razreda Akademije znanosti in umetnosti v Ljubljani* 1 (1941), p. 188.

31 Pitamic, 1927, p. 203.

32 Pitamic, 1920, p. 14. See also p. 18: "The relation between legal order and the implementation of law, ultimately, . . . resembles the symbol chosen by old Indians for philosophy itself, namely a snake biting its own tail."

33 Cf. Leonid Pitamic: Ustava in zakon (Constitution and Law), in: *Slovenski pravnik* (Ljubljana) 36 (1922), p. 9.

why human reason must recognize just such an effective order . . . as a legal one, why it has to devise a basic norm just for this order and not for some other ones".[34] When Pitamic thinks in such a manner, he follows the interpretation that the source of legal normativity is inherent in the object of cognition and not just in our reason:

> In the same way as causality cannot be just a category of our reason but is something objective within the objects themselves, so also the source of legal normativity is not some hypothetical norm presupposed by the observer, but has to be some objective norm independent of the legal observer.[35]

The return to the object "law" means that its objective validity from the lowest to the highest instance is based on a norm having an objective validity:

> such norms and such institutions are to be established which will make possible, to a great extent, peaceful coexistence and peaceful trade between states or between groups of people within the states, and the enforcement of these norms is to be safeguarded by effective guarantees (also by compulsory measures).[36]

This basic norm is objective because it draws its contents from man as an individual and a social being - from man, who is the final object of every law.[37] The basic norm is not a legal norm, but a social-ethical one, substantiating the law and its nature.[38]

It is in the nature of the object of law that the content of the norm is no longer legal, i.e., that the system is no longer *legal* if the norm misses the essence of the object:

> Thus, there are principles originating from the nature of man as a social being, which refer to the coexistence of men and are valid for individual persons as well as for their different associations. These principles are the

34 Leonid Pitamic: O ideji prava (On the Idea of Law), in: *Zbornik znanstvenih razprav* (Ljubljana) 19 (1943), p. 195.

35 Leonid Pitamic: Čista pravna teorija in naravno pravo (Pure Theory of Law and Natural Law), in: *Razprave pravnega razreda Akademije znanosti in umetnosti v Ljubljani* 1 (1941), p. 184. Cf. also p. 184: "Did not *Kant* himself admit this when he said in his book Critique of Pure Reason that an object of cognition was only given to us if it affected our sensory nature? It seems to me that at least causality is thereby recognized as a non-categorial function since 'being affected' by objects is already an effect, whose cause is within the objects; thus, causality is already within the object and is not, or at least not solely, just a form of our reason for the cognition of the outer world."

36 Ibid., p. 185.

37 Ibid., pp. 185–186.

38 Ibid., pp. 185–186.

> bases or the fundaments of law. The content of the principles is very general and allows different ways of detailed determination (concretization). Yet this determination must remain within the limits of the principles and must not be contrary to them; otherwise it would forfeit the nature of law though it takes the name of law.[39]

At first Pitamic calls these principles natural law as a "superior source of law",[40] and then later he speaks about "the entirety of real law" incorporating natural law as a superior source of law as well as positive and customary law created within it,[41] until he finally exhausts the nature of law, which already as such incorporates natural law.[42]

The descent to law and its nature shows Pitamic that the main elements thereof are order and humane behaviour. *Order* is for him so

> essential that it is no longer law when it ceases to be "order". When the norms of a legal order are no longer carried out permanently, they do not serve the "order" in the community for which they are intended; then there rules "disorder", a lawless state or another legal order has started to work.[43]

Yet the order that is of such importance for law is not some order emptied of content, but an order regulating the behaviour of *men*. This regulation must

> consider its object to at least such an extent that it does not take away its content. If law is to remain law, it may only command or permit humane external behaviour and not its opposite, "inhumane behaviour", if it does not want to lose the qualities of law.[44]

The order ensured by law loses the nature of law if its inhumanity exceeds the extent that still allows for the existence of an individual and human coexistence.

39 Pitamic, 1943, p. 198. Cf. Pitamic, 1941, p. 189.
40 Pitamic, 1941, p. 189.
41 Pitamic, 1943, p. 200.
42 Leonid Pitamic: Naturrecht und Natur des Rechtes, in: *Österreichische Zeitschrift für öffentliches Recht*, N.F. 7 (1956), pp. 190–207. – Reprint in: Pitamic, 2009. An den Grenzen der RR, p. 206. "Wir haben uns begnügt, von einer, wie wir glauben, gemeinsamen Basis, nämlich dem Rechtsbegriff in seiner möglichsten Allgemeinheit ausgehend, seine beiden Grundelemente 'Ordnung' und 'menschliches Verhalten' zu beschreiben und gegenseitig zu wägen. Bevor man nach anderen Quellen sucht, muss man zuerst die nächste Quelle, das ist den Rechtsbegriff selbst, *ganz* ausschöpfen. Tut man dies gründlich, dann zeigt sich, dass das Wesen der fundamentalen, allgemeinen Rechtsgrundsätze, das sogenannte primäre Naturrecht, schon in der Natur des Rechtes enthalten ist und nicht in einem neben oder über dem positiven Recht schwebenden 'Naturrecht' gesucht zu werden braucht."
43 Ibid., p. 192.
44 Ibid., p. 194.

This is the minimum content of law determined in a most general way and acceptable by anyone accepting humanity as a value:

> Any order ensuring, also by compulsory measures, that by regulating external human behaviour the life of the members of a community *as men* is effective, should be regarded as legal order.[45]

And this is also a common denominator that is acceptable irrespective of the worldview, a basis that has to be implemented in more detail and put in a concrete form in individual positive laws. It is a kind of a common denominator that should transcend the multiformity of the conceptions of natural law and put natural law back where it belongs – into law and its nature.

Synthetic (Integral) Nature of Law

Step by step, these results prompted Pitamic to combine the positive-law and the natural-law conceptions of the nature of law. For Pitamic, to sum up once again, the essential elements of law are order and humane behaviour. These elements are interdependent. The order is associated with legal norms regulating external human behaviour. It is so essential that law ceases to be law when its norms cease to be at least *grosso modo* effective.[46] However, not any order can function as an element of law; the condition is that it is an order which prescribes "only external humane behaviour and does not prescribe or allow its contrary, 'inhumane behaviour', otherwise it loses its legal quality".[47]

However, the legal norm "ceases to be law when its content seriously threatens the existence and social interaction of the people subject to it".[48] For this it is not sufficient that there is some kind of inhumanity in the content of the legal norm (e.g., high taxes which are unjust); there has to be "a conspicuous, obvious, severe case of inhumanity" (such as mass slaughter of helpless people).[49] There has to be a "crude disturbance" (e.g., the extermination of the members of another race), which interferes so intensely with law that its nature is negated.[50]

45 Leonid Pitamic: Die Frage der rechtlichen Grundnorm. In Völkerrecht und rechtliches Weltbild, in: *Festschrift für Alfred Verdross*. Springer, Wien 1960, p. 216. – Reprint in: Pitamic, 2009. An den Grenzen der RR.

46 Pitamic, 1956, pp. 192–193.

47 Pitamic, 1956, p. 194.

48 Pitamic, 1956, p. 199.

49 Pitamic, 1960, p. 214.

50 Leonid Pitamic: Naturrecht und Natur des Rechtes, in: *Österreichische Zeitschrift für öffentliches Recht*, N.F. 7 (1956), p. 199. – Reprint in: Pitamic, 2009. An den Grenzen der RR. See also Pitamic, 1960, p. 215: "Es kann ja auch nach positivem Recht sogar eine rechtskräftige Entscheidung aus gewissen schwerwiegenden Gründen wegen krasser Verletzungen des positiven Rechtes angefochten und außer Kraft gesetzt werden."

Ulfrid Neumann convincingly observes that Pitamic "does not invoke ethical criteria beyond law, but appeals to elements of the legal concept itself".[51] This form of justification is to some extent in accordance with Radbruch and his formula. The similarities between Radbruch and Pitamic consist predominantly in the fact that their projects both aim at the justification of the legal concept, and that they both, in a similar way, explore the boundary which may not be transgressed by a conflict between single elements of law in order to remain within lawfulness. The Rubicon is crossed once the order is "blatantly inhumane" (Germ. *krass unmenschlich*). We are here faced with an obvious parallel to Radbruch's "formula of intolerability" (Germ. *Unerträglichkeitsformel*).[52]

It cannot be concluded from Pitamic's oeuvre that he drew on Radbruch's theories. In the already quoted work *An den Grenzen der Reinen Rechtslehre* (*On the Edges of the Pure Theory of Law*), Radbruch's name is only mentioned once in association with heteronomous obligations.[53] In Pitamic's central book, *Država* (The State, 1927), Radbruch is not quoted at all. The majority of reasons for their affinity lie in the fact that Radbruch and Pitamic underwent a similar development, which ultimately led to similar results. Radbruch as a neo-Kantian endorsed value-theoretical relativism and held the view that legal values cannot be "identified" (Germ. *erkennen*) but only "acknowledged" (Germ. *bekennen*).[54] Given the fact that the supreme value of law cannot be known, it is necessary, for the sake of legal security, that this content be defined by the state authority.[55]

His experiences with Nazism motivated Radbruch to make his points of view complete and partly also to complement them in the light of the condition of legal values. This was done after World War II. The definitive derivation states that when the conflict between positive statute and justice reaches an "intolerable degree", "the statute as 'flawed law' (Germ. *unrichtiges Recht*)

51 Ulfrid Neumann: Buchbesprechung: Leonid Pitamic, *An den Grenzen der Reinen Rechtslehre. Herausgeber und Einführungsstudie: Marijan Pavčnik*. Ljubljana 2009 (Erstausgabe 2005). Archiv für Rechts- und Sozialphilosophie 97 (2011), p. 281.

52 See ibid.

53 Leonid Pitamic: Eine "Juristische Grundlehre", in: *Österreichische Zeitschrift für öffentliches Recht* 3 (1918), p. 750. – Reprint in: Pitamic, 2009. An den Grenzen der RR.

54 Gustav Radbruch: Grundzüge der Rechtsphilosophie. Verlag von Quelle, Leipzig 1914. – Reprint in: A. Kaufmann (ed.): *Gustav Radbruch Gesamtausgabe*. Volume II. C.F. Müller, Heidelberg 1993, pp. 9–204. Quoted from the reprint in Gustav Radbruch Gesamtausgabe II, 1993, pp. 22 and 162. [The English quotation is taken from Stanley L. Paulson: On the Background and Significance of Gustav Radbruch's Post-War Papers, in: *Oxford Journal of Legal Studies*, 26 (2006), p. 31.] See also Gustav Radbruch: *Rechtsphilosophie*. Eds. E. Wolf, H.-P. Schneider. 8th ed. K. F. Koehler Verlag, Stuttgart 1973, p. 96, and Gustav Radbruch: Le relativisme dans la Philosophie du Droit, in: *Archives de philosophie du droit et de sociologie juridique* (1934): pp. 105–110. German: Der Relativismus in der Rechtsphilosophie. In Gustav Radbruch *Gesamtausgabe*. Ed. A. Kaufmann. Volume III, pp. 17–22. C.F. Müller, Heidelberg 1993.

55 Radbruch, 1973, pp. 164–165.

must yield to justice" (the formula of intolerability). Besides this formula, there is also the formula of deniability (Germ. *Verleugnungsformel*); this formula applies when the law deliberately betrays equality. In this case, the law is not "merely 'flawed law', it completely lacks the very nature of law".[56]

Pitamic's development was similar. He first encountered theory and philosophy of law as Kelsen's disciple and was impassioned by normative purism as a form. He was not very deeply affected by the sharp distinction between the *is* (Germ. *Sein*) and the *ought* (Germ. *Sollen*), as he also contemplated law sociologically and axiologically. From the very beginning, he was perturbed by the self-sufficiency of law as a normative system. In the face of the assertion that an ought can only be derived from an ought, he advanced the thesis, inspired by Aristotle, that man is by his very nature implanted into normative relations.[57]

His experiences with the barbarism of the 20th century certainly had an influence on Pitamic, who, just like Radbruch, placed law in relation to values. Radbruch argues that law strives for justice, while Pitamic seeks the solution in a concept of law which also has to be humane. Radbruch's formula is articulated more thoroughly than Pitamic's legal concept. However, Pitamic can also be understood as saying that conscious disavowal of equality is inhumane, and that an inequality which is intolerably inhumane lacks legal character.

An exhaustive comparison of Radbruch and Pitamic is not the object of this investigation. Yet a comparison was necessary because it highlighted a parallel with Kelsen's normativity thesis. Kelsen stuck to this thesis until the very end and thus, from the point of view of his theory, he was indifferent to the content of positive law. This content simply was not an object of his formal, normative analysis of law. Radbruch and Pitamic included the content into their arguments and, in their respective way, made it a yardstick for their concepts of law. This enabled them to posit that their respective investigative methods were outside of natural law and legal positivism. More precisely, in

56 Gustav Radbruch: Gesetzliches Unrecht und übergesetzliches Recht, in: *Süddeutsche Juristenzeitung* 1 (1946), pp. 1–8. Quoted from the reprint in Radbruch, 1973, pp. 345–346. [The English quotation is taken from Paulson, 2006, p. 26.] – For more on Radbruch and Radbruch's Formula, see, e.g., Arthur Kaufmann: Gustav Radbruch – Leben und Werk. In *Gustav Radbruch Gesamtausgabe*. Ed. A. Kaufmann. Volume I. C.F. Müller, Heidelberg, pp. 9–88; Robert Alexy: *Begriff und Geltung des Rechts*. Alber, München 1992, pp. 52ff; Frank Saliger: *Radbruchsche Formel und Rechtsstaat*. C.F. Müller, Heidelberg 1995; Gerhard Sprenger: 50 Jahre Radbruchsche Formel oder: Von der Sprachnot der Juristen. *Neue Justiz* 1 (1997), pp. 3–7, and Ralf Dreier, Stanley L. Paulson: Einführung in die Rechtsphilosophie Radbruchs, in: Gustav Radbruch: *Rechtsphilosophie. Studienausgabe*. C.F. Müller, Heidelberg 1999. See also Ralf Dreier: Gustav Radbruch, Hans Kelsen, Carl Schmitt, in: H. Haller et al. (eds.): *Staat und Recht. Festschrift für Günther Winkler*. Springer, Wien, New York 1997, pp. 193–215.

57 See Leonid Pitamic: Die Frage der rechtlichen Grundnorm, in: *Völkerrecht und rechtliches Weltbild. Festschrift für Alfred Verdross*. Springer, Wien 1960. – Reprint in: Pitamic, 2009. An den Grenzen der RR, p. 212. See also Marijan Pavčnik: Die Frage der rechtlichen Grundnorm (Pitamic' Brief an Hans Kelsen). *Archiv für Rechts- und Sozialphilosophie* 96 (2010). – Reprint in: Pitamic, 2009. An den Grenzen der RR, pp. 93–94.

the words of Robert Alexy,[58] their investigative methods can be described as dual. This means that they, again either in his own way, combine the factual and the ideal sides in their investigations. The factual side encompasses the positive legal order and the effectiveness of this order, while the ideal side addresses the (moral) adequacy of its content. Their common denominator is that law only remains law as long as its content is not extremely unjust or extremely inhumane.

The discovery that the nature of law is dual also opens up the possibility of a dialogue – in such a manner as also by Peter Koller – between all those who are not radical positivists or moralists.[59] Radical positivists accept any imaginable content of law, while radical moralists grant only a law which conforms to their moral ideal. The Pure Theory of Law is not an example of radical positivism; it only assumes arbitrariness (Germ. *Beliebigkeit*) of content in order to make possible an analysis of law irrespective of its content. Kelsen's thesis of normativity is dialogical for all those interested in the content of a normative legal structure. Kelsen's theory (and especially the theory of the hierarchical structure of the legal order) reveals (even provokingly, in its own way) where the questions about the legal content are situated.

Kelsen, at least in a certain sense, refused to accept this dialogue, because for him law was only a closed system of legal norms. Kelsen's thesis was that a relation is only possible "between elements of one and the same system".[60] The one-sidedness of Kelsen's approach is illustrated very aptly by the already mentioned mountain allegory.

Pitamic contributed to the improvement of the contents of the Pure Theory of Law. His key argument is that the methods used in investigating and understanding law have to be in accordance with the nature of law. The understanding of the nature of law is a particular prior knowledge guiding the scholar in his choice of the method with which he approaches his field of study. By following this guideline and by arguing according to a clear method, we can also open up a space for dialogue and for the juxtaposition of contrasting points of view. "Then", according to Pitamic, we can "approach the aim which we have to strive for by all – with the best intentions *all* – means: *cognition*".[61]

58 Robert Alexy: Hauptelemente einer Theorie der Doppelnatur des Rechts, in: *Archiv für Rechts- und Sozialphilosophie* 95 (2009), pp. 151–166; and Robert Alexy: The Dual Nature of Law, in: *Ratio Juris* 23 (2010), pp. 167–182. See also Peter Koller: The Concept of Law and its Conceptions, in: *Ratio Juris* 19 (2006), pp. 180–196; and Peter Koller: Der Begriff des Rechts und seine Konzeptionen, in: W. Brugger, U. Neumann, S. Kirste (eds.): *Rechtsphilosophie im 21. Jahrhundert*. Suhrkamp, Frankfurt am Main 2008, pp. 157–180.

59 See Koller, 2008, pp. 160ff, 175ff.

60 Hans Kelsen: Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus, in: *Philosophische Vorträge, veröffentlicht von der Kant-Gesellschaft*, 31, 73 pp. Pan – Verlag Rolf Heise, Charlottenburg 1928. – Reprint in: Hans Klecatsky, René Marcic, Herbert Schambeck (eds.): *Die Wiener rechtstheoretische Schule*. Vol. I, pp. 281–350. Wien 1968: Europa Verlag 1928. Quoted from the reprint in: Klecatsky et al., I, p. 305.

61 Pitamic, 1917, p. 367.

Contribution to a Dialogue Between Theories

Methodological Importance for the Pure Theory of Law

Pitamic's understanding of law has several meanings and shades of meaning. His initial investigations together with the articles directly dealing with the Pure Theory of Law enrich just this theory and open up new horizons for it. The enrichment consists primarily in the requirement that every theory, also the Pure Theory of Law, has to define its object in a consistent manner. As already mentioned, Pitamic supported the principle of economy,[62] as substantiated by the physicist and philosopher Mach. The principle of economy draws upon the sociological method embracing *grosso modo*, an efficient world of legal norms, and subjecting it to a pure normative analysis as done by Kelsen's theory of law.

The object of Kelsen's normative method possesses spatial and temporal coordinates. The limitation is given sociologically and has to be considered also when law is dealt with from another viewpoint. Pitamic would say that the sociological limitation arises from the fact that in Slovenia we are not following the Code of Hammurabi or Roman law, but the norms imparted by Slovenian statutes and regulations.

Kelsen's normativism is pure and only interested in the formal-logical structure of law and in the connections between the elements of this structure. If a structure that has been emptied of its content – e.g., law as a graduated legal order – [63] is filled up, in addition to the sociological and normative methods also the axiological one has to be applied. The latter is based on values and on their meaning for law. If these three aspects of law (the sociological, normative and value aspects) are suitably combined, *transformations* experienced by law come open.[64] The making of a statute, the understanding thereof and its implementation are multidimensional phenomena. The Pure Theory of Law gives this multidimensionality a framework and, by treating law as a specific normative structure, reveals its empty (pure) sections one has to take a position on and fill them up with regard to their contents.

Pitamic's mountain metaphor is a good example of the understanding of law, which would only gain by being looked at from an all-around methodological viewpoint. It is not only the question of climbing and descending the mountain, but the key issue refers to the possibility of understanding and

62 See section IV.1. of this chapter.

63 See especially Adolf Merkl: *Die Lehre von der Rechtskraft. Entwickelt aus dem Rechtsbegriff*. Franz Deuticke, Leipzig, Wien 1923; and Adolf Merkl: Prolegomena einer Theorie des rechtlichen Stufenbaues, in: Alfred Verdross (ed.): *Geselschaft, Staat und Recht. Untersuchungen zur Reinen Rechtslehre. Festschrift für Hans Kelsen zum 50.* Geburtstag. Verlag von Julius Springer, Wien 1931, pp. 252–294.

64 See Marijan Pavčnik: Methodologische Klarheit oder gegenständliche Reinheit des Rechts? Anmerkungen zur Diskussion Kelsen – Pitamic, in: *Archiv für Rechts- und Sozialphilosophie*, Beiheft 136 (2013). – Reprint in: Marijan Pavčnik: *Ćista teorija prava kot izziv (Reine Rechtslehre als Anregung)*. GV Založba, Ljubljana 2015. RR als Anregung, p. 125–126.

substantiating the value movement between the normative and the factual starting points and *vice versa*, the movement which is the peculiar heart and driving force of law.[65] Pitamic's theory clearly perceives especially the boundaries[66] (facts of being and values), on which the normative structure is based and within which this movement takes place. Looking practically, these aspects are the "crucial" ones for Pitamic.[67] Kelsen's theory is not interested in these aspects because it rejects any connections and transitions between different systems (e.g., between law and morals). If it acted this way, this would present a categorical deviation from the approach of the Pure Theory of Law.[68]

The Importance for the Synthetic (Integral) Understanding of Law

The central importance of Radbruch's, Pitamic's and other synthetic (integral) views of law is that they *bridge* the one-sidedness of the extreme legal positivism on the one hand and of the extreme natural-law conceptions on the other hand. The extreme legal positivism is so completely indifferent to the content of law that law can have any content. The extreme natural-law view of law only acknowledges the positive law that is in accordance with its value ideal. The views bridging these contradictory conceptions are aware that law comprises factual as well as value-normative elements. These conceptions find themselves in the battlefield of life, which is never the best but strives to be just and humane. Radbruch and Pitamic both speak quite convincingly about it; in this matter, they do not differ fundamentally from each other.[69]

Those thinking integrally make *dialogue* possible. A dialogue can only take place between those speaking about the same or at least similar elements of law. If these elements are diametrically opposite and no connection exists between them, any dialogue is ruled out in advance. A dialogue is only possible, as Peter Koller says, if one accepts the requirement that law refers to the social reality in which it is created, effective and acknowledged (*reality requirement*); the second requirement is that law as a normative order differs from other normative orders, especially from morals (*differentiation requirement*);

65 This is the direction taken, in his own way, by Alexander Peczenik, who clearly differentiates between jumps into law, jumps within law and arguments substantiating these transformations. See, e.g., Alexander Peczenik: *Grundlagen der juristischen Argumentation*. Springer-Verlag, Wien, New York 1983, pp. 5ff, 55 ff; Alexander Peczenik: *On Law and Reason*. Kluwer, Dordrecht etc. 1989, pp. 115ff, 130f, 295ff; and Alexander Peczenik: *Scientia Juris*. Springer-Verlag, Dordrecht 2005, pp. 90ff, 174ff. See also Aarnio, Alexy, Peczenik 1983, 13ff, 18ff, 27ff and 36ff. Cf. Marijan Pavčnik: *Juristisches Verstehen und Entscheiden*. Springer-Verlag, Wien, New York 1993, pp. 77ff; and Kirste 2008, pp. 134ff.

66 Cf. Marijan Pavčnik, 2005, pp. 30–32.

67 Pitamic, 1922, p. 548. Cf. also Leonid Pitamic: Naturrecht und Natur des Rechtes, in: *Österreichische Zeitschrift für öffentliches Recht*, N. F. 7 (1956), pp. 206–207. – Reprint in: Pitamic, 2009. An den Grenzen der RR.

68 See Pavčnik, 2013, pp. 106–108.

69 See section VI. of this chapter.

and the third requirement is that law as social behaviour practice differs from brute force and predatory forms (*normativity requirement*).[70]

Synthetic (integral) conceptions comply with these requirements. A minimum framework sufficient for a dialogue may be even narrower. The same phenomenon, i.e., law, is discussed if the issue are norms that are generally effective in particular countries, if these norms refer to the external behaviour of legal subjects and if these norms are adequately (still bearably) just and humane. If these three conditions are fulfilled, we are not talking at cross purposes but about issues that are at least partly common.

To say it even more directly: The minimum common elements do not only refer to the synthetic (integral) theories of law; they also refer to other theories of law if only they talk about the same phenomenon or about a part of the same phenomenon. Any dialogue, as it has already been said, is ruled out between extreme positivists and extreme natural law theorists. Among others, however, a dialogue can at least partly take place and can contribute to checking, supplementing or at least examining common issues.

The breadth of the dialogue also depends on whether one engages in it as a participant in the legal game or just as an external observer thereof. The observer's (e.g., a theoretician's) view can be broader or narrower. It is likely that he will be only interested in certain dimensions of law and therefore focus on them. If elements of the same phenomenon (i.e., law) are in question, a dialogue is possible. The graduated legal order, to which the Pure Theory of Law dedicates itself, is emptied of its content (sociological surroundings and values), yet it is an important element of law that other theories must take into consideration. A supporter of the integral view of law will not reject the theory of graduated legal order, but will accept it and suitably supplement it sociologically and with values. The same can be said for the opposite direction if the theories in question are not the ones wishing to remain completely pure. But also in these cases a minimal dialogue can take place. A classic example is the Pure Theory of Law, in which the purity did not completely work out. *Nolens volens*, the Pure Theory of Law had to take position on philosophical, sociological and value issues because it could not define the object of its investigation without it.[71]

The participant's view of the law is even more sensitive. If among the participants only those taking authoritative decisions (an archetype thereof being the judge) are mentioned, it is evident that they are torn between all elements

70 See Koller, 2006, p. 184, and Koller, 2008, p. 162.

71 See and cf. Kelsen, 1928, pp. 281ff. See also Stanley L. Paulson: Four Phases in Hans Kelsen's Legal Theory? Reflexions on a Periodization, in: *Oxford Journal of Legal Studies*, 18 (1998); Stanley L. Paulson: Arriving at a Defensible Periodization of Hans Kelsen's Legal Theory, in: *Oxford Journal of Legal Studies*, 19 (1999), pp. 351–364; and Maathias Jestaedt: Von den »Hauptproblemen« zur Erstauflage der »Reinen Rechtslehre«, in: Robert Walter, Werner Ogris, Thomas G. Olechowski (eds.): *Hans Kelsen: Leben – Werk – Wirksamkeit*. Manz, Wien 2009, pp. 113–135.

of the legal phenomenon. The judge decides concrete cases that form part of social relationships. He decides them on the basis of legal principles and legal norms disclosed by the constitution, statutes and other general legal acts. The decision-making is only possible when he evaluates the factual starting point in view of the normative starting point and *vice versa* as well as in view of the values that are legally important and legally protected. A participant in the legal game (e.g., the judge) is thus inevitably also a (co-)creator of law. So are the legislators and other lawgivers. They cannot deal just with single elements of the legal phenomenon. Their task is – if I may repeat myself – to separate single elements, to define them as to their meaning and to interconnect them. This represents one of the central challenges of law and at the same time a huge responsibility for the decisions taken.

* * *

Behind the elements of law there is always a person (e.g., a judge), who – if he acts responsibly – may not hide himself behind the article number. The judge does not decide cases just in accordance with the constitution and the statutes, but his decision also depends on how he *understands* the constitution and the statutes. Law is an interpretative phenomenon, and it therefore demands that, in this dimension, it is substantiated by arguments (of understanding).[72] The judge or any other decision-maker must be aware that, as Pitamic would say, *Hominum causa omne ius constitutum*. A very indicative viewpoint in this connection can also be found in the paper rounding off Pitamic's opinion on the nature of law:

> Concerning this issue, the graduated structure of law does not have any role, because all legal phenomena, the abstract and the concrete ones, the norms or the application thereof, in all their forms from the highest to the lowest ones and irrespective of their accord with a higher "stage", have to correspond to the nature of law, if they are to be called law.[73]

This is the direction we must take. If we deviate from this route, we betray law and nature. If we remain on this course, we can contribute – sometimes more and sometimes less – to the rule of law. It would be naive to think that we shall reach the Golden Age the poet Ovid was talking about, but it is realistic to think that we shall be able to live reasonably securely.

72 See Boris Furlan: Teorija pravnega sklepanja (Theory of Legal Concluding), in: *Zbornik znanstvenih razprav* 10 (1933–1934), pp. 29–53; Marijan Pavčnik, 1998 and Marijan Pavčnik: Juristisches Entscheiden als intellektuell verantwortliche Aktivität, in: Frank Saliger et alt. (eds.): *Rechtsstaatliches Strafrecht. Festschrift für Ulfrid Neumann zum 70.* Geburtstag. C. F. Müller, Heidelberg 2018, pp. 295–308.

73 Pitamic, 1956, pp. 206–207.

Part II
Law, Policies and Politics

7 Criminal Law and Crime Policy in Transition Countries

Between Human Rights and Effective Crime Control

Alenka Šelih

The topic of the conference, organized on the occasion of the Faculty of Law centenary, "Law and (R)evolution 1920–2020: Past Experiences and Future Challenges", is an excellent point of departure for a short analysis of the causes and ways of how criminal law and crime policy have been developing in Central and East European countries after the "Big Change" of the 1990s. Elements of evolution and to some extent of revolution have been interchangeably applied in this part of the legal system, which has always been prone to political influences.

For quite some time, crime policy has faced the dilemma of whether to place higher priority on advancing human rights standards or strengthening the means of effective crime control. For many Central and East European (CEE) countries, this dilemma was of particular importance because human rights were the motivating factor in the processes of democratization in the 1990s. In Poland, at the beginning of these developments, it was the issue of civil and political rights that Solidarity first advanced in its actions.[1] It was these rights which in Slovenia activated broad social movements on problems such as environmental protection and gay and lesbian rights,[2] and brought tens of thousands of people to the streets in 1988 against a politically motivated criminal proceedings.[3] Finally, human rights issues finally made the famous hole in the border between Hungary and Austria through which – it seemed – socialism was escaping from its own countries. It was an illusion to think, at that time, that this perhaps represented the end of history, but nevertheless, it was felt in all CEE countries that a better and more open society was going to be established.

1 Bartosz Kaliski: Solidarity, 1980–1: The Second Vistula Miracle? In: Kevin McDermott, Matthew Stibbe (eds.): *Revolution and Resistance in Eastern Europe: Challenges to Communist Rule*. Berg 2006.

2 For the history of gay and lesbian movement in Slovenia since the 1980s, see Nataša Velikonja (ed.): *Dvajset let gejevskega in lezbičnega gibanja*. Društvo ŠKUC, Ljubljana 2004.

3 Gregor Jenuš: Proces proti četverici in Odbor za varstvo človekovih pravic, in: *Studia Historica Slovenica: časopis za humanistične in družboslovne študije* 7 (2007), p. 61.

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In these countries, crime policy was seen at that time as closely connected with human rights issues: the one-party system by itself produced systemic human rights violations in crime policy – for example, penal legislation in some cases violated certain basic political rights, an independent judiciary was not available, and the fair trial maxim was absent. These as well as other human rights violations occurred in particular countries at different levels at different times. The "socialist bloc" was far from being a monolithic entity.

In contrast to this, crime policy in countries with older, more established democratic systems was considered to be free of such systemic human rights violations. Nevertheless, crime policy in those states has shown different levels of respect for human rights in different trends of crime policy. Thus, for example, the rehabilitative model paid relatively little attention to this aspect. Indeed, it was later criticized for its lack of respect for offenders' human rights, even though it was centred on offenders and their (potential) re-socialization, and was implemented in the emerging and increasing social-welfare state where the responsibility of the state for its citizens was strongly emphasised.[4]

In the Western democracies, the new schools of crime policies that had emerged in the 1970s had brought human rights to the forefront of crime policy, in the form of *just dessert* ideology.[5] Prompted by the real or perceived unfairness of individualized sanctioning typical of the rehabilitative crime policy model, the *just dessert* ideology demanded the imposition of equal and just responses for similar offences. This tendency was strengthened by the ideas of restorative justice that demanded respect for the human rights of crime victims. However, these policies developed relatively quickly into policies of *law and order*, *incapacitation*, and others.[6] As a result, these latter policies seem to have been much less concerned with respect for human rights than they were with effective crime control, which in reality was translated into a more punitive approach to crime and criminals. It is safe to say that, in these perspectives, human rights lost their importance in the formulation of a liberal and humane response to crime.

In the 1980s and 1990s, the vocabulary of crime policy was broadened to embrace safety – an idea which started with *urban safety* and soon became a general concept. A new and strong emphasis on *security* became one of the most prominent goals of crime policy, and since its emergence it developed into probably the most important topic in crime policy. The risks of everyday life have been studied, and with them the all-embracing notion of the *risk society* has emerged since the 1980s as a leading paradigm in crime policy

4 Iain Crow: *The Treatment and Rehabilitation of Offenders*. SAGE 2001.

5 American Friends Service Committee: *Struggle for Justice: A Report on Crime and Punishment in America*. Hill & Wang 1971.

6 James Q. Wilson: *Thinking about Crime*, 2nd ed. Basic Books 1983; Franklin E. Zimring, Gordon Hawkins: *Incapacitation: Penal Confinement and the Restraint of Crime*. Oxford University Press, Oxford 1995.

as we know it.[7] Emphasis on the risks of crime, of becoming a victim, has become dominant[8] – so much so that the general public is ready to sacrifice some human rights protections long taken for granted, in order to achieve the feeling of greater safety. In this context, human rights protections for suspects, defendants, and offenders have lost their importance; it is the *security* of the society at large and that of the individual, combined with victims' rights, that has emerged as the new socially desirable goal to be achieved.[9]

The underlying *control theories* that helped to develop these crime policy orientations viewed crime and criminals as normal, routine elements of modern society.[10] Particular theories like those of *crime as opportunity*, *rational choice*, *situational crime prevention*,[11] and others have become very influential in the political environment that is determined to "fight the crime" in "a war on crime".[12]

This picture of evolving crime policies in the older democracies was in sharp contrast to what was going on at the same time in the CEE countries, where social discontent had become strong and was about to spill over. In these countries – which differed greatly in their crime policy orientations[13] – human rights and demand for their respect were the most important impulse for the changes. Some aspects of crime policy – decriminalization of verbal political offences, respect for freedoms of speech and of association, due process, fair trial, an independent judiciary, and the diminution of police powers – were in the forefront of social movements that had begun.

At the same time that "the Great Change" was occurring in the CEE countries and they were occupied with quite different tasks and not with crime policies, crime policy in the older democracies developed further in the same directions it had been taking at the end of the 1980s. From today's perspective,

7 Ulrich Beck: *Risikogesellschaft: auf dem Weg in eine andere Moderne*. Suhrkamp 1986.

8 This also lead to a heightened concern with measuring and controlling the fear of crime in communities and societies (see, e.g., Kenneth F. Ferraro, Randy LaGrange: The Measurement of Fear of Crime, in: *Sociological Inquiry* 57 (1987), p. 70; R. Taylor, J. Covington: Community Structural-Change and Fear of Crime, in: *Social Problems* 40 (1993), p. 374).

9 David Garland: *The Culture of Control: Crime and Social Order in Contemporary Society*. Oxford University Press, Oxford 2001.

10 Michael R. Gottfredson, Travis Hirschi: *A General Theory of Crime*. Stanford University Press 1990.

11 Derek B. Cornish, Ronald V.G. Clarke (eds.): *The Reasoning Criminal: Rational Choice Perspectives on Offending*. Springer 1986; Marcus Felson, Ronald V.G. Clarke: *Opportunity Makes the Thief: Practical Theory for Crime Prevention*. Home Office Policing and Reducing Crime Unit 1998. Ronald V.G. Clarke: Situational Crime Prevention: Theory and Practice, in: *British Journal of Criminology* 20 (1980), p. 136.

12 Jonathan Simon: *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear*. Oxford University Press, Oxford 2007.

13 For an illustrative comparison of Hungarian penal policy with those of Poland, Czech Republic, and Slovenia before and after the "Big Change", see Miklós Lévay: Penal Policy, Crime and Political Change, in: Alenka Šelih, Aleš Završnik (eds.): *Crime and Transition in Central and Eastern Europe*. Springer 2012.

it seems that the human rights agenda in the CEE countries had come at a time when in the older democracies its mobilizing strength had already been slowing down. In the 1990s, crime policy priorities in the Western democracies became focused on the risk of crime in post-modern society, the management of crime and its processes, governance of safety,[14] private-public partnerships in crime policy, and other similar topics. Very quickly, these developments produced results that were criticized in these countries themselves, but which have, in the field of crime policy, contributed as a general matter to more punitive orientations: increased numbers of prisoners;[15] the privatization of some traditionally state or public services, from private policing[16] to private prisons;[17] and the existence of an "exclusive" safe society and another "unsafe" one. All these developments were, in my view, very detrimental to the development of crime policies in the CEE countries, where at the same time demands for fair and humane crime policies, respect for human rights and fair trial and other civil liberties were at the top of agendas for reform of crime policies and legislation, which in some of these countries had been very punitive.

Immediately after the "Great Change" of the 1990s, the CEE countries were confronted with tremendous challenges: most of them had changed profoundly their state and economic structures. They were inundated with foreign experts, who knew very little about the political, economic, and social structures of the individual countries. Their advice sometimes was adequate, but often they simply reflected certain views of the world, of particular economic or social science schools, on various problems and which were largely unresponsive to the particular needs of these countries in transition. In some of the CEE countries, and Slovenia was one of them, not only the transition had to be managed, but the state or the nation had to be built at the same time – and in Slovenia, on the brink of the war. After a while, these countries started to understand that out of this "cocktail" of advice they had to choose those approaches they accepted as relevant. This, however, was not a simple and straightforward process, since there had been many interests behind all those proposals and advice.[18]

14 Two typical examples of such approaches are predictive or hotspot policing (see, e.g., Spencer Chainey, Lisa Tompson, Sebastian Uhlig: The Utility of Hotspot Mapping for Predicting Spatial Patterns of Crime, in: *Security Journal* 21 (2008), p. 4) and crime control through urban planning and spatial design (see Timothy D. Crowe: *Crime Prevention through Environmental Design: Applications of Architectural Design and Space Management Concepts*, 2nd ed. Butterworth-Heinemann 2000.

15 For a comprehensive comparative overview of prison rates in European countries, see Frieder Dünkel (ed.): *Kriminalität, Kriminalpolitik, strafrechtliche Sanktionspraxis und Gefangenenraten im europäischen Vergleich*. Forum-Verl Godesberg 2010.

16 Les Johnston: *The Rebirth of Private Policing*. Routledge 1992.

17 Sharon Dolovich: State Punishment and Private Prisons, in: *Duke Law Journal* 55 (2005), p. 437.

18 For an excellent overview of different approaches to establishing new political, institutional and economic systems in these countries, see Sabrina P. Ramet, F. Peter Wagner: Post-Socialist

In the midst of this process, when ten CEE countries were coping with preparations to enter the European Union, the 11 September 2001 events and their aftermath represented a tremendous turning point: to those crime policy professionals in the CEE countries who took "rights seriously", the changed attitudes and the visible lowering of human rights standards, which the Western countries had for decades proclaimed cornerstones of their free and democratic systems, were a terrible blow.[19] The introduction of measures that clearly did not advance or even violated basic human rights in the crime field was taken by some as a betrayal of an ideal for which they had been working for ten years. In a way, their view – perhaps naive – of liberal democracies as lighthouses for the preservation and respect for human rights, was shaken forever.

Developments in Slovenia are a good illustration in point. In contrast to most other CEE countries, Slovenia had, at least from the mid-1970s, not only a relatively low crime rate but also a relatively liberal crime policy, although some systemic human rights violations did exist (for example: political offences and no independent judiciary). On the other side, although the criminal law provided for the death penalty, this punishment was imposed for the last time in 1957. The rate of prisoners per 100.000 adults in the population was approximately 70 or 80, and the maximum penalty provided by law (not taking into account the death penalty) was 20 years of imprisonment.[20] In the 1990s this maximum was increased to 30 years – with the argument "that it is Europe that demands that" – and on 1 November 2008, life imprisonment was introduced without any persuasive argumentation. No research had been made into the problem, and no statistical data indicated a great rise in the quantity or seriousness of crime.[21] These changes simply reflected changes in the orientation of crime policy, its politicization, and politicians' expectations that they will be rewarded in the next elections for being "tough on crime".[22]

Models of Rule in Central and Southeastern Europe, in: Sabrina P. Ramet (ed.): *Central and Southeast European Politics Since 1989*. Cambridge University Press, Cambridge 2010.

19 See, e.g., Lucia Zedner: Securing Liberty in the Face of Terror: Reflections from Criminal Justice, in: *Journal of Law and Society* 32 (2005), p. 507.

20 Dragan Petrovec, Mojca M. Plesničar: The Societal Impact and Role of Imprisonment: An Example from Slovenia, in: Eoin Carroll, Kevin Warner (eds.): *Re-imagining Imprisonment in Europe: Effects, Failures and the Future*. Liffey Press 2014. Moreover, in that period the Slovenian penal system in general was based on humanistic ideas, such as socio-therapeutic treatment, while the government funded an extremely progressive and successful experiment of opening prison institutions (see Dragan Petrovec, Mitja Muršič: Science Fiction or Reality: Opening Prison Institutions (The Slovenian Penological Heritage), in: *The Prison Journal* 91 (2011), p. 425).

21 The introduction of life imprisonment encountered strong criticism by a larger part of the Slovenian (criminal) law doctrine (see, e.g., Katja Filipčič: Life Imprisonment in Slovenia, in: *Crimen* 10 (2019), p. 225; Alenka Šelih: Dosmrtni zapor in njegova odprava, in: *Zbornik znanstvenih razprav* 77 (2017), p. 7.

22 "Tough on crime, tough on causes of crime" was political slogan of the New Labour by Tony Blair.

It was not only the 9/11 events that changed so much in the crime picture: it seems as if the changes took place at a time when the general atmosphere in Western democracies was ready to embrace new types of crime policies. Even before 9/11, crime and insecurity dominated a large part of professional as well as public debate in these countries and became important aspects of social as well as political discourse. At the same time, responses to crime have been changing almost as much as crime itself. While the modern state provided security to its inhabitants predominantly by police and judiciary (and exceptionally by military), the post-modern state developed a series of agencies that served this end. If formerly safety had been left to "professionals", very soon security became an object dealt with by multiple agencies – a problem with which everyone was supposed to be involved. We all have become "partners against crime". At the same time, crime problems and security issues have ceased to be simply national problems; instead, their internationalization has become more and more widespread.

These and some other recent developments have contributed to essential redefinitions and changes in crime policies in the past ten years. Some of these new forms and types of crime policy have lowered or changed human rights standards that have been taken for granted for decades. It seems superfluous to mention in this connection cases like the Guantanamo Bay prison and the methods used there, but one must do that. In some other countries, the scope of criminalization had been expanded to include forms of behaviour that previously were not taken as criminal and represented only incivility or misbehaviour. Some EU measures taken against terrorism – especially the EU framework decision of 13 June 2002,[23] later replaced by the EU Directive 2017/541[24] – come very close to infringing on human rights standards by introducing the crime of terrorism as a political offence, an offence with a special motive, and one incriminating very early preparatory activities. These steps, according to critics, could be misused to silence political opponents.[25] Some countries very recently introduced *vigilante groups* to patrol streets in cities, towns, and villages.[26]

The CEE countries, which had long experienced crime policy in totalitarian regimes, have been stunned to see that that social and state systems that they had viewed as their democratic ideal (so to speak) are employing similar

23 Council Framework Decision of 13 June 2002 on combating terrorism [2002] *OJ L* 164, pp. 3–7.

24 Directive 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA [2017] OJ L 88, pp. 6–21.

25 Marieke De Goede: The Politics of Preemption and the War on Terror in Europe, in: *European Journal of International Relations* 14 (2008), p. 161.

26 See, e.g., Douglas Sharp, Susie Atherton, Kate Williams: Civilian Policing, Legitimacy and Vigilantism: Findings from Three Case Studies in England and Wales, in: *Policing and Society* 18 (2008), p. 245.

or even the same forms and methods that these countries experienced before. There are of course systemic differences between the two situations, but nevertheless it was not only sobering but indeed disappointing to see democracies reach for means and ways that the CEE countries had known from very different times and experiences. At the same time, these new ways, means, and forms have bolstered those tendencies in the CEE countries that previously had advocated more repressive and punitive responses to crime problems.

When talking about balance between human rights standards and effective crime control, one should stress the need for efficiency too. However, the post-modern society and the post-modern state should achieve it through ways and measures that respect basic human rights achieved previously.

Finally, one has to mention yet another important factor that has appeared in the world at large most recently: the financial and economic crisis. It has brought misery and poverty especially to underprivileged populations all over the world – those people who already before might have been prone to crime. The same holds true also for Western democratic countries as well as for the CEE countries: those parts of the population that had been in the most precarious economic and social positions before – "in the good times" – have suffered the most. Millions have lost jobs and millions have lost their savings; both have consequently lost economic sustainability or at least safety. Viewed from a human rights perspective, there is no doubt that the economic human rights of these population groups have been seriously violated. It goes without saying that such a situation is an ideal one for crime to increase.[27]

History teaches us that in a situation like the one the world is facing today, there exist two scenarios in which societies at large and along with them crime policies can develop: one leads in a more and more punitive direction, which may come close to violating human rights standards, and the other – more sustainable – would, regardless of the problems with which it is confronted, attempt to reconcile effective crime control with respect for human rights for all involved. We may now be at such a crossroads, and all those for whom human rights have mattered in the past as well as at present and into the future, and who have "taken rights seriously", should raise our voices in defence of human rights and, hence, in defence of freedom.

27 For an empirical support of this claim, see United Nations Office on Drugs and Crime: *Monitoring the Impact of Economic Crisis on Crime*, Final Report, 2012.

8 Evolution or Revolution?

The Future of Criminal Justice in England and Wales After Brexit

Nicola Padfield

Introduction

Professor Pitamic's Opening Lecture for the inauguration of the Law School at the University of Ljubljana in 1920 is (to me) astonishingly relevant to the United Kingdom (UK) of 2020. He was speaking in very uncertain constitutional times, which resonate closely with the uncertainties in the UK today. I start with a partial synopsis and critique of his lecture, relevant to my own interests. This leads me to apply his analysis (as I see it) briefly to Slovenia today, but more fully to the UK. Having looked at some of the crucial constitutional issues at stake, I address the future of criminal justice in England and Wales. The future looks as worrying as it did in 1920 to Professor Pitamic.

Professor Pitamic's Vision

Professor Pitamic starts and ends with 'Man himself' and the moral qualities required of all citizens to maintain and develop a nation. Moving swiftly over the fact that women don't explicitly feature in his lecture (I wonder how many were in the audience?[1]), it is important to note that this constitutional theorist wants to situate his lecture within the context of political and social morality. He sees that the challenges facing his new state at that time were exacerbated by the absence of a shared common political morality. As he says, "the concept of society is a normative problem". Clearly, man is a social animal, and societies need rules. But he goes much further: the US constitutional continuity (which he admires) rests on two *moral* forces (the emphasis is in the original): (1) the limitless trust placed in judges and (2) the high moral integrity of those judges, which justifies that trust.

1 There were many 'celebrations' in the UK last year of the centenary of the Sex Disqualification (Removal) Act 1919, which made it possible for women to qualify as lawyers (barristers or solicitors) for the first time. It is of course only 101 years since women achieved the vote.

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Trust in our legal institutions is today at a low ebb.[2] Yet it remains essential. People must be able to rely on 'their' judges (and their police, and other institutions, of course) if they are to respect the law. Roberts and Plesnicar[3] argue for stronger attempts to promote legitimacy in sentencing, that sentencers are perceived to be representative of the community and accountable for their decisions. In recent years, there has been a growing interest in the need for trust, and in the related concept of 'legitimacy'. Bottoms and Tankebe[4] explore the dynamic and interactive nature of legitimacy: legitimacy as a dialogue between claims to power and a justification of those claims by public agreement. Of course, trust and legitimacy overlap.[5] As Tyler and Jackson point out:

> When people ascribe legitimacy to the system that governs them, they become willing subjects whose behaviour is strongly influenced by official (and unofficial) doctrine. They also internalize a set of moral values that is consonant with the aims of the system. And – for better or for worse – they take on the ideological task of justifying the system and its particulars.[6]

Professor Pitamic would, I suspect, enjoy engaging with this literature. He starts with morality, but his overwhelming concern is the need for legal order. He was writing just after a successful 'revolution' had resulted in a new state. He was deeply troubled by the uncertainties surrounding the new legal order – what legal force the old Austrian laws still held, and who had the authority to amend them, for example. The only solution for him was a new constitution, and as soon as possible, for "if our wait for a constitution continues too long, all the questions raised here will have to be resolved by means of the custom-based law which emerges from the jurisprudence of the highest courts".

Would that be a bad thing? Professor Pitamic has a sneaking (if slightly mocking?) admiration for the UK constitution. After a lengthier discussion of

2 See M. Hough, J. Jackson, and B. Bradford, 'Legitimacy, Trust, And Compliance: An Empirical Test Of Procedural Justice Theory Using The European Social Survey' in Justice Tankebe and Alison Lieling (eds.), *Legitimacy and Criminal Justice: an international exploration* (Oxford University Press 2013).

3 J.R. Roberts and M. Plesničar, 'Sentencing, Legitimacy, and Public Opinion' in G. Mesko and J. Tankebe (eds.) *Trust and Legitimacy in Criminal Justice: European Perspectives* (Springer 2015).

4 A.E. Bottoms and J. Tankebe, 'Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice' in; 102 *J. Crim. L. & Criminology*, 2013, https://scholarlycommons.law.northwestern.edu/jclc/vol102/iss1/4

5 See J. Jackson and J. Gau, 'Carving up Concepts? Differentiating between Trust and Legitimacy in Public Attitudes towards Legal Authority' in E. Shockley, T.M.S. Neal, L. PytlikZillig and B. Bornstein (eds.) *Interdisciplinary Perspectives on Trust: Towards Theoretical and Methodological Integration* (Springer, 2016).

6 T.R. Tyler and J. Jackson, 'Popular legitimacy and the exercise of legal authority: Motivating compliance, cooperation and engagement' in 20 (1) *Psychology, Public Policy and Law* (2014), 78–95, 88.

the US constitution (to which I will return), he says of the "English" that they "are more inclined to follow tradition and customary law" and "dislike fixed, written constitutions". He paints a picture of what he calls the "simple" English system: "Parliament does not control judges and judges do not control Parliament. The problem of revolution does not arise, since there is nothing against which a revolution could be directed, as there is no constitution".

It is true that the British "constitutional monarchy", or what Professor Pitamic prefers to call a "parliamentary monarchy", does not have one written constitutional document or one law which is above all others. But we have a constitution in the UK, written in hundreds of Acts of Parliament, court judgements, and constitutional conventions. Its essential principles are disputed and continually evolving: Parliamentary sovereignty, the rule of law, the separation of powers. The flexibility of our constitution may explain why we have not had a revolution, but our constitution is being shaken very hard today.

Revolutionary things have indeed been going on in the UK. In this chapter I will argue that these revolutionary developments are related to three particular factors, all of which can be found in Professor Pitamic's analysis. First, today's politics has revealed a narrow nationalism, which leads to a fear of 'internationalism', a fear of foreigners and 'others'. This is crucial background to understanding Brexit. Second, the uncomfortable relationship between the constituent parts of the UK have become much more obvious: here there are clear parallels with the experience of the former Yugoslavia. Is Slovenia better off as an independent nation, or better off as a constituent unit in a multi-ethnic polity alongside the other Yugoslav nations? What or who is a Slovene or a Serbian, anyhow? Professor Pitamic makes the common mistake of confusing the 'English' with the British. Or maybe he was talking simply of the English when he discussed the United Kingdom? The third factor is the uncertainty which surrounds the balance of power between Parliament, the executive and the judiciary. It is Professor Pitamic's view that a constitutional document can help resolve some of these problems. We return to all three issues below.

Professor Pitamic loves a good constitution. For him, statute is secondary to the constitution, but he is also clearly wary of "the shortcomings of a text and the omnipotence of interpretation". It would seem that he prefers the constitution of the US, which he calls a "judicial republic". He comments:

> It is a testament to the wisdom of the American Founding Fathers that having realised the logical necessity of bestowing this great sovereign power to one branch of government – i.e. to the legislative, executive or judicial powers – they chose to entrust it to the judicial branch, the one which is politically weakest because of its constitution and competences, that is least prone to undertaking reckless or politically motivated experiments and, finally, the one which is able to effect constitutional change only gradually, by deciding discrete cases.

Why is this such a good thing? "It illustrates the difference between a revolution waged by official interpretation and a revolution that destroys the body of a state". Professor Pitamic is very nervous of over-mighty legislators. That is the position that he saw in "Europe": in Europe, Parliament has the last word on constitutional interpretation; in America, it is the judge. This leads to what he calls a *psychological* difference between these two systems (again, the emphasis is in the original):

> A parliament will be composed of politicians, who are by virtue of their profession closely tied to their parties and will rarely exercise their powers in constitutional matters in an objective manner, but rather in a party-political fashion. This has been shown in the majority of European states. In America, this great power is entrusted to an independent, irremovable, well-chosen, well-trained and sufficiently remunerated judge, who is by virtue of his education and profession accustomed to deciding in an objective and sober manner, and who cares more about the good of the state and mankind than the advancement of political parties.

For Professor Pitamic, independent and honourable judges are to be trusted more than politicians, who seek short-term political advantage:

> It seems to me an expression of great culture of mind, heart and will if a people entrusts a judge – as a symbol of justice from time immemorial – with this great power; and a sign of an equally great culture if the judge indeed honours that trust, which all those intimately familiar with North America will admit to be the case. In countries with strict parliamentary systems and, in particular, in countries composed of regions that lack a common political tradition and where bitter political conflict can occur, I believe that in addition to administrative courts, a *constitutional court* should be introduced, to exercise control over Parliament.

Professor Pitamic's passion for trustworthy government gives his lecture a contemporary ring. We see the danger of dominant party-politics all around us today. We hope that he is right that most judges care more about the good of the state and humankind than their own advancement. And he is probably right that elected politicians appear to care more for the advancement of their parties. This may be because they believe that their party is best equipped to advance the good of the state, but it may also lead them to shake the legal order.

He was a great deal more than a legal theorist. Having been chancellor of the University of Ljubljana between 1926–27, he was the ambassador of the Kingdom of Yugoslavia to the US from 1929 to 1935. He went back to teaching at the universities of Ljubljana and Zagreb. In 1940–41, he was elected Dean of the Faculty of Law once again and remained a working Professor until 1952, when he finally retired. Much else had been going on. In 1948, the Communist regime expelled him from the Academy of Sciences and Arts. He

lived on until 1971. He seems to have been a practical intellectual, a man who realised the vital importance of combining theory, law and practice.[7]

The Boundaries of Freedom

As Professor Pitamic says, society can only exist in a state of limited freedom. Defining the boundaries of that freedom is our challenge. In this part of the chapter, I shall make a few comments on Slovenia in 2020 and say more about the UK today. I explore constitutional questions before turning specifically to questions of criminal justice. While the chapter may not share all of Professor Pitamic's views of the common law, it will share his conclusion that "ethical attributes and moral sense" must be found not only within judges but also within all of a State's citizens. Brexit has come about in part because of a failure of citizens to engage adequately with crucial moral, political and legal questions. And politicians have to take a significant criticism for their failure to lead public opinion appropriately. The possible adverse consequences of Brexit are obvious, both in criminal justice but also in relation to broader questions of political stability. But we start with Slovenia.

A Brief Constitutional Review: Slovenia 2020

I am a criminal lawyer, not a historian, and my knowledge of the world in which Professor Pitamic lived and worked is largely based on Macmillan[8] and an excellent recent BBC radio programme.[9] As I understand it, the Serbs, Croats and Slovenes got together in large measure because they did not want to be small countries in an unstable world. The Paris peace conference after World War I (1914–18) was an extraordinary event dominated by strong men and powerful politics. A new state was born in the Balkans in 1919, but tensions continued throughout the next few decades. The socialist federal republic of Yugoslavia established by Josip Broz Tito after World War II (1939–45) was very different from the state established in 1919: it was not only a republic, but it was also federal. Tito did not want one class or one 'nation' to dominate. But in order to achieve his goals, he maintained a highly centralised party. This 'strongman socialism' collapsed with his death. The

7 I was reminded while writing this of Professor Nigel Walker, who called his memoires '*A Man without Loyalties*'. It was a surprising title, since he always appeared deeply loyal to his colleagues and to the institutions he served. The title simply suggests that he never really identified with the institutions in which he worked: even as Director of the Institute of Criminology at the University of Cambridge, he preferred to keep a critical distance. In his own, rather naughty, words he says, "I have been a man without loyalties. Friendships and enmities are more rewarding" (p. xiii). Was Professor Pitamic of a similar disposition?

8 M. Macmillan, *Peacemakers: Six months that changed the world* (John Murray 2001).

9 Bridget Kendall explored the history of the history of the Treaty of Versailles – in five future wars: www.bbc.co.uk/programmes/m00066yn/episodes/player

glue which held Yugoslavia together also collapsed, very painfully. Any vision of peaceful co-existence disappeared. And so, we get to the birth of Slovenia in June 1991. Slovenia became the first republic that split from Yugoslavia to become an independent sovereign state. The fragmentation of Yugoslavia and the absolutely ghastly series of wars which took place between 1991 and 1999 remind us that Professor Pitamic's concern for the rule of law was well-placed.

What would Professor Pitamic have to say today? I cannot comment on whether the current division of the former Yugoslavia into a number of quite different states is to be welcomed or not, but the term 'Balkanisation' is sometimes used in and of the UK today. It is a somewhat derogatory term for the process of fragmentation or division of a region or state into smaller regions or states that are often hostile or uncooperative with one another (to use Wikipedia's definition). The similarities between the history of 'the Balkans' and the current malaise in the UK is clear.

On 1 May 2004, Slovenia joined the European Union (EU), which opened a new chapter in the country's constitutional history. Again, the answer to the question whether this was purely a 'good thing' is not straightforward. Back in 2006, I wrote an article with Professor Katja Sugman entitled 'The spread of EU criminal law'. We concluded that "In Slovenia's case, unbridled pro-EU euphoria combined with a lack of attention to criminal law issues, led to the uncritical copying of solutions without understanding what they really meant or without questioning their necessity".[10] Did Slovenia really need to introduce life sentences, for example? We were concerned to argue for a coherent criminal justice policy which respected fundamental human rights and which recognised that there might be significant value in diverse legal practices. It is this fear of ever greater harmonisation, without adequate respect for difference and history, which has led to some of the resistance to the EU in the UK today. What would Professor Pitamic have to say? He would surely have approved of the Council of Europe and the European Convention on Human Rights, but would he have advanced some caution about the growth in size and power of the EU?

A Fuller Critique: The United Kingdom 2020

How does the UK fit into this critique? Are we seeing a 'Balkanisation' of the UK? Brexit in the early 21st century is certainly what Professor Pitamic calls "an experiment with unpredictable consequences". Will the state remain the same despite changes in its legal framework? Will Brexit lead to a greater fragmentation of the country, or is it simply a symptom of an underlying disenchantment with the political processes?

Professor Pitamic described the English system of Government as 'simple', not least because there is no constitution. Of course, there is no one constitutional document, but 'constitutional law' is found in a mass of legislation and

10 N. Padfield and K. Šugman, 'The spread of EU Criminal Law', in 7 *Archbold News* (2006) 9.

case law, and where constitutional conventions also play a key role.[11] We have a flexible constitution, built on a common shared political morality.[12] Today, though, this political consensus is being tested to breaking point. Three factors were identified in the introductory section: a narrow sense of nationalism which leads to a fear of 'internationalism', the uncomfortable relationship between the constituent parts of the UK, and the uncomfortable relationship between Parliament, the executive and the judiciary.

First, there's the fear of others, the fear of internationalism. Brexit (the withdrawal of the UK from the EU) seems to be based largely on fear of 'those people in Europe'. This commentary is not written by a political scientist, but I remain personally convinced that the UK would have been better off within the EU than outside of it. The quality of debate which led to the referendum result in June 2016 was very poor, and opinions have remained polarised ever since. Of course, relationships with 'Europe' have been unsettled throughout history. In the late 1940s, the UK saw itself at the heart of European peace plans, taking the lead in setting up the Council of Europe (originally with 12 members, now with 47), and British lawyers were in the forefront of drafting the Council's most famous creature, the European Convention on Human Rights. One version of history would say that the UK was not a founding member of the European Economic Community (EEC) simply because General de Gaulle did not invite it in. The UK joined on 1 January 1973, as a result of the European Communities Act 1972. Two and a half years later, the UK enjoyed its first nationwide referendum: 67% voted in favour of staying in the EEC, on a national turnout of 64%. Since then there has been a loud political anti-European message, often based on myth and fantasy. The two main political parties have appeared ambivalent, not knowing whether their electoral chances were improved by continued membership or not. But many of those who remain committed Europeans are nervous that the EU grew so fast, not only in numbers (to the current 28 Member States) but also in ambition and political reach. What began as a purely economic union, a single market, has become a more political union. Decision-making processes are not well understood.

The second factor raised in the opening section was the uncomfortable relationship between the four different jurisdictions contained within the UK. History can explain how we got to where we are today: the current relationship between the English, Scots, Welsh and Irish people, and their governments, reflects centuries of complex power struggles. The UK has never really been a 'unitary' state, in that it comprises four separate 'countries', but

11 N. Padfield, 'The Implementation of the European Arrest Warrant in England and Wales: Between Trust, Democracy and the Rule of Law', in 3 *European Constitutional Law Review* (2007) 253–268.

12 For inspiring analyses, see T.R.S. Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (Oxford University Press 2013).

the powers devolved to the countries are delegated by the 'mother' Parliament of the UK (which can be seen as the successor to the Parliament of Great Britain, formed in the Acts of Union 1707). I won't explore the key events in the 16th to 20th centuries, nor even review more recent political history. We can start with the Royal Commission on the Constitution, also referred to as the Kilbrandon Commission, which was set up by the Labour government in 1969.[13] It took four years to report, by which time the UK had a Conservative Government and had joined the EEC. After another change of government, a new Labour government published a White Paper *Democracy and Devolution: Proposals for Scotland and Wales*, which led to the unsuccessful Scotland and Wales Bill. The Scotland Act 1978 and the Wales Act 1978 were then passed, but neither could come into force unless approved by referendums. Devolution referendums were held in March 1979 in Scotland and Wales. The Welsh assembly was rejected by a majority of voters, while Scottish devolution was supported by 51.6% of those voting, or 32.9% of those on the electoral register. Since the Act had specified that it must have the support of 40% of the entire electorate, that referendum too was lost. The Acts were repealed, the Government lost a 'no confidence' vote and there was another general election, which brought in Margaret Thatcher and 18 years of Conservative rule.

Scottish and Welsh devolution was finally implemented under the next Labour government, elected in 1997, by the Scotland Act 1998 and the Government of Wales Act 1998, following further referenda. The Scotland Act 1998 delineates the legislative competence of the Scottish Parliament by explicitly specifying powers that are 'reserved' to the UK Parliament, i.e., the Scottish Parliament may legislate in all areas that are not explicitly reserved to Westminster. This is important: criminal justice laws and practice, for example, are significantly different in Scotland from those in England and Wales. The Welsh Assembly had no powers to initiate primary legislation until limited law-making powers were gained through the Government of Wales Act 2006 (following a Yes vote in another referendum in March 2011). It can legislate without consulting the UK Parliament or the Secretary of State for Wales in the 20 areas that are devolved, which include health, education, economic development, transport, the environment, agriculture, local government and some taxes, but not criminal justice. The Assembly was renamed the Welsh Parliament in May 2020.

The position in Northern Ireland is even more difficult to summarise. Northern Ireland was created in 1921, when Ireland was partitioned by the Government of Ireland Act 1920. Unlike the south, which became the Irish Free State in 1922, the majority of Northern Ireland's population were unionists, who wanted to remain within the UK. Three decades of conflict, known as the Troubles, which cost thousands of lives, ended (we hope) with the

13 Kilbrandon Commission (1973) *Report of the Royal Commission on the Constitution* (HMSO 1973).

Good Friday agreement of 1998. The Northern Ireland Act 1998 established the Northern Ireland Assembly, with responsibility for a range of devolved policy matters. One of the issues which is so worrying about Brexit is the challenge to the sensitive relationship between the north and the south. The Good Friday agreement granted the Republic the ability to "put forward views and proposals" with "determined efforts to resolve disagreements between the two governments". Even without Brexit, the power sharing agreement in Northern Ireland appeared to have broken down, with three years of deadlock and no functioning government in Northern Ireland from 2017, due to disagreements between the two main political parties. The Assembly resumed in January 2020, shortly before the UK left the EU.[14]

This summary of devolution suggests that we may be becoming an increasingly 'Disunited Kingdom'. Scottish, Welsh and Irish nationalism are alive and indeed thriving. There may be few calls for English nationalism, but there are limits to English tolerance.[15] The UK remains a unitary state, with different powers devolved from the UK Parliament to the Scottish Parliament, the Welsh Parliament, the Northern Ireland Assembly and the London Assembly and to their associated executive bodies, the Scottish Government, the Welsh Government, the Northern Ireland Executive (and in England, also to the Greater London Authority and other 'combined authorities'). There is much uncertainty about the appropriate roles for national, international, regional and local authorities.

Third, and finally, we must confront the uncomfortable relationship between Parliament and the executive in the UK constitution. I have (until now) believed that a slightly uncomfortable tension between Parliament and the executive was healthy for our constitution. The constitution is, after all, a compromise. The 'separation of powers' works imperfectly everywhere and requires effective 'checks and balances', but the uncertainties underlying this tension have recently come very much to the fore. Howarth[16] usefully contrasts what he calls the Westminster view, with Parliament at the heart of Government, with the Whitehall view, where Parliament is largely peripheral, there to support the party in power, the party who won the most recent election. At the time of this writing,

14 This paper was written for a conference in Slovenia in March 2020. It has been finalised on 1 October 2020. In the 7 months, between these two dates, the world has been dominated by the Covid-19 pandemic. But the consequences of Brexit (and the constitutional nightmares) continue to evolve: see the deeply controversial UK Internal Market Bill 2019–21, introduced into the House of Commons in September 2020. In particular, the clauses with regard to Northern Ireland (market access for goods and state aid) are causing huge concern, both in the EU and the UK, with their potential breaches of international law (the EU-UK Withdrawal Agreement).

15 My thanks to Professor Mike Kenny: I have attended two excellent lectures by him in the last year which have deepened my understanding of these issues.

16 D. Howarth, 'Westminster versus Whitehall: Two Incompatible Views of the Constitution', *U.K. Const. L. Blog* (10 April 2019), https://ukconstitutionallaw.org

it looks as though Westminster (and the concept of 'parliamentary sovereignty') is winning the most recent battle in a long-standing war.

In the important case of *R (Miller) v The Prime Minister; Cherry and others v Advocate General for Scotland* [2019] UKSC, the Supreme Court was asked whether the advice given by the Prime Minister (by now Boris Johnson) to the Queen on 27 or 28 August 2019, that Parliament should be prorogued from a date between 9 and 12 September until 14 October, was lawful and to explain the legal consequences if it was not. This felt like a very political question, and there was much debate as to whether or not the Court would wish to interfere. But the eleven Justices decided unanimously that the decision to advise the Queen to prorogue Parliament was unlawful because it had the effect of frustrating or preventing the ability of Parliament to carry out its constitutional functions without reasonable justification. The Prime Minister had offered no justification. Having decided that the advice was unlawful, it was clearly void and of no effect. This meant that the Order in Council to which it led was also unlawful, void and of no effect and should be quashed. This meant that when the Royal Commissioners walked into the House of Lords, it was as if they walked in with a blank sheet of paper. Parliament had not been prorogued.

So, Parliament resumed. The tussle continued. Eventually the Prime Minister, Boris Johnson, persuaded both the EU and Parliament to accept his version of a withdrawal agreement. He called a general election, which his Conservative Party won very convincingly. The UK left the EU in January 2020. Our constitutional and political future remains, to me, bleak or, at the very least, foggy.

The Future of Criminal Justice?

So now we turn at last to the future of criminal justice in England and Wales post-Brexit. Domestically,[17] what we have seen in the last ten years has been 'austerity', which has led to massive cuts in the budgets of the police, the Crown Prosecution Service, prisons and probation services. These cuts have led to many a crisis, which suggests that the system is close to a breaking point.[18] Between 2010 and 2018, the number of police officers dropped by 15%. The Crown Prosecution Service had a budget decrease of almost 30% between 2010 and 2014, and is still struggling. Prison regimes have been particularly hard hit, with HM Chief Inspector of Prisons announcing an extraordinary decline in safety and care in many prisons over recent years, with rising levels of violence and self-harm. The Government accepted that its privatisation of probation services was a policy failure. In 2021, the National Probation Service (NPS) took back

17 It will have become clear that when I discuss 'domestic' criminal justice, I refer to England and Wales, since Scotland and Northern Ireland have rather different systems.

18 This was the conclusion of the influential Committee of Public Accounts of the House of Commons (2016).

responsibility (from the failed Community Rehabilitation Companies) for the supervision of all offenders. This is not (yet) the wholesale returning of probation 'services' to the public sector, since new 'innovation partners' will be responsible for delivering unpaid work and rehabilitative services, but hopefully an improvement.

Against this backdrop of enormous financial cuts, we have also witnessed some useful co-operation between criminal justice agencies across Europe. At the same time, EU criminal law has been developing fast.[19] It is based on mutual trust, not yet harmonisation or unification. Useful developments include, for example, the European Arrest Warrant, which has provided a simplified method for transferring suspects between Member States, and the European Investigation Order, which promises much.[20] Europol and Eurojust have enabled much better joined-up law enforcement. The value of other EU institutions is difficult to evaluate. For example, OLAF (the European anti-fraud office, which investigates fraud against the EU budget, corruption and serious misconduct within the European institutions, and develops anti-fraud policy for the European Commission): can we be confident of its effectiveness?

What will happen to these developments now that the UK has left the EU? Mutual trust will hardly have been strengthened! Perhaps the UK will be seen no longer to fulfil the level of fundamental rights as enshrined by the Charter of Fundamental Rights? Who knows. Irish courts have already asked the CJEU whether the UK's notification to leave the EU (according to Art. 50 of the Treaty on European Union) provided sufficient ground to refuse EAW requests issued by the UK. The EU has already started legal action against the UK over what is widely seen as a breach of the withdrawal agreement.[21]

The government of Prime Minister Theresa May was well aware of the risk of a 'no deal' Brexit. It laid the Law Enforcement and Security (Amendment) (EU Exit) Regulations 2019 (SI 2019 No 742) before Parliament.[22] The Government explained that we "currently participate in around 40 EU measures that support and enhance security, law enforcement and judicial cooperation in criminal matters". If we have a 'no deal' Brexit, our access to all these 'tools' will end. The then Minister for Policing and the Fire Service (Nick Hurd) said in Parliament in February:

> By way of context, the Committee will, I am sure, be aware that the UK currently participates in a number of EU tools and measures that

19 See C. Briere and A. Weyembergh (eds.) *The Needed Balances in EU Criminal Law: Past, Present and Future* (Hart 2017); and V. Mitsilegas, *EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe* (Hart 2016).

20 The EU Directive 2014/41/EU was implemented domestically in the Criminal Justice (European Investigation Order) Regulations 2017.

21 www.bbc.co.uk/news/uk-politics-54370226

22 www.legislation.gov.uk/ukdsi/2019/9780111178102/memorandum/contents

> support security, law enforcement and judicial co-operation in criminal matters, some of which, such as the European arrest warrant or Europol, will be very familiar. We also participate in a number of security-related EU regulatory regimes related to firearms, drug precursors and explosive precursors. Should the UK leave the EU without an agreement next month – the no-deal scenario – the UK's access to those tools and measures would cease. At the same time, the UK would cease to be bound by those security-related EU regulatory systems. That decoupling would occur as a result of the UK having withdrawn from the European Union.[23]

The risks involved in this 'decoupling' are obvious and worrying. It seems to me to be deeply misguided even to consider walking away from the improved co-operation in criminal matters. We must, of course, recognise that all is far from perfect in the European Union. We have to be vigilant to ensure that both suspects' and victims' rights are well entrenched in new processes. This is not easy in a union of 28 countries with very different histories and very different political priorities. The Court of Justice has become more engaged with criminal justice concerns, such as the state of prisons throughout Europe. In the well-known decision in *Aranyosi and Caldararu* (Joined Cases C-404/15 and C-659/15), the Court decided that, in extradition cases, if the executing authority "finds that there exists . . . a real risk of inhuman or degrading treatment, . . . the execution of that warrant must be postponed" (para. 98). It must be a welcome decision that Member States can refuse to execute EAWs issued by countries which fall below recognised standards. It has been fascinating to watch, for example, Dutch courts require the French authorities to provide further information to address the question whether there was a real risk of inhuman and degrading treatment in certain French prisons.[24] There have been similar challenges in many jurisdictions.

It is also important to recognise that simplified procedures are rarely genuinely very simple. An example is the dispute as to who, in fact, is a 'judicial authority' empowered to order an arrest. It is to me surprising that even in 2019 there could still be surprises. In May 2019, the CJEU gave judgment in the cases of *Public Prosecutor's office of Lübeck* (C-508/18 OG), *Public Prosecutor's office of Zwickau* (C-82/19 PPU PI) and in *Prosecutor General of Lithuania* (C-509/18 PF). The Court considered two Lithuanian nationals and one Romanian national who were challenging the execution of European arrest warrants issued by German public prosecutor's offices and the Prosecutor General of Lithuania. The question was whether the prosecutors

23 https://hansard.parliament.uk/commons/2019-02-27/debates/709fcd91-33af-4e98-bdfc-f919cf2cf414/DraftLawEnforcementAndSecurity(Amendment)(EUExit)Regulations2019

24 Court of Amsterdam, 13/751468–17, 30 May 2017 and 17 August 2017.

were independent judicial authorities since they were part of an administrative hierarchy headed by the Minister for Justice. The CJEU ruled that the German prosecutor's office did not provide a sufficient guarantee of independence from the executive for the purposes of issuing a European arrest warrant. This challenge would have been unthinkable even a few years ago.[25]

We have seen wonderful moves towards 'mutual recognition' (which remains difficult), but British authorities (as others elsewhere) still break the law (or take shortcuts?) when it suits them. A really shocking case was *Warren v AG Jersey* [2011] UKPC 10, where the Privy Council (in effect, the Supreme Court sitting as the final appeal court for Jersey, in the Channel Islands) held that a conviction was safe where the police had put a listening device in the car of a suspect who was about to drive through France and Germany, without getting the permission of the French and Dutch authorities to use listening devices on their national territory (indeed, knowing that they would refuse permission). Pragmatism is alive and well in the criminal justice system. The need to value fundamental human rights is as important in 2020 as it was in 1920.

Relationships between the UK and that other Europe represented by the European Court of Human Rights (ECtHR) remain and will remain somewhat 'edgy'. Recent governments have been quick to criticise the ECtHR on subjects such as prisoners' right to vote or the legality of the 'whole life tariff' in life sentences (on both topics, see Creighton, Padfield, and Pirosa 2017). Sometimes politicians have even sought to challenge the legitimacy of the ECtHR – those foreign judges, some of whom are simply academics! And it is not only the Government which responds negatively to the ECtHR – there have been some obvious tensions between the English domestic courts and the ECtHR. The most dramatic example (so far!) was the massive debate about the use of hearsay evidence at trial. A forceful Supreme Court in *Horncastle* [2009] UKSC 14 persuaded the ECHR to take a step back from its criticism of English law in *Al-Khawaja v UK* (2012) 54 EHRR 23. But there are other examples. The English Court of Appeal in *McLoughlin and Newell* [2014] EWCA Crim 188 seems to have convinced the ECtHR (wrongly in my eyes) that the possibility of compassionate release in English law could justify 'whole life' tariffs. The response of the majority[26] of the ECtHR in *Hutchinson v UK* [2017] ECHR 6 was very disappointing, as it pulled back from its more forthright condemnation of English practices in *Vinter v UK* (2016) 63 EHRR 1.

So, we see a European Court of Justice beginning to show concern for criminal justice values and a European Court of Human Rights which continues to hold Member States to account for human rights violations, all in

25 But see also CJEU, Grand Chamber Judgement of 8 Dec. 2020, No. C-584/19 (*Staatsanwaltschaft Wien*), ECLI:EU:C:2020:1002, para 76.).

26 To my mind, Judge Pinto's dissent was much more convincing.

the context of domestic financial austerity and political tensions. But the institutional, constitutional and legal challenges which stand in the way of good UK–EU relations in the future are obvious.

Conclusion

Justice, particularly criminal justice, is difficult to achieve – in law and in practice. We live in a world[27] quite as confused as that described by Professor Pitamic. We may not be recovering from the realities of a war which had just seen over 16 million people killed, but it is a time of immense uncertainty, threatened by many insecurities and challenges which are global in nature. Of course, it is crucial that European states continue to improve their mechanism for cooperation. Personally, I think the UK needs to be inside the world's clubs, not outside. Isolationism is irresponsible.

The relationship between the European Union and the UK after Brexit will undoubtedly be complex. There will probably be more litigation (though this depends in criminal justice on the availability of good-quality legal advice and representation to suspects, offenders and prisoners). The relationship between the European Court of Human Rights and the UK may become even rockier than it has already been for many years. The domestic courts will doubtless build upon the common law tradition of civil liberties and human rights. The future of our constitution, and of the relationship between the different jurisdictions/countries within the UK, I find absolutely impossible to guess. It may be that we are facing a political or constitutional revolution; in criminal justice, it feels more like the usual evolution. The 'system' continues to be pushed to save money and to take shortcuts to justice; the need for due process, to re-balance the system in favour of the underprivileged, is clear.

Let us return to Professor Pitamic. He was concerned to argue that in "countries composed of regions that lack a common political tradition and where bitter political conflict can occur", a constitutional court should be introduced to exercise control over Parliament. He would presumably be delighted that professors in this faculty now sit on the Constitutional Court of Slovenia. He would (I think) be impressed that the UK Supreme Court (a constitutional court if not in name?) struck down the Prime Minister's decision to prorogue Parliament for five weeks at a crucial juncture in the Brexit process. But what he would make of the UK's constitution right now is difficult to say. In the introduction, I briefly explored concepts of trust and legitimacy, which did not feature in Professor Pitamic's analysis,

27 Perhaps we should apply Professor Pitamic's analysis far beyond Europe: see for example, J. Chan, 'A Storm of Unprecedented Ferocity: Shrinking Space for Political Rights, Public Demonstrations and Judicial Independence in Hong Kong', in *International Journal of Comparative Constitutional Law* (2018).

but which are crucial to any evaluation of criminal justice today. Trust and legitimacy are important ingredients to any political settlement – but also vital if people are to be expected to obey the law. Let us end, as Professor Pitamic does, with his call for the "moral qualities" required of all citizens to maintain and develop a nation, moral qualities which require us to have a concern for those most vulnerable to the use and abuse of power. Equality before the law and fair treatment are vital components of justice. Those of us concerned to preserve human rights, and a criminal justice system based on trust and legitimacy, need to be vigilant – and to speak out.

9 Law, Evolution and Constitutional Courts

Maria João Antunes

Introduction

On 15 April 1920, Leonid Pitamic said that

> the concept of revolution rests on the essential that the rearrangement or overthrow being effected is justified by a system distinct from the one being overthrown; if justification can be found *in the same system*, the upheaval is no longer revolution, but *evolution*.

Nowadays, constitutional courts perform this role as they can determine that a particular statute no longer conforms with the Constitution, establish that the meaning of a particular constitutional norm has changed or that the law which governs a new issue is consistent with the Constitution. This contribution evaluates this role of the constitutional courts by reviewing certain pertinent cases of the Portuguese Constitutional Court.[1] In the 1960s the predictions were that the 20th century would be remembered as the century of the constitutional courts.[2] Today, those predictions seem to have been right. Constitutional courts play an important role in the creation of the law, even if we cannot see their decisions as a formal source of law: they have the role of the "supreme interpreter" of the Constitution, for example, interpreting the fundamental right to life as including intra-uterine life[3]; they identify the principles and rules which are implicit in the Constitution, such as the guilt principle in criminal matters[4]; and they define the meaning of constitutional principles

1 All the cases discussed herein are available at www.tribunalconstitucional.pt. Almost all of them are also summarised in English.

2 See Mauro Cappelletti: Il Controlo Giudiziario di costitutzionalità, apud Maria Lúcia Amaral: "O modelo europeu de justiça constitucional. Origens e fundamentos, in: Estudos em Memória do Conselheiro Artur Maurício. Coimbra Editora 2014, p. 1027.

3 In Portuguese Constitutional Court, on this subject, see Rulings 25/84, 85/85, 288/98, 617/2006 and 75/2010.

4 In Portuguese Constitutional Court, about this subject, see Rulings 43/86, 426/91, 274/98, 124/2004, 605/2007, 80/2012, 102/2015, 56/2016 and 124/2016.

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such as human dignity, rule of law, equality or proportionality.[5] Although constitutional courts cannot substitute for the legislator, constitutional jurisprudence has a positive impact on the law-making process. The rule of law giving primacy to law and consequently to the principle of legality has given way to the rule of law which gives primacy to Constitution and consequently to the principle of constitutionality that imposes the subordination of legislation to the Constitution where fundamental rights are incorporated.[6]

In the 20th century, a culture of legality evolved into the culture of constitutionality. After the debate between Carl Schmitt (*Der Hüter der Verfassung*) and Hans Kelsen (*Wer soll der Hüter der Verfassung sein?*) on the "keeper" of the Constitution, the Kelsenian idea that the Constitution should be "kept" by the courts and judicially guaranteed prevailed over the Schmittian idea of a distinction between the Constitution and constitutional law and, consequently, of the implication that the courts cannot "keep" the Constitution.[7] In the same vein, the rule of law which guarantees respect for the Constitution had also incorporated into it fundamental rights and vested the power to protect these rights and exercise control over the legislature in a special constitutional court.[8] The incorporation of fundamental rights into the Constitution is not enough, and the legislator's best control is a constitutional court.[9]

Conformity With the Constitution Changing Over Time

Sometimes, legislation has to change because it is no longer consistent with the Constitution, even if it has originally been found to be constitutionally conformed. An example is seen in the decisions concerning the legislation on the time limits for the paternity investigation action and the donor anonymity in heterologous reproduction. This type of decision raises the question of

5 About Portuguese constitutional jurisprudence on some of these subjects, see the Reports "O Princípio da Dignidade da Pessoa Humana na Jurisprudência Constitucional", "O Princípio da Proporcionalidade e da Razoabilidade na Jurisprudência Constitucional, também em relação com a Jurisprudência dos Tribunais Europeus" and "The rule of law and constitutional justice in the modern world", available at www.tribunalconstitucional.pt. According to Article 277 (1) of Portuguese Constitution, not only norms that contravene the provisions of the Constitution but also the principles enshrined therein are unconstitutional.

6 About this evolution, see Gustavo Zagrebelsky: *El derecho dúctil. Ley, derechos, justicia*. Editorial Trotta, Madrid 1995.

7 About this debate, see Amaral, 2014, pp. 1031ff; and Reis Novais: *Direitos fundamentais e justiça constitucional em estado de direito democrático*. Coimbra Editora, Coimbra 2012, pp. 189ff.

8 In this sense, Robert Alexy: La institucionalización de los derechos humanos en el estado constitucional democrático, in: *Derechos y Libertades* 5 (2000), 8, pp. 37ff.

9 Although nowadays remains the question about the best way to control the lawmaker: by the court, by the democratic process or even by "taking the Constitution away from the Courts" (Mark Tushnet). About this discussion, in Portugal, Novais, 2012, pp. 149ff, 183ff and 217ff; and Rui Medeiros: *A Constituição Portuguesa num contexto global. Universidade Católica Editora*, 2015, pp. 90ff, 115ff, 123f, 224ff, 232ff.

whether we are still in the context of the interpretation of the Constitution or whether we are already facing a constitutional mutation. If there is only a different balancing exercise of the rights involved or if there is a real change in the meaning of a constitutional rule, without the text changing.[10]

Time Limits for the Paternity Investigation Action

The rule set forth in paragraph 1 of Article 1817 of the Portuguese Civil Code provides for time limits for the paternity investigation action, originally setting it at two years and now at 10 years after the child has turned 18 years old. The issue whether this time limit is unconstitutional or not has traditionally been dealt with by balancing the competing interests: the right to personal identity and to establishing one's paternity, on the one hand, and the right to respect for the privacy of family life and intimacy as well as legal certainty, on the other. This balancing exercise would be conducted in accordance with the principle of proportionality.

In the past, the Constitutional Court had considered that the time limit of two years set forth in Article 1817(1), as drafted by Decree-Law 496/77 of November 25, was in conformity with the constitutional norms (Rulings 413/89, 451/89, 311/95 and 506/99). In subsequent development, however, the Court decided that same rule was not in conformity with the same constitutional norms because the time limit provided was too short (Ruling 23/2006). The broader context that has led to this changed constitutional evaluation included a deepened social awareness and a greater appreciation of the right to one's genetic and personal identity. There was here a different interpretation of the Constitution but not a constitutional mutation.[11]

As Ruling 23/2006 had an *erga omnes* binding force, the Decree-Law 496/77 was amended after the Constitutional Court decision. The Law 14/2009 of 1 April 2009 amended the Decree-Law, however, not by abolishing the time limits for paternity investigation actions but by setting a longer time limit of 10 years.

After this amendment, two further cases of concrete judicial review (incidental control) followed. In Ruling 401/11, the Constitutional Court found that the new wording of Article 1817(1) of the Civil Code as drafted by Law 14/2009 of 1 April 2009 is not unconstitutional: at 28 years of age, the maturity of the child is sufficiently stabilised and the interests of family life and legal security also deserve protection. In Ruling 488/2018, the Constitutional Court found that the new provision is unconstitutional. According to

10 For this definition of constitutional mutation, see Klaus Stern: *Das Staatsrecht der Bundesrepublik Deutschland*. München 1984, p. 161. In Portuguese literature, see Gomes Canotilho: *Direito Constitucional e Teoria da Constituição*. Almedina 2003, pp. 1228ff.

11 In the same sense, Sousa Ribeiro: Mutações Constitucionais. Um conceito vazio?, in: *Estudos em Memória do Conselheiro Artur Maurício. Coimbra Editora* 2014, pp. 604f.

the Court, the time limit of 10 years is unconstitutional as it infringes the fundamental rights to found a family, to personal identity, to a free development of one's personality and to knowing one's biological ancestry. Article 26(1–3) of the Portuguese Constitution establishes as personal rights the rights to personal identity and to the development of personality and that the law shall guarantee the genetic identity of the human person.

As there were two different rulings on the same constitutionality question, the Constitutional Court had to decide, in an appeal to the plenary,[12] whether Article 1817 (1) is in conformity with the Constitution or not. In Ruling 394/2019, the Constitutional Court found that the new provision is not unconstitutional.

Donor Anonymity in Heterologous Reproduction

Concerning the law about medically assisted procreation, the Portuguese Constitutional Court decided in 2009 that the rule of donor anonymity in heterologous reproduction does not injure the right to know one's parentage and for parentage to be acknowledged (Ruling 101/2009). In heterologous assisted procreation, it is not reasonable to insist on the biological criterion. The bond of filiation must be formed in relation to the beneficiary of the medically assisted procreation who did not contribute with his reproductive cells to the process, on condition that he gave his valid consent to the formation of the bond.

In April 2018, concerning the same rule, the Constitutional Court decided that the legislature opting in favour of the anonymity of the donors in the case of heterologous procreation, although not in absolute terms, has imposed an unnecessary limitation on the fundamental rights to personal identity and to the development of the personality of persons born as a result of medically assisted procreation techniques using donated gametes or embryos (Ruling 225/2018). Consequently, the Court decided that the rule was unconstitutional, considering the growing importance attributed to the right to know one's origins. Here there was also a different interpretation of the Constitution and not a constitutional mutation.[13]

12 In the Portuguese system a decision of unconstitutionality in cases of incidental control does not automatically mean the annulment of the unconstitutional statutory provision. The decision applies only in the specific case. The Constitutional Court may declare with *erga omnes* binding force the unconstitutionality of any norm, when it has already held the norm unconstitutional in three concrete cases or when some entities (for instance, the Presidente of Republic, the Ombudsman or the Attorney General) ask the Court for that (Article 281 of the Portuguese Constitution).

13 Some conclude that Constitution neither imposes nor forbids access to one's origins. In this sense, Sousa Ribeiro: Breve análise de duas questões problemáticas: o direito ao arrependimento da gestante de substituição e o anonimato dos dadores, in: *Que futuro para a gestação de substituição em Portugal?* Instituto Jurídico da Faculdade de Direito da Universidade de Coimbra, Coimbra 2018, pp. 36ff.

The Change in the Meaning of a Certain Particular Constitutional Norm

Sometimes evolution of established constitutional standards occurs even though the text of the Constitution remains the same. The Constitutional Court can interpret a constitutional norm in a way that gives it a meaning different from the one the norm had originally. A constitutional norm can change its meaning over time, such as, for instance, the right to get married. The Court can even anticipate a new wording of an article of Constitution such as, for instance, the article about the principle of equality. This type of decision also raises the question of whether we are still in the context of a mere different interpretation of the Constitution or whether we are already facing a constitutional mutation.[14]

Same-Sex Marriage

In April 2010, the Portuguese Constitutional Court held that the essential core of the constitutional guarantee applicable to marriage is not damaged by abandoning the rule that spouses must be of different sexes. According to the Court, extending the ability to marry to persons of the same sex does not conflict with the recognition and protection of the family as a "fundamental element of society" (Rulings 121/2010 and 359/2009).

The Constitutional Court decided on the issue because the President of the Republic asked the Court to conduct a prior review of constitutionality of the norms contained in a Decree of the Assembly of the Republic, which was sent to him for promulgation and which allowed for civil marriage between persons of the same sex. The Court found the norms to be consistent with Article 36(1) of the Constitution ("everyone has the right to form a family and to marry under conditions of full equality").[15]

The Constitutional Court decided that although it is possible to consider that at the time when the Constitution was drafted and in the light of the social reality and legal context in which it emerged, the form of marriage contemplated was between two persons of different sexes, it is also possible to conclude that the drafters of the Constitution also did not adopt any provision that would prevent the institution of marriage from evolving. The fact that the right to marry was configured as a fundamental right means that the legislator cannot remove it from the legal order. Marriage is seen as a legal institution intended to regulate situations in which persons live together, in recognition of marriage's importance as a basic form of social organisation, and the Constitution does not define the role of the elements that go to make up the legal institution of marriage. Instead, it expressly charges the ordinary legislator

14 See *supra* 2.

15 In the Portuguese system, prior review of constitutionality is provided for in article 278 of the Constitution.

with maintaining the necessary link between the law and social reality. The Court was thus of the opinion that at each given moment in history, the ordinary legislator is responsible for the task of understanding what the dominant conceptions are and enshrining them in the legal order.

Although the text of the Constitution has not changed, there was an evolution concerning the right to marry a person of the same sex. Because of this evolution, the law now allows people of the same sex to marry each other (Article 1577 of the Civil Code). Here we can say that there was a constitutional mutation as there was a real change in the meaning of a constitutional rule, without the text changing. Article 36(1) still says that "everyone has the right to form a family and to marry under conditions of full equality".[16]

Punishment of Homosexual Acts Committed With Adolescents

The Constitutional Court decided that the provision of Article 175 of the Criminal Code, under which homosexual acts committed with adolescents were punished even where the perpetrator had not taken advantage of the victim's inexperience, was unconstitutional because it violated Articles 13(2) ("*no one may be privileged, favoured, prejudiced, deprived of any right or exempted from any duty for reasons of ancestry, sex, race, language, territory of origin, religion, political or ideological beliefs, education, economic situation or social circumstances*") and 26(1) ("*everyone is accorded the rights to the development of personality*") of the Constitution (Ruling 247/2005).

Sex crimes are regarded as crimes against persons, against the strictly personal value of freedom of sexual choice. They are no longer viewed as crimes against the values, interests or ethical and social principles of community life. A distinction is also made between offences against sexual freedom and infringements of the right to sexual self-determination – a distinction that is aimed specifically at allowing protection to be extended because of the victim's age where the victim is a child or, in any case, a minor who has reached a certain age. The legal interest protected is also that of sexual freedom and self-determination. It is associated in particular with the legal right of minors to the free development of their sexual identities, which is offset against the varying degrees of development of their personalities. This counterbalancing process is reflected in the differing levels of protection of minors' sexual freedom and self-determination according to their age, 14 or under, 14 to 16 or 14 to 18. A comparison of Articles 174 and 175 of the Criminal Code shows that both provisions were introduced to protect the legal right to sexual self-determination for minors aged 14 to 16 through the punishment of serious sexual acts likely to affect the free development of their sexual identity. The offences created thereby are an exception to the principle that the carrying out of sexual acts will only damage the overall sexual development of children under 14 and that once minors have

16 In this sense, Ribeiro, 2014, pp. 605ff.

reached the age of 14, they are free to choose their sexual relations. While from the victim's viewpoint, it is the right to self-determination which justifies these provisions, from the perpetrator's viewpoint it is the (conflicting) right to the free expression of his or her sexuality, which is restricted in the name of respect for the rights of minors aged 14 to 16. The right to the development of one's personality (Article 26(1) of the Constitution) required by respect for human dignity (Article 1 of the Constitution) is reflected by the right of citizens to self-fulfilment as individuals, which includes the right to sexual self-determination, particularly in the form of the right to a sex life according to the choice of each of those enjoying these rights. With regard to these rights, the Constitution expressly guarantees the right to "legal protection against any form of discrimination". This means that these rights cannot be restricted in different ways according to the different factors which make up their content – in this case, the sexual orientation of the person enjoying these rights. Since Article 175 of the Criminal Code – unlike Article 174 – attaches no significance to the abuse of the victim's inexperience, it introduces a difference in legal treatment based on sexual orientation (homosexuality) and on no other rational grounds, thereby undermining the protection afforded by the principle of equality enshrined in Article 13(2) of the Constitution.

Abuse of the minor's inexperience, which was referred to in Article 174 but not in Article 175 of the Criminal Code, meant exploiting (or taking advantage of) the victim's lack of sexual experience and hence relying on less resistance on the victim's part to the serious sexual acts described in the article, causing damage to the adolescents' free sexual development, particularly their sexual orientation. Consequently, when the legislation was drafted, it had been accepted that circumstances could vary and either that the minor aged 14 to 16 was already sexually active or that he or she had no sexual experience, but no advantage had been taken of his or her inexperience. In such cases, no threat was posed to the free development of the minor's sexual identity which had been the justification for pinpointing the typical feature of taking advantage of the minor's inexperience. The law had been based on the presupposition that homosexual acts between adults and 14- to 16-year-old minors interfered with the free development of the minor's personality, based on the understanding that in this type of offence, it was only the homosexual nature of the acts which was of any significance. However, the parameters of normality and abnormality could not be used, under Articles 13(2) and 26(1) of the Constitution, to justify any difference in legal treatment. It was precisely when dealing with situations which were associated with minority categories or sociologically disadvantaged sectors of the population that the constitutional principle of equality really came into its own, permanently or partly guaranteeing different people's rights and their right to be different.

Although Article 13(2) of the Constitution did not refer to sexual orientation at the time, the judicial courts applied Article 175 of the Criminal Code in the abovementioned case, the Constitutional Court decided that sexual orientation could not justify a different treatment ("*no one may be privileged, favoured,*

prejudiced, deprived of any right or exempted from any duty for reasons of sexual orientation"). For the Constitutional Court, although the text of Article 13 (2) of the Constitution did not expressly mention sexual orientation until 2004, it should already be interpreted accordingly. We can say that there was a real change in the meaning of that constitutional rule, before the text changing.

Nowadays, since 2004, Article 13(2) refers to "sexual orientation", and criminal legislation has also evolved. After Ruling 247/2005 and another similar decision (Ruling 351/2005), the Criminal Code was amended and no longer makes any distinction between homosexual and heterosexual acts.[17]

The Constitutionality of Laws Governing New Issues

Sometimes the Constitutional Court has to decide if a law which governs a new issue is consistent with the Constitution or not. In other words, these are the cases where the Constitution itself does not change but legislation is adopted that regulates a certain novel area or subject for the first time. As examples, the cases concerning medically assisted procreation and surrogate gestation are outlined.

Medically Assisted Procreation

Concerning the law about medically assisted procreation, the Portuguese Constitutional Court decided in 2009, conducting an *ex post* abstract review, several questions of constitutionality (Ruling 101/2009). These involved: the acceptability of the use of medically assisted procreation techniques in cases involving a risk of transmission of diseases with non-genetic or non-infectious origins; the absence of any provision for a maximum age limit for recipients of medically assisted procreation treatment; the use of medically assisted procreation to treat serious illness in a third party; the use of embryos in research; the acceptability of heterologous procreation; the question of knowing donor identity; the rules governing filiation in heterologous reproduction; the requirement not to create excess embryos and the general prevention of multiple pregnancies; the pre-implantation genetic diagnosis; the allegation that the law does not provide for any punishment for reproductive cloning in certain circumstances, and that the technique of transferring a nucleus without reproductive cloning is acceptable; the fact that although surrogate maternity without payment is considered illegal, it does not lead to criminal punishment.

With regard to all these questions, the Court considered that there was no infringement of material constitutional limits that would make the solutions

17 About all this evolution, Maria João Antunes: Dos atos homossexuais com adolescentes aos atos sexuais com adolescentes (da norma dos casos à norma do artigo 173.º do Código Penal), in: *Estudos em Memória do Conselheiro Artur Maurício*. Coimbra Editora, Coimbra 2014, pp. 1009ff.

adopted by the law under review unconstitutional. The essential content of the principle of respect for the dignity of the human person was not injured in any way. The other constitutional rights and values which the applicants alleged have been undermined – particularly the rights to physical and moral integrity, to personal identity, to genetic identity, to the development of personality, to the protection of the privacy of personal and family life, to form a family, and to health – have been sufficiently considered. The Court decided that there has been enough respect for the principle of precaution to safeguard the essential content of the rights that might be violated. Even though an analysis of comparative law showed that the options the ordinary legislative authorities adopted when they weighed up the various rights at stake differed from solutions that have been chosen in a number of other legislations, those options could not be condemned from a constitutional point of view.

The Court looked at the questions of the acceptability of the use of medically assisted procreation techniques in cases involving a risk of transmission of diseases that are not of genetic or infectious origin, the absence of any maximum limit on the age of recipients of the treatment, the use of the technique to treat a serious illness in a third party, and the use of embryos for research purposes. The Court concluded that the legal system before it did not give rise to any effective risk that medically assisted procreation techniques might be used for purposes which could be criticised from an ethical perspective, and that the legislative authorities have taken care to create safeguard mechanisms which ensured the preservation of the rights at stake, and especially an adequate protection of embryos.

On the question of heterologous procreation – i.e., use of the medically assisted procreation technique that implies resorting to donor gametes and to a donation of embryos that raises the issue of the right to genetic identity – the Court decided that the latter right is not affected, because it especially refers to the intangibility of the genome and the unicity of each person's genomic makeup, and essentially requires the prevention of the genetic manipulation of the human being and cloning, and not the prevention of heterologous procreation.

On the subject of the need to avoid the creation of excess embryos, the Court decided that the rules before it (which were set out in the chapter on *in vitro* fertilisation) did not breach any constitutional limits. The Court accepted that embryos can only be created by inseminating oocytes, and that it is only permitted to inseminate the number of oocytes (and thus create embryos) that are needed for the success of the medically assisted procreation process, in the light of good medical practice and the couple's clinical situation. The ordinary legislative authorities consequently based themselves on a principle of need, which must be assessed in accordance with a medical criterion and from the perspective of a minimum intervention based on a calculation of probabilities. This makes it impossible to interpret the law in any way that would permit the arbitrary creation of embryos, given that it is not possible to be unaware that the fertilisation process is linked to the goal of procreation. The Court also noted that, as

the National Council of Ethics for the Life Sciences acknowledged, in principle, it was not possible to guarantee an absolute match between the number of embryos created and the number of embryos transferred to the uterus. Turning to the general prevention of multiple pregnancies, and the alleged violation of the right to the protection of health on the grounds that the law permitted the implantation of more than one embryo in the mother's uterus, with the ensuing risk of multiple pregnancies and situations in which foetuses are deformed, the Court noted that even though the law did not place a maximum limit on the number of embryos that can be transferred, it only allowed for "the creation of the number of embryos deemed necessary to the success of the process, in the light of good clinical practice", and also subjected the insemination of oocytes in each case to "the couple's clinical situation" and the need to ensure the "prevention of multiple pregnancies".

The applicants also argued that the legal rules governing pre-implantation genetic diagnosis were unconstitutional. They alleged that this diagnosis was intended to produce human beings who are selected in accordance with predetermined qualities, and thus constituted a manipulation that is contrary to the dignity, integrity and unique and unrepeatable identity of the human being. The Court ruled that the use of pre-implantation genetic diagnosis as a diagnostic investigation technique is not in breach of fundamental ethical principles, and can offer positive value from an ethical perspective: when it is possible to avoid the development of a human being who has a high probability of being born with, or developing, a serious illness that will lead to premature death and prolonged and irreversible suffering; or when, following medical assessment, it is shown that at least one of the progenitors carries a hereditary genetic alteration that causes serious illness; and also, in the light of the principle of solidarity, when pre-implantation genetic diagnosis is used to select embryos that will donate stem cells in order to treat a fatal disease in a family member.

In relation to the alleged absence of criminal punishment for reproductive cloning and the acceptability of the technique of transferring nuclei without reproductive cloning, the Court felt that there was nothing in the law that would permit the conclusion that it did not criminalise reproductive cloning. The literal text of the rule in question indicated that a nucleus could only be transferred for the purpose of making pre-implantation genetic diagnosis techniques viable, and then only when the pre-implantation genetic diagnosis techniques in question were themselves authorised by the law; the law did not say that nucleus transfers could be autonomously used as a pre-implantation genetic diagnosis technique in their own right.

On the issue of the absence of any criminal punishment for unpaid surrogate maternity, the law did criminalise both being a party to, and promoting, paid surrogate maternity contracts, but did not provide for penal sanctions for unpaid surrogate mothers. The legislative authorities opted to differentiate between the legal effects in these two situations, depending on whether the arrangement is remunerated or not: in both cases, there is a civil law effect (the

nullity of the arrangement), but in the second of the two there are also criminal sanctions. The Court considered that while the legislative authorities were not necessarily obliged to criminalise a given form of conduct, whenever they considered that there was a legal asset or right which deserved the protection of the law, they did possess a degree of freedom to consider their choice of the most appropriate means of guaranteeing that asset or right, while simultaneously respecting the other values and interests which the Constitution protects in the light of the key principle of the dignity of the human person. The Court, therefore, considered that there was no unconstitutionality in that omission.

Surrogate Gestation

In April 2018, the Constitutional Court analysed, also conducting an *ex post* abstract review, the admissibility of the right to start a family with recourse to surrogate gestation in the cases where the project of becoming a parent could not otherwise be put into practice on account of clinical grounds that were impeditive of pregnancy (Ruling 225/2018[18]). The Court held that the norms that allowed for the celebration of surrogate gestation agreements on an exceptional basis and with prior authorisation and the ones that not allow for the revoking of the consent of the surrogate mother until the child has been delivered to the beneficiaries were unconstitutional.

With regard to the admissibility of surrogate gestation, the Court considered that the fact that the Portuguese legislator had envisaged it as an exceptional method of procreation, subject to the autonomous consent of the interested parties and decided upon by means of an altruistic agreement, subject to the prior authorisation of an administrative authority, did not violate the dignity of the pregnant woman, of the child born as a result of this method or the obligations of the State towards the protection of children. Notwithstanding, pronouncing itself on specific aspects of the legal framework, the Court found that certain principles and fundamental rights enshrined in the Constitution had been breached.

There was an excessive indeterminacy of the law with regard to the limits set for the autonomy of the parties as well as to the restrictions that could be imposed on the behaviour of the surrogate mother in the surrogate gestation agreement. The precise definition of such limits was required in order to validly allow for the definition of the rules of conduct applying both to the beneficiaries and to the surrogate mother as well as of the standards that were to be used by the National Council for Medically Assisted Procreation in the authorisation of the surrogate gestation agreement. There was a breach of the principle

18 See also Ruling 465/2019. The law on medically assisted procreation – Law 32/2006, 26 July – was amended in accordance with the jurisprudence of the Constitutional Court by Law 90/2021, 16 December.

of determinability of the law, which is a corollary of the principle of the democratic rule of law.

The restriction of the possibility to withdraw the consent given by the surrogate mother from the beginning of the medically assisted procreation therapeutic procedures until the delivery of the child to the beneficiaries was in breach of the fundamental right to the development of one's personality, interpreted in accordance with the principle of the dignity of the human person, and of the right to found a family. Indeed, this restriction prevented the full exercise of the fundamental right to the development of the surrogate mother's personality, which in turn conferred constitutional legitimacy to the interventions performed within the framework of the surrogate gestation.

The legal uncertainty as to the civil status of persons as a result of a surrogate gestation agreement being declared null and void due to the fact that the legal regime does not allow for a consolidation of legal positions in this case as parents or as the child. The legal regime neither differentiates according to the time or seriousness of the grounds invoked in order for the agreement to be declared invalid. Accordingly, there was a violation of the right to personal identity and of the principle of legal certainty arising from the principle of democratic rule of law.

Conclusion

The legislation, the Constitution and the constitutional courts are no more the sole agents of evolution in a legal order. The global trends of cross-boundary legal relations and interdependence have resulted in a time of constitutional cosmopolitanism, constitutional pluralism and a multilevel system of rights protection.[19] The national lawmaker became subject to other material ties – to more ties and different ties – and is increasingly influenced by entities outside the national boundaries. It is no longer apt to consider the development of the law solely through the national prism (the relationship between the legislation, the Constitution and the constitutional courts), as the national lawmaker is now also bound by European and international law and by the jurisprudence of supranational courts.[20] It is even to be considered the potential opposition between judges of the maximum level – the judges of the constitutional

19 On this subject Medeiros, 2015; and the Report "A tutela multinível dos direitos fundamentais", www.tribunalconstitucional.pt.

20 The decisions of the European Court of Human Rights in *cases M. v. Germany* and *Del Río Prada v. Spain* are a very good example, because of their repercussion in Germany and Spain on two matters of criminal law (principle of legality and security measures). See Maria João Antunes: Proteção multinível do princípio da legalidade criminal – a 'doutrina Parot' e o caso *Inés del Río Prada*, in: *Estudos em Homenagem ao Prof. Doutor Manuel da Costa Andrade*. Boletim da Faculdade de Direito da Universidade de Coimbra, Coimbra 2017, pp. 117ff.

courts, the judges of the European Court of Human Rights and the judges of the Court of Justice of the European Union.[21]

Nevertheless, the domestic constitutional forum is one where these influences – and the way they help change the sensibilities or the context of national (constitutional) law – are evaluated and the possible changes to the constitutional structure effected by the Constitutional Court as the guardian of the constitutional order.[22] This change is often one of evolution rather than revolution. The chapter sought to illustrate the main ways in which this evolutionary development may occur.

21 See Adán Nieto: Derecho penal y constitución en la era del global law, in: *Garantías constitucionales y Derecho penal europeo*, Marcial Pons, 2012, p. 87.

22 About the impact of the jurisprudence of the European Court of Human Rights in German Constitutional Court, Christopher Micaelsen: 'From Strasbourg, with Love' – Preventive Detention before the German Federal Constitutional Court and the European Court of Human Rights, in: *Human Rights Law Review* 12 (2012), pp. 148 ff. About the impact in Portuguese Constitutional Court, see the Report "The Portuguese human rights constitutional law", www.tribunalconstitucional.pt.

10 Plotting (R)evolution?

On Critical EU International Relations Law

*Elaine Fahey**

Introduction

This chapter has as its objective the re-reading of EU International Relations (IR) law by revealing insights from revolution as developed by Leonid Pitamic some time ago and the more recent emergence of EU critical studies. EU IR is a field where the EU's engagement with the world, international organisations and current and future third countries has become a highly prominent symbol of the EU's capacity to survive and endure in the global legal order, however weakened internally crisis by crisis. International relations appear increasingly to operate as a most insightful lens to analyse EU integration like no other subject. There have also been dramatic advances in international relations where global activity of the Union is coherent, unified and active. It contrasts sharply with internal rule of law, Eurozone and migration crises perplexing the bloc.[1] As a legal field, EU IR law (or foreign affairs or external relations law) has long been a highly doctrinal and competence-oriented subject, dominated by court-centric views on EU integration. It is not a particularly stable time in IR, where the rules-based and multilateral legal order increasingly comes under attack, which the EU still nonetheless centrally supports, as part of the core business of its IR – unlike so many others.[2] Most significantly, the EU has just lost one of its most global members because of Brexit.

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1 See James Caporaso: Europe's Triple Crisis and the Uneven Role of Institutions: The Euro, Refugees and Brexit, in: *Journal of Common Market Studies* 56 (2018), p. 1345.

2 See Elaine Fahey (ed.): *Institutionalisation Beyond the Nation State*. Springer 2018; G. John Ikenberry: The End of Liberal International Order? in: *International Affairs* 94 (2018), p. 7; Rachel Brewster: The Trump Administration and the Future of the WTO, in: *Yale Journal of International Law Online* 1 (2018).

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Western legal tradition is arguably limited in its contribution to revolution and perhaps intellectually dominated by the work of Berman as to Revolution, at least prior to the Arab Spring and the rising era of exit from international organisations.[3] It is an interesting fact of legal discourse that revolution has an extremely limited scholarship, not least in the realm of EU law. Revolution is often concerned with understanding 'straw figures' and distinguishing temporal shifts and gaps between order and continuity.[4] Revolution is frequently viewed as sharp breaks with the old or where law and courts provide continuity.[5] Pitamic aligns well with such literature. Moving forward to the present day in Europe, revolution in the context of EU law has mainly related to the role of the Court of Justice of the EU (CJEU) in its landmark *Van Gend en Loos* decision developing direct effect and changing fundamentally our understanding of subjects and objects as to public international law. Nowadays, the CJEU holds birthday parties to celebrate its most activist decision and invites hundreds of academics to such an event.[6] Arguably, the values of Pitamic have become more distant than ever in the Western legal tradition to some degree despite their salience.

The successes of the EU in the world are subject to little internal critical EU law studies. One of the most significant features of contemporary EU law today is that it is not a subject that attracts much attention from those working on critical legal studies, and most critical work historically and to the present day centres on the Court.[7] Sectoral policies and actions of EU institutions form the object of study for most students of EU law, yet it is difficult to

3 See Harold J. Berman: *Law and Revolution: The Formation of the Western Legal Tradition*. Harvard University Press 2009; Harold Joseph Berman: *Law and Revolution, II: The Impact of the Protestant Reformations on the Western Legal Tradition*. Harvard University Press 2009; Harold L. Korn: The Choice-of-Law Revolution: A Critique, in: *Columbia Law Review*, 83 (1983), pp. 772–973; Owen Taylor: *International Law and Revolution*. Routledge, Abingdon 2019; Massimo Tita: Law as Revolution: Historiographical and Literary Traces, in: *Historia et Ius* 17 (2020), p. 1; Victoria Sentas, Jessica Whyte: Law, Crisis, Revolution, in: *Australian Feminist Law Journal*, 31 (2009), pp. 3–14; Andrey N. Medushevsky: Law and Revolution: The Impact of Soviet Legitimacy on Post-Soviet Constitutional Transformation, in: *Telos* 189 (2019), pp. 121–135; Amalia Amaya: The Explanationist Revolution in Evidence Law, in: *The International Journal of Evidence & Proof* 23 (2019), pp. 60–67. Anne Peters: Introduction. A Century After the Russian Revolution: Its Legacy in International Law, in: *Journal of the History of International Law*, 19 (2017), pp. 133–146.

4 Cf. Nimer Sultany: *Law and Revolution. Legitimacy and Constitutionalism after the Arab Spring*. Oxford University Press, Oxford 2017.

5 See Nathan Brown: Law and Revolution: Legitimacy and Constitutionalism After the Arab Spring, in: *International Journal of Constitutional Law*, 17 (2019), p. 357.

6 Court of Justice of the European Union: 50-year Celebrations in 2013, https://curia.europa.eu/jcms/jcms/P_95693/en (accessed 16 July 2020).

7 See, e.g., Andrew Williams: *EU Human Rights Policies: A Study in Irony*. Oxford University Press, Oxford 2004; Elaine Fahey: Critical EU International Relations Law: A Research Agenda, in: P.J. Cardwell, M.-P. Granger (eds.): *Research Handbook on the Politics of EU Law*. Edward Elgar 2020.

describe the sum total thereof to be anything close to critical EU law studies. Latest debates about the methods and methodology of EU and public international law are largely data driven[8] or advocate deeper law-in-context methods or historical studies,[9] but are often heavily 'court-centric'.[10]

A new era of IR appears very successful but also less oriented towards the individual – specifically as to the place of direct effect and enforcement of trade agreements. It necessitates careful reflection on how to study the field of EU IR. These issues invite further reflection at this critical juncture. What could be labelled here to be critical EU IR law? How can revolution and critical reflection assist? What is revolution and evolution in EU IR law? What are the subjects and objects of critical EU IR law going forward?

The chapter considers: (1) the EU as Globalist?; (2) EU International Relations (IR) law: the EU as a victim of its success; (3) the court-centric module of EU IR law: is revolution ever possible?; and (4) how would we revolutionise EU IR law, followed by conclusions.

The EU as Globalist?

The EU is explicitly committed in its treaties to being a distinctive 'globalist' as a matter of law and to pursuing multilateral solutions.[11] Significant entities in the world currently wish to leave or threaten to leave or defund several international organisations (e.g., African Union from the International Criminal Court, ICC), UK from the Council of Europe and EU, US from the WTO, NATO or UN, amongst others), and the World Trade Organisation (WTO) has been plunged into existential crisis.[12] The EU, by contrast, has and continues to support the development of both existing and new international organisations through institutionalisation. For example, the EU has a recent history of promoting and 'nudging' institutional multilateral innovations in a range of trade and security fields, from the ICC,[13] a UN Ombudsman[14] to a Multilateral Investment Court,[15] promoting a distinctive global vision

8 E.g., Wolfgand Alschner, Joost Pauwelyn, Sergio Puig: The Data-Driven Future of International Economic Law, in: *Journal of International Economic Law* 20 (2017), p. 217.

9 See Rob van Gestel, Hans-Wolfgang Micklitz: Why Methods Matter in European Legal Scholarship, in: *European Law Journal* 20 (2014), pp. 292, 313–316.

10 Cf. Michelle Egan: Toward a New History in European Law: New Wine in Old Bottles?, in: *American University International Law Review* 28 (2013), p. 1223.

11 Cf. Article 21 Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/1 (TFEU).

12 Ikenberry, 2018; Karen E. Smith: The European Union in an Illiberal World, in: *Current History* 116 (2017), p. 83.

13 See: The Rome Statute of the International Criminal Court (1998).

14 See: UN Ombudsman – United Nations Security Council Resolution 2083 (2012).

15 See: Multilateral Investment Court – Council of the European Union: *Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes* (2017) 12981/17.

accountability, legitimacy and the rule of law. The EU's vision of the 'global' in its policies is also ostensibly distinctive. Many leading EU policy documents across a range of policies have an explicitly global dimension and span ranges of EU international relations, in the pre- and post-Lisbon period: e.g., European Security Strategy,[16] European Agenda on Security,[17] Action Plan on Human Rights and Democracy,[18] Trade and Investment Strategy – the Trade for All Strategy[19] or the Joint Framework on countering hybrid threats.[20] The EU's Global Strategy for EU Foreign and Security Policy launched in 2016 is the most explicit invocation of the term 'global' in the EU's policy-making to date.[21] The EU's vision of the global has been argued to be one of the most transparent and open or participatory EU strategies ever produced because it was constructed or conceived through a process of input from a range of EU think-tanks and 50 gatherings in the EU and beyond.[22] It is an important change in action given that EU foreign policies have generally been conceived within an iterative process between the EU, national and international legal orders – and is also distinctive internationally.[23] The EU's vision of the global is understood to tread a difficult line between 'realist' and 'normative' approaches to foreign policy, hovering between shared and common action with European values, albeit a rules-based global order with multilateralism as its key principle, thereby contrasting sharply with emergent administrations.[24] However, since parts of the Strategy appear to have lost their salience since its publication, either expressly or by implication through short-term views of the global, its attempt to fashion itself as an overarching vision is perhaps

16 Council of the European Union: *A Secure Europe in a Better World – European Security Strategy* (2009), www.consilium.europa.eu/media/30823/qc7809568enc.pdf (accessed 16 July 2020).

17 See Commission: *Communication from the Commission: The European Agenda on Security*, COM (2015) 185 final.

18 Council of the European Union: *Action Plan on Human Rights and Democracy* 2015–19, (2015) 10897/15.

19 See Commission: *Trade for All: Towards a More Responsible Trade and Investment Policy* (2015), http://ec.europa.eu/trade/policy/in-focus/new-trade-strategy (accessed 16 July 2020).

20 See European Parliament and the Council: *Joint Framework on Countering Hybrid Threats: A European Union Response.* Joined Communication, JOIN (2016) 18 final.

21 The growing prominent of foreign policy is evident within EU law from the new Strategy, which is 60 pages long and reflects the enhanced foreign affairs competences of the EU post-Lisbon, multiples of its predecessors in length. See Giovanni Grevi: A Global Strategy for a Soul-Searching European Union, in: *European Policy Centre* 1 (2016).

22 I.e., in Turkey, Tunisia, Norway, Japan and Australia and gatherings of the Foreign Affairs Council Development Council, Defence, COREPER, Secretary divisions and Departments of Foreign Affairs.

23 See Marise Cremona: Values in EU Foreign Policy, in: Malcolm Evans, Panos Koutrakos (eds.): *Beyond the Established Legal Order: Policy Interconnections Between the EU and the Rest of the World.* Hart Publishing 2011.

24 See Ikenberry, 2018; Smith, 2017. See EU Global Strategy, 3.5.

disputable.[25] As a result, the EU's vision of the global can be argued to promote certain ambiguity as to the question as to the essence of the EU's global, despite its highly distinctive, character.[26]

The EU's efforts to lead multilateralism, e.g., at the WTO at a time of its worst crisis yet, shows its liberal vision of the global in an area of key EU strength, yet such efforts appear visionless in the absence of the US and appear heavily dependent upon shoring up support of leading developed nations to the exclusion of the global others. The EU's efforts to engage with *inter alia* the US as foe, the complexity of China, climate change, human rights in trade agreements all appear as significant uphill battles in a world moving away from globalism. It poses new questions as to what a globalist is in this era.

Brexit initiates a series of institutional unknowns as to international organisations for EU IR (e.g., UN, WTO, CoE), places where the EU's gains to act like a quasi-state have been most successful. It invites a debate about critical understandings of EU IR law in this era. EU IR law will have to make the shift from friend to frenemy when it comes to Britain in the post-Brexit era. In international relations, the UK has been an immense asset to the emerging global identity of the EU.[27] It has in particular acted as a lead channel of diplomatic information in the European External Action Service (EEAS) network emerging, drawing upon its significant Commonwealth heritage and immense civil service expertise in foreign affairs. The UK remains a seat holder at the UN Security Council and has acted as a vibrant contester of the loss of sovereignty of Member States at the UN, in particular in the wake of the EU gaining special UN observer status there, which generated significant disputes as to speaking rights at the assembly.[28] It is an extraordinarily complicated shift from friend to frenemy for the EU to deal with post-Brexit. How the EU will engage with its former member at a variety of international fora is of much significance, probably most concretely at the WTO. There, the EU and US have acted as the two most dominant litigants in most WTO litigation, and China now acts the third most frequent litigator/defendant.[29] Thinking forward, however, a question remains for EU IR law of the impact of its former member upon its 'place' to side in international disputes, e.g., before the WTO dispute settlement body. Will the UK side with Europe or the US? Before the

25 It was published 48 hours after the Brexit vote in June 2016, to convey "business as usual". See Editorial comments: We Perfectly Know What to Work For: The EU's Global Strategy for Foreign and Security Policy, in: *Common Market Law Review*, 53 (2016), p. 1199. For example, its omission of Brexit or its inclusion of the now seemingly ill-fated TTIP.

26 CMLR Editorial Comments, ibid., p. 1203.

27 *Global Britain Influence After Brexit. UK in a Changing EU*, 15 February 2019, https://ukandeu.ac.uk/global-britain-influence-after-brexit (accessed 16 July 2020).

28 Smith, 2017.

29 Joost Pauwelyn: The WTO 20 Years On: 'Global Governance by Judiciary' or, Rather, Member-driven Settlement of (Some) Trade Disputes Between (Some) WTO Members?, in: *European Journal of International Law* 27 (2016), p. 1119.

UN and International Court of Justice (ICJ) in recent Chagos Islands dispute, a level of ostracisation in UK–EU relations was apparent.[30] How this will continue in other future fora, where a decision as to voting blocs, for example, fosters such concerns remains to be seen. It will certainly create tension as to the place and significance of Europe within international organisations and its meaning where significant new tensions look likely.

EU International Relations (IR) Law: The EU as Victim of Its Success?

EU IR law is arguably a field where the EU's engagement with the world has become a highly prominent symbol of the EU's capacity to survive and endure in the global legal order, perhaps in contrast to internal strife.[31] While the Single Market is one of the oldest features of EU integration and the core hub of its extensive jurisprudence economic law, international relations integration is perhaps a more recent phenomena, enjoying a less extensive jurisprudence.[32] The externalisation of the EU's Single Market is increasingly studied across disciplines.[33] The post-Lisbon era of EU IR law is objectively viewable as a vibrant one, where considerable and far-reaching agreements have been negotiated by the EU with some of the leading economies of the developed world.[34] Many post-Lisbon agreements in the area of trade are reputed to be deeper and wider and to constitute a deeper form of international economic law aiming at more progressive partnerships, e.g., through increasing forms of regulatory cooperation with global intent, negotiating 'deeper' partnerships, beyond mere trade free agreements. The Treaty of Lisbon was intended to be a landmark phase in international relations after the introduction of legal personality, coherence and unity in EU international relations. This period has correspondingly seen significant democratic enhancements in order to bolster the credentials of international relations, including a significant role for the EP.[35] There have been important developments as to transparency and openness in this period and a more meaningful engagement with *inter alia*

30 Marco Milanovic: ICJ Delivers Chagos Advisory Opinion UK Loses Badly, in: *EJIL: Talk!*, 25 February 2019, www.ejiltalk.org/icj-delivers-chagos-advisory-opinion-uk-loses-badly (accessed 16 July 2020).

31 See Smith, 2017.

32 Marise Cremona, Anne Thies (eds.): *The European Court of Justice and EU External Relations Law: Constitutional Challenges. Modern Studies in European Law*. Hart Publishing 2014, p. 298.

33 Anu Bradford: The Brussels Effect, in: *Northwestern University Law Review* 107 (2012), p. 1.

34 Aliki Semertzi: The Preclusion of Direct Effect in the Recently Concluded EU Free Trade Agreements, in: *Common Market Law Review* 51 (2014), p. 1125.

35 Christina Eckes: How the European Parliament's Participation in International Relations Affects the Deep Tissue of the EU's Power Structures, in: *International Journal of Constitutional Law* 12 (2014), p. 904.

civil society, the Ombudsman, enhancing its democratised credentials. It is, in short, a significant evolution which has taken place.[36]

As the author and others have sought to demonstrate recently, there is a proliferation of the EU's subjects and objects as a matter of EU IR law, where more actors are subject to the scope of EU law, its reach, its territory, its procedures and its conditionality.[37] As a result, the EU constantly appears as a victim of its own increasing success in the world. In turn, the EU has developed a whole swathe of administrative and procedural provisions to enable better participation, consultation, involvement and notice of its laws and their impacts. For example, there are broader civil society and participation requirements for third countries to engage with EU IR law.[38] EU administrative decisions are increasingly addressed to individuals or legal persons in third countries, e.g., sanctions regimes, which both deepen and widen.[39] The EU increasingly also acts with significant territorial reach.[40]

The rising number of subjects and objects of EU law have entailed that the EU frequently appears to be more of a victim of its own success. However, from EU animal welfare law, financial and banking legislation, EU competition law, EU environmental law to data protection, there is an asserted rise in the adoption of EU law beyond its borders, known as 'The Brussels Effect'.[41] There is also a perceived rise in 'EU extra-territoriality', in a variety of forms.[42] The reach of EU law is not merely unidirectional from an economic perspective but also administrative and procedural, spanning rights and obligations for the EU and its subjects and objects as others. It has created a significant challenge for the EU: how to deal with its expansive global reach and how to process the massive public interest in its global effects, both inside and outside the EU.[43] As EU law increasingly has a broader global reach, there is argu-

36 See Sophie Meunier, Milada Anna Vachudova: Liberal Intergovernmentalism, Illiberalism and the Potential Superpower of the European Union, in: *Journal of Common Market Studies* 56 (2018), p. 1631.

37 See Samo Bardutzky, Elaine Fahey (eds.): *Framing the Subjects and Objects of EU Law: Exploring a Research Platform*. Edward Elgar Publishing 2017.

38 See Emilia Korkeo-aho: Evolution of the Role of Third Countries in EU Law – Towards Full Legal Subjectivity?, in: Bardutzky, Fahey (eds.), 2017, p. 227.

39 For example, Article 11(3) of Consolidated Version of the Treaty on European Union [2008] OJ C115/13 (TEU) provides that the Commission is obliged to consult in its rule-making with 'the parties concerned', largely understood to encompass stakeholders irrespective of their country of origin.

40 See Joanne Scott: The New EU "Extraterritoriality", in: *Common Market Law Review* 51 (2014), p. 1343.

41 See Joanne Scott: From Brussels with Love: The Transatlantic Travels of European Law and the Chemistry of Regulatory Attraction, in: *American Journal of Comparative Law* 57 (2009), p. 897; Suzanne Kingston: Territoriality in EU (Taxation) Law: A Sacred Principle, or Dépassé?, in: Joachim Englisch (ed.): *International Tax Law and New Challenges from Constitutional and Legal Pluralism*. IBFD 2015.

42 See Elaine Fahey: *The Global Reach of EU Law*. Routledge 2016, ch. 2.

43 E.g., overwhelmed by several hundred thousand responses to its proposals on a Multilateral Investment Court.

ably a broader definition of the 'global', which is less transparent and more far-reaching.[44] Similar to the expanding subjects and objects of EU law, global reach also increasingly includes similar administrative hurdles for the EU.[45]

There are an increasingly broad number of cases where the EU's subjects and objects litigate this global reach – for, against, seeking or denying its protections or claims to assist. The EU WTO Seals litigation or Western Sahara CJEU litigation provide ample evidence thereof.[46] Can the EU continue such global reach? Arguably, the EU's global span is becoming unsustainable. Yet is Brexit the revolution or is qua Pitamic, an onslaught of anarchism the likely outcome? Can the EU resist the charges that its reach or 'Brussels Effect' is imperial? Arguably the EU's public interest ideals have never been more important, e.g., as to climate change.[47]

The Individual Citizen and Future of EU IR Law: Revolution or Evolution?

Despite the growing legalisation of EU international relations, a significant shift is taking place in EU International Relations where all new post-Lisbon trade agreements lack direct effect.[48] Since new post-Lisbon trade agreements explicitly and unambiguously lack direct effect, they put into sharper question the role of individual enforcement of EU international trade law going forward and the

44 Elaine Fahey: The Global Dimension of the EU's AFSJ: External Transparency versus Internal Practice, in: NYU Law Jean Monnet Working Paper Series 4/2018 (2018), https://jeanmonnetprogram.org/wp-content/uploads/JMWP-04-Elaine-Fahey.pdf (accessed 16 July 2020).

45 E.g., extra-territorial dimensions of Council Directive (EU) 2015/637 of 20 June 2015 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and repealing Decision 95/553/EC [2015] OJ L 106/1.

46 Case C-266/16 *Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs and Secretary of State for Environment, Food and Rural Affairs Western Sahara Campaign* ECLI:EU:C:2018:118; WTO – Appellate Body Decision 14/3051 of 22 May 2014; Case C-398/13 P *Inuit Tapiriit Kanatami and Others v Commission* ECLI:EU:C:2015:535. Eva Kassoti: The ECJ and the art of treaty interpretation: *Western Sahara Campaign UK*, in: *Common Market Law Review* 56 (2019), p. 209; Jed Odermatt: Fishing in Troubled Waters ECJ 27 February 2018, Case C-266/16, R (on the application of Western Sahara Campaign UK) v Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs, in: *European Constitutional Law Review* 14 (2018) p. 751; Paola Concini, Tania Voon: EC – Seal Products: The Tension between Public Morals and International Trade Agreements, in: *World Trade Review* 15 (2016), p. 211–234; Rike U. Kramer-Hoppe, Tilman Kruger: International Adjudication as a Mode of EU External Governance: The WTO Seal Case, in: *Journal of Common Market Studies* 55 (2017), p. 535; Robert Howse, Joanna Langille, Katie Sykes: Pluralism in Practice: Moral Legislation and the Law of the WTO after Seal Products, in: *George Washington International Law Review* 48 (2015), p. 81; P.J. Cardwell, Ramses Wessels: EU External Relations and International Law: Divergence on Questions of 'Territory'?, in: Elaine Fahey (ed.): *Convergence with the Global Legal Order: The EU and the World*. Hart 2020, ch. 8.

47 See Anu Bradford: *The Brussels Effect: How the European Union Rules the World*. Oxford University Press, Oxford 2020, ch 8; Jan Zielonka: Europe as a Global Actor: Empire by Example?, in: *International Affairs* 84 (2008), p. 471.

48 Opinion 1/17 of the Court of Justice of the European Union, ECLI:EU:C:2019:72.

effectiveness of remedies.[49] For example, concern increases about the regulatory cooperation provisions in new generation trade agreements – in particular, about their quasi-legislative effects.[50] Such developments suggest that the subjects and objects of EU IR law look likely to alter significantly going forward. It will become increasingly complex for litigants to assert an entitlement to litigate arguably. It may conversely generate more opportunities also for parties to litigate the effects of international agreements. The greatest politicisation of EU IR law has arguably only recently begun to take place, e.g., millions protesting against the Transatlantic Trade and Investment Partnership (TTIP) or the recognition by the General Court that democratic principles apply to the negotiation of the EU's international relations.[51] The role of the individual in EU IR law, passively or actively, is only likely to increase. It is worth noting that there is an evolving literature on sub-national structures in global societies, which posits an increased voice in all areas of policy-making.[52] Across the global legal order in a range of contexts, the development of the mega-regional trade agreements had also spurred a new interest in transparency and participation of civil society, which is evolving across regimes.[53] This view of an enlarged voice and participation needs to be carefully engaged with as regards understanding the future place of the individual in international relations and its construction. Arguably this evolution taking place buffers the individual in EU law.

However, there is an increasingly patchy role for individual fundamental rights in the implementation of the next generation of trade agreements.[54] Civil society has a diverse role across many new-generation trade agreements, and the European Parliament in particular has an inconsistent engagement with fundamental rights and free trade agreements. Is the need for revolution growing?

The Court-Centric Model of EU IR Law: Is Revolution Ever Possible?

Contrary to Pitamic's earlier views on Europe, Parliament is no longer the only authoritative voice on European Law. The CJEU has significant powers in EU IR law, e.g., *ex ante* Opinion review is not possible in many national

49 Semertzi, 2014.

50 Ernst-Ulrich Petersmann: Transformative Transatlantic Free Trade Agreements Without Rights and Remedies of Citizens? in: *Journal of International Economic Law* 18 (2015), p. 579.

51 E.g., Stop TTIP/CETA case in Case T-754/14 *Efler v European Commission*, ECLI:EU:T:2017:323.

52 J. van Zeben: Local Governments as Subjects and Objects of EU Law, in: Fahey, Bardutzky (eds.), 2017.

53 See Elaine Fahey: *Introducing to Law & Global Governance*. Edward Elgar 2019, ch. 1.

54 Isabella Mancini: Fundamental Rights in the EU's External Trade Relations: From Promotion 'Through' Trade Agreements to Protection 'in' Trade Agreements, in: Eva Kassoti, Ramses Wessel (eds.): *EU Trade Agreements and the Duty to Respect Human Rights* Abroad, CLEER Paper 1/2020, 61, www.asser.nl/media/679745/cleer020-01_web_final.pdf (accessed 16 July 2020).

systems as to foreign affairs.[55] The Court has also not been willing to grant individuals significant powers in IR.[56] The Court has also mostly been antipathetic to transfers of powers to non-EU bodies. The question of how powerful the Court is seems like an eternal research question of EU law.[57] The CJEU does increasingly more international relations and more advocacy of its IR-related case law outside of the Courtroom.[58] As a legal field, EU IR law has long been a doctrinal and competence-oriented subject, dominated by court-centric views on EU integration, dominating its methodology, standard textbook expositions and scholarly debates thereon. There are arguably a handful of truly 'constitutional' moments in external relations and mostly at a time predating broader constitutional moments in other fields of EU law.[59] One of the most striking features of EU law today is that it is a wholly court-centric subject derived from the creation of its independent legal system, beyond the original source of the EU treaties agreed between the Member States in the Treaty of Rome, as an act of public international law and a treaty registered under ordinary international law procedures.

Much ink has been spilled on the interpretation by the Court of Justice of the nature of the EU legal system in its foundational decision in *Van Gend en Loos*, where the Court radically altered the understanding of the individual and subjects and objects of the EU treaties. This decision caused the Court to hold a celebration in 2013 of 50 years of its landmark decision, celebrating its activism and unique interpretation of the EU treaties that would result in an extraordinary supranational system evolving therefrom.[60] The birthday celebration of this decision and its understanding have arguably radically moved from 'activism' to mainstream. However, the Court's activism would arguably result in particular in a landmark series of decisions, such as Opinion 2/13 where the Court – itself becoming a party to European Convention on Human Rights (ECHR) accession in negotiations with the Council of Europe – would strike down the agreement mandated for accession in the treaties by the Member

55 See Mario Mendez: *The Legal Effects of EU Agreements*. Oxford University Press, Oxford 2013.

56 *Western Sahara Campaign UK*.

57 Rachel Chichowski: *The European Court and Civil Society: Litigation, Mobilization and Governance*. Cambridge University Press, Cambridge 2007.

58 See Koen Lenaerts: ECJ President on EU Integration, Public Opinion, Safe Harbor, Antitrust, in: *Wall Street Journal*, 14 October 2015, https://blogs.wsj.com/brussels/2015/10/14/ecj-president-on-eu-integration-public-opinion-safe-harbor-antitrust (accessed 16 July 2020).

59 Bruno De Witte: Too Much Constitutional Law in the European Union's Foreign Relations?, in: Marise Cremona, Bruno De Witte (eds.): *EU Foreign Relations Law – Constitutional Fundamentals*. Hart Publishing 2008, p. 3.

60 Court of Justice of the European Union, Celebrations of the 50th anniversary of the judgment in Van Gend en Loos, 13 May 2013, https://curia.europa.eu/jcms/jcms/P_95693/en (accessed 16 July 2020).

States, contrary to the text of the treaties.[61] The decision is a landmark ruling on the concept of the autonomy of EU law, which the Court held would be infringed by accession. It is a neat example of the significant shift in the Court's actorness and its own evolving autonomy.

Although the Union had no single set of objectives for the Union's external policy prior to the Treaty of Lisbon, contemporary external policy objectives are "non-teleological, non-prioritised, open-ended and concerned more with policy orientation than goal setting"[62] and that the contribution of the Court in theory has been considerably constrained in contrast with its function in the internal market. However, its extraordinary Opinion 2/13,[63] in defiance of the spirit of the treaties, may cause one to reflect on what is meant by external objectives post-Lisbon. These developments matter for other domains of EU IR, such as external migration, where increasingly 'delegalisation' takes place in high-profile CJEU case law, leaving litigants without redress.[64] For example, the nature of jurisprudence, which will likely develop on individuals' rights in international relations, looks certainly likely to diminish to a degree in trade, at least in terms of direct enforcement. It is of significance that EU IR law is particularly difficult to litigate in this new era. The inappropriateness of the place of a court-centric subject in this new era is thus of much significance.

How Would We Revolutionalise EU IR Law?

Historians, sociologists and political scientists examining the foundations of the EU legal system have developed a significant literature showing how a committed group of legal entrepreneurs worked to support the legitimacy of the CJEU's jurisprudence and establish European law as a distinct field.[65] However, it is work founded upon a body of case law that is studied principally relating to the internal market and its evolution rather than EU external

61 Opinion 2/13 of the Court of Justice of the European Union, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms,* ECLI:EU:C:2014:2454.

62 Marise Cremona: A Reticent Court? Policy Objectives and the Court of Justice, in: Marise Cremona, Ane Thies (eds.): *The European Court of Justice and External Relations Law*. Hart Publishing 2014, p. 31.

63 Opinion 2/13 (n 61).

64 Elaine Fahey: Between Delegalisation and Hyperlegalisation: On Laws, Norms and Principles in the External Management of Migration, in: Sergio Carrera, Juan Santos Vara, Tineke Strik (eds.): *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Reconsidered*. Edward Elgar, Cheltenham, forthcoming.

65 Morten Rasmussen: The Origins of a Legal Revolution – The Early History of the European Court of Justice, in: *Journal of European Integration History* 14 (2008), p. 77; Antoine Vauchez: *Brokering Europe*. Cambridge University Press, Cambridge 2015; Daniel Kelemen: The Court of Justice of the European Community: Changing Authority in the Twenty-First Century, in: Karen Alter, Laurence Helfer, Mikael Madsen (eds.): *International Court Authority*. Oxford University Press, Oxford 2018, ch. 10.

relations. It is also a highly distinctive form of understanding integration through law. In more recent times, of rising Euroscepticism, there is an emerging literature in political science/international relations (thus apart from legal scholarship) on critical EU studies, which has sought to target the place of practice and methodology to overturn key assumptions as to EU integration.[66] There are now a range of scholars seeking to advocate more critical approaches to EU foreign policy through decentring of EU actorness in their attempts to capture and reframe perceived 'Eurocentrism' in a variety of areas of foreign policy.[67] This accords well with pluralistic and participatory understandings of EU foreign policy, yet such an approach may not be legally sufficient. Critical studies afford us insights here to deconstruct and frame the evolving nature of EU IR law as its most successful domain. It is one where the EU risks becoming victim of its own success internally and externally becoming victim to significant backlashes against Eurocentrism and the complexity of decolonialisation.[68] Critical studies may provide insights which capture the dynamic nature of EU IR law.

It is arguably a useful genre of analytical and normative theorisation to apply to the study of the EU at a moment of significant disintegration and to apply legal developments and assumptions. Some advocate the turn to 'everyday' practice as a result, to engage better with the nature of the elites and the everyday of the EU. Such a genre, for example, seeks to bring EU studies scholars closer to the social phenomenon that they want to study and argues for the use of approaches which bring scholars closer to the people who construct, perform and resist the EU on a daily basis.[69] In doing so, it looks to disorder and order EU studies. It thus increasingly reflects critically upon the subjects and objects of the EU law-making and integration processes. As a result, it seeks to challenge the orthodoxy of integration narratives but without adopting Euroscepticism as its end goals. This is argued here to be of much significance for legal scholars at this temporal juncture, analysing EU law and its many sub-fields, which range from trade to security to migration to international relations law.

66 See Rebecca Adler-Nissen: Towards a Practice Turn in EU Studies: The Everyday of European Integration, in: *Journal of Common Market Studies* 54 (2016), p. 87; Emanuel Adler, Vincent Pouliot: International Practices, in: *International Theory* 3 (2011), p. 1; Richard Whitman: Another Theory is Possible: Dissident Voices in Theorising Europe, in: *Journal of Common Market Studies* 54 (2016), p. 3.

67 Stephan Keukeleire, Sharon Lecocq: Operationalising the Decentring Agenda: Analysing European Foreign Policy in a Non-European and Post-Western World, in: *Cooperation and Conflict* 53 (2018), p. 277; Ian Manners: Another Europe is Possible: Critical Perspectives on European Union Politics, in: Knud Erik Jørgensen, Mark A. Pollack, Ben Rosamond (eds.): *Handbook of European Union Politics*. Sage Publications 2006.

68 Nora Fisher Onar, Kalypso Nicolaïdis: The Decentring Agenda: Europe as a Post-colonial Power, in: *Cooperation and Conflict* 48 (2013), p. 283.

69 Adler-Nissen, 2016, pp. 87–89.

Critical legal theory, or Critical EU Studies, as a methodology or genre of approach might be understood generally to exist independently without focussing upon law or EU law therein. Most standard textbooks on European Union law written in the English language medium do not have at the time of this writing a chapter on Critical EU law, nor in specialist textbooks on EU IR law does such a topic exist. The era of Brexit poses a considerable challenge to EU IR law, at least in theory as to its models of integration, its views on EU engagement in the world and the relationship between one of the largest Member States exiting from the bloc at a time of the evolution of its international relations powers. Arguably, the greatest controversies of EU IR law in recent times are how the EU has achieved levels of development and integration in legal terms far beyond the political momentum for those powers and competences. It could be hypothesised that recent debacles in the Walloon or Dutch Parliament as to the EU–Canada Comprehensive and Economic Trade Agreement (CETA) and its ratification demonstrate how Member States and their parliaments are not politically ready for the advances of the EU in international relations. Alternatively, it is significant that the democraticisation of EU IR remains embryonic. Revolution may yet be the next most likely outcome.

Conclusions

This chapter has examined the concept of critical EU IR law as a subject worthy of revolution and subject to significant evolution. EU law is increasingly burdened by a spiralling number of subjects and objects and its own increasingly global reach, with many advantages and also disadvantages posited therein. Yet as a legal field, EU IR law has long been a highly doctrinal subject, dominated by highly court-centric views on EU integration and in need of further analytical insights to grapple with the post-Brexit era. EU IR law yet appears increasingly as a highly deserving focus of the deeper and better study of EU integration. Since new post-Lisbon trade agreements explicitly and unambiguously lack direct effect, they further put into sharper focus the role of individual enforcement of EU international trade law going forward and the effectiveness of remedies. It is of major significance that EU IR law will become increasingly difficult to litigate in this new era and render the conventional court-centric narrative of EU integration somewhat difficult to place. This new era of arguably even more subjects and objects of EU IR law puts such a successful subject as EU IR into a new spotlight. Framing critical EU IR law as a research agenda thus enables forward reflections across a range of subjects and themes. Revolution as a genre is a rich one and here appears apt to reflect upon the significant moments of change in EU IR law and in the spirit Pitamic advances.

11 The Quiet Revolution of Global Governance Law

Jan Wouters

Introduction

As the pace, breadth, and depth of globalization continue to grow, a quiet revolution is taking place in the legal sphere.[1] Traditional international law is slowly but surely being bypassed, or at least complemented, by an emerging law of global governance. This process is characterized by (1) an increasing normative role for non-state actors, from international organizations to private business associations; (2) a fine-grained combination of hard, soft, and informal law-making at various levels of governance (international, regional, national, local); and (3) sophisticated challenges for the safeguarding of accountability, (democratic) legitimacy, and the rule of law.

Admittedly, while it is an increasingly tangible reality, global governance law is being contested from various corridors. As just one example: in his September 2018 address to the UN General Assembly in New York, then US President Donald Trump stated that "America will always choose independence and cooperation over global governance", that the US "will never surrender America's sovereignty to an unelected, unaccountable, global bureaucracy", and that America rejects "the ideology of globalism". Instead, according to Trump, one should "embrace the doctrine of patriotism".[2] In his 2019 address to the UN General Assembly, he added that "[t]he future does not belong to globalists. The future belongs to patriots. The future belongs to sovereign and independent nations".[3] The inclination for political actors to think in terms of nation-

1 On the relationship between revolution and legal systems, see Leonid Pitamic, *Law and Revolution,* English translation of the Opening Lecture *Pravo in revolucija* of 15 April 1920 at the inauguration of the first Academic year 1919/1920 at the University of Ljubljana Faculty of Law, opening chapter of this volume.

2 Transcript of the President's address of 25 September 2018, www.theatlantic.com/international/archive/2018/09/trump-unga-transcript-2018/571264

3 Transcript of the President's address of 24 September 2019, https://ml.usembassy.gov/remarks-by-president-trump-to-the-74th-session-of-the-united-nations-general-assembly. See also the reflections of Michael A. Peters, 'Trump's nationalism, "the end of globalism", and "the age of patriotism": "the future does not belong to globalists. The future belongs to patriots"', in *Educational Philosophy and Theory* 52 (13) 2020, 1341.

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states and sovereignty is very much back in vogue: one will recall that "take back control" was the motto of the Brexit campaign in the United Kingdom.[4] Nevertheless, in spite of hiccups and recent, particular forms of 'deglobalization'[5] – triggered by financial crises, nationalist governments, and pandemics, including the Covid-19 crisis and its impact on thinking about strategic autonomy[6] – globalization and global governance continue their long march forward.

Remarkably, legal systems and legal curricula in law schools are only coming to terms with these recent developments and challenges very slowly. The present contribution aims to provide some initial analysis and responses as to how to better understand them; how to ensure accountability, democratic legitimacy, and respect for the rule of law; and how to develop didactical tools and curricula to prepare students in today's law schools for these realities.

The contribution will start by describing some of the features of global governance law. It will then address some of the challenges which this 'quiet revolution' poses from the viewpoints of accountability, democratic legitimacy, and the rule of law. We will end with some reflections on how the legal curriculum in law schools should take global governance law into account.

Characteristics of Global Governance Law

Concept of "Global Governance"

The concept and discipline of "global governance" is not legal in nature; it originated from the social sciences, out of a sense of frustration, as Thomas Weiss describes:

> At the international level "global governance" can be traced to a growing dissatisfaction among students of international relations with the realist and liberal-institutionalist theories that dominated the study of

4 See Tim Haughton, 'It's the slogan, stupid: The Brexit Referendum', www.birmingham.ac.uk/research/perspective/eu-ref-haughton.aspx. For critical considerations, see Juliette Ringeisen-Biardeaud, '"Let's take back control": Brexit and the Debate on Sovereignty', in *Revue Française de Civilisation Britannique/French Journal of British Studies* XXII-2 (2017) 1.

5 See, e.g., Alexandre Abdal and Douglas M Ferreira, 'Deglobalization, Globalization and the Pandemic', in *Journal of World-Systems Research* 27 (1) 2021, 202; Harold James, 'Deglobalization: The Rise of Disembedded Unilateralism', in *Annual Review of Financial Economics* 10 (1) 2018, 219; Oleg Komolov, 'Deglobalization and the "Great Stagnation"', in *International Critical Thought* 10 (3) 2020, 424.

6 See *inter alia* Ricardo Borges de Castro, 'Lessons from the battleground: EU strategic autonomy after the 'vaccine wars', 5 February 2021, www.epc.eu/en/publications/Lessons-from-the-battleground-EU-strategic-autonomy-after-the-vaccin~3b43e0; Josep Borrell, 'Why European strategic autonomy matters', 3 December 2020, https://eeas.europa.eu/headquarters/headquarters-homepage/89865/why-european-strategic-autonomy-matters_en; Mario Damen, *EU strategic autonomy 2013–2023. From concept to capacity*, European Parliament Briefing, July 2022, www.europarl.europa.eu/RegData/etudes/BRIE/2022/733589/EPRS_BRI(2022)733589_EN.pdf

> international organisation in the 1970s and 1980s. In particular, these failed to capture adequately the vast increase, in both numbers and influence, of non-state actors and the implications of technology in an age of globalisation.[7]

Within the social sciences, there was unease with the traditional approaches to international relations: the argument being, that they were too strongly based on the nation-state as the basic unit of analysis.[8] Many scholars found that these approaches did not sufficiently reflect the rise of other, non-state, actors, and the multilevel interactions among various levels of policy-making. In a way, global governance law is a similar expression of unease with the traditional approach of public international law. Within public international law, States are still analyzed as the primary actors and units, while non-state actors – with the possible exception of intergovernmental organizations, although their non-state nature can be disputed if they decide by consensus or unanimity of the participating governments – are still given something of a second- or third-rate treatment.

Lawyers, of course, always look for a definition, but there is no definition of global governance which is universally agreed upon. It is, in fact, an elusive notion, and many descriptions have burgeoned since the term came into vogue in the mid-1990s.[9] The following description, developed by Ramesh Thakur and Luc Van Langenhove, is instructive:

> the complex of formal and informal institutions, mechanisms, relationships, and processes between and among states, markets, citizens and organizations – both intergovernmental and nongovernmental – through which collective interests on the global planet are articulated, rights and obligations are established, and differences are mediated.[10]

The attractiveness of this definition is the central role it gives to institutions, laws, norms, policies, and rules, and that it recognizes a broad set of actors

7 Thomas G. Weiss, 'Governance, Good Governance and Global Governance: Conceptual and Actual Challenges', in *Third World Quarterly* 21 (2000), 796.

8 See Klaus Dingwerth and Philipp Pattberg, 'Global Governance as a Perspective on World Politics', in *Global Governance* 12 (2006), at 191, with reference to Klaus D. Wolf and Gunther Hellmann, 'Die Zukunft der Internationalen Beziehungen in Deutschland', in Gunther Hellmann, Klaus D Wolf and Michael Zürn (eds.), *Die Neuen Internationalen Beziehungen: Forschungsstand und Perspektiven in Deutschland* (Nomos 2003) at 588.

9 To our knowledge, the oldest known definition of global governance can be found in James N. Rosenau, 'Governance in the Twenty-First Century', in *Global Governance* 1 (1995), 13: "global governance is conceived to include systems of rule at all levels of human activity – from the family to the international organization – in which the pursuit of goals through the exercise of control has transnational repercussions".

10 Ramesh Thakur and Luk Van Langenhove, 'Enhancing Global Governance Through Regional Integration', in *Global Governance* 12 (2006), 233.

that are relevant for cross-border interactions, without confining them to the traditional categories of public international law. In a way, global governance liberates us from the shackles of overly rigid definitions, concerning the sources and subjects of the international legal order. It opens our eyes to the many multi-level interactions between global, regional (at the macro level), national, subnational, and local levels of rule- and policy-making. It makes it possible to broaden our legal-scholarly horizon by studying the interplay between a great variety of norms: not just between different layers of rule-making,[11] but also between public and private law norms,[12] and between formal and informal norms and institutions.[13] The study of public international law, informal international law-making, and global governance are, therefore, not to be viewed in isolation, but as a continuum where multiple intra- and interdisciplinary perspectives enrich each other.

Characteristics of Global Governance Law

I will now delve a little deeper into some of the features of global governance law (GGL). These include the fact that GGL (1) touches on nearly all areas of law, including private law; (2) requires an understanding of the great diversity of non-state actors; (3) displays a wide variety of hard, soft, and informal law-making processes; and (4) occurs at various levels of governance, with mutual interactions among these levels.

11 See, e.g., on multi-level regulation, Andreas Follesdal, Ramses A. Wessel and Jan Wouters (eds.), *Multilevel Regulation and the EU. The Interplay between Global, European and National Normative Processes* (Martinus Nijhoff Publishers 2008). For a short introduction, see Jan Wouters and Ramses A. Wessel, 'The Phenomenon of Multilevel Regulation: Interactions between Global, EU and National Regulatory Spheres', in *International Organizations Law Review* 4 (2007), 169.

12 See, e.g., Jan Wouters and Jed Odermatt, 'International Banking Standards, Private Law, and the European Union', in Marise Cremona and Hans Micklitz (eds.), *Private Law in the External Relations of the EU* (Oxford University Press 2016) 171; Jan Wouters, 'Private Law, Global Governance and the European Union', in Anne L.M. Keirse and Marco B.M. Loos (eds.), *Alternative Ways to a New Ius Commune* (Intersentia Publishing 2012) 21.

13 A very important new 'informal' global governance actor is the G20, which constantly interacts with formal institutions: see *inter alia* Jan Wouters and Ines Willemyns, 'The Interplay between the G20 and the World Trade Organization: Informal Law-making in Action', in Julien Chaisse and Tsai-yu Lin (eds.), *International Economic Law and Governance: Essays in Honour of Mitsoa Mitsushita* (Oxford University Press 2016) 183; Jan Wouters, Sven Van Kerckhoven and Jed Odermatt, 'The EU at the G20 and the G20's Impact on the EU', in Bart Van Vooren, Steven Blockmans and Jan Wouters (eds.), *The EU's Role in Global Governance: The Legal Dimension* (Oxford University Press 2013) 259; Jan Wouters and Dylan Geraets, 'The G20 and Informal International Lawmaking', in Joost Pauwelyn, Ramses A. Wessel, Jan Wouters, Ayelet Berman and Sanderijn Duquet (eds.), *Informal International Lawmaking: Case Studies* (TOAEP 2013), 19; Jan Wouters and Thomas Ramopoulos, 'The G20 and Global Economic Governance: Lessons from Multilevel European Governance?', in *Journal of International Economic Law* 15 (2012), 751; Jan Wouters and Sven Van Kerckhoven, 'The OECD and the G20: An Ever Closer Relationship?', in *George Washington International Law Review* 43 (2011), 345.

GGL Touches on Nearly All Areas of the Law

First, GGL is not limited to public international law or even to private international law. It touches upon nearly all areas of the law, public and private, national, transnational, and international. Two illustrations are offered here; both stem from the confines of private law.

The first example is taken from the area of private standards. Over the past decades, several private standards schemes have emerged in a variety of sectors[14]: a prominent example is the food sector. Such private standards have not been drafted by legislatures or regulatory authorities, but have instead been formulated by non-governmental entities, such as, in the example of the food sector, supermarket chains, retail consortia, manufacturers,[15] producers, and trade cooperatives.[16] A prominent example[17] is GlobalG.A.P.[18] – the Global Partnership for Good Agricultural Practice (until 2007 EurepGAP), which is a business-to-business (B2B) private standard-setting initiative of the food industry. Food retailers, producers, and suppliers that agree to the terms of reference of the organization are all eligible for membership. More than 200,000 food producers from all over the world are certified by GlobalG.A.P.

Interestingly, the whole GlobalG.A.P. legal design rests on purely private law mechanisms. Its ownership and day-to-day administration are in the hands of FoodPlus GmbH, a private limited company based in Cologne, which is subject to German company law (GmbH Gesetz). The shareholders are the supermarket chains, food producers, retailers, etc.

Since GlobalG.A.P. is a private initiative, it is not subject to traditional democratic control and accountability mechanisms.[19] That begs a number of questions, in terms of accountability and legitimacy. These will be considered in the next section.

14 See, for a general overview, Jan Wouters, *Le statut juridique des standards publics et privés dans les relations économiques internationales* (2020) 406 Recueil des Cours de l'Académie de la Haye.

15 Spencer Henson and Thomas Reardon, 'Private agri-food standards: Implications for food policy and the agri-food system', in *Food Policy* 30 (2005), 241.

16 Guillaume Gruère and Debdatta Sengupta, 'GM-free private standards and their effects on biosafety decision-making in developing countries', in *Food Policy* 34 (2009), 399.

17 Other examples include the BRC Global Standard and the International Food Standard (IFS). See, together with an overview of B2C ("business to consumer") standards, Maria Cecilia Mancini, 'Public and Private Food Standards', in Liesbeth Dries et al. (eds.), *EU Bioeconomy Economics and Policies: Volume II, Palgrave Advances in Bioeconomy: Economics and Policies* (Palgrave, 2019) 47, at 53 ff. For an ever wider overview, see Doris Fuchs and Agni K. Kalfagianni, 'Private Food Governance', in David M. Kaplan and Paul B. Thompson (eds.), *Encyclopedia of Food and Agricultural Ethics* (Edward Elgar Publishing, 2019, 2nd ed.) 2060, 2062 ff.

18 www.globalgap.org

19 See Nicholas Hachez and Jan Wouters, 'A Glimpse at the Democratic Legitimacy of Private Standards. Assessing the Public Accountability of GlobalG.A.P.', in *Journal of International Economic Law* 14 (2011), 677.

A second example of private law-based governance is forest certification. In the absence of a binding legal instrument under international law, a variety of forest law enforcement and private governance initiatives have emerged. These are aimed at tackling sensitive issues related to illegal logging and promoting sustainable forest management worldwide through certification.[20] Private actors set and enforce standards for the management of forests, also referred to as 'forest certification'.[21] A famous example of such an initiative is the Forest Stewardship Council (FSC). Launched in 2003, the FSC is a widely recognized system of forest certification that has often been praised for being an innovative and properly functioning global 'soft' governance mechanism. Its environmental and sustainability standards benefit a global network of businesses, organizations, and communities.[22] Similarly to GlobalG.A.P., FSC is run by a German, non-profit legal person based in Bonn, FSC Global Development GmbH.

The aforementioned examples make clear that private global governance initiatives, like GlobalG.A.P. and FSC, cannot be fully understood without an affinity with private law, in particular contract and company law. Furthermore, these initiatives relativize state sovereignty as they operate without the involvement of public authorities, and often develop much higher labour, environmental, and health/sanitary standards than what public international authorities, like the Codex Alimentarius Commission, are able to produce.[23]

It is interesting to study the reactions of States and international organizations to these initiatives, as they have exhibited a mixture of endorsement and concern. The EU, for its part, is very fond of these private governance schemes and relies on them: both in its food regulation[24] and in recent legislation, for example, a 2010 regulation prohibiting the placement of illegally harvested

20 These include the Lembaga Ekolabel Indonesia (LEI), the Programme for the Endorsement of Forest Certification Schemes (PEFC), the Malaysian Timber Certification Council (MTTC) and the Certificación Florestal (CerFlor Brazil).

21 See Axel Marx, Emilie Bécault and Jan Wouters, 'Private standards in forestry: assessing the legitimacy and effectiveness of the Forest Stewardship Council', in Axel Marx, Jo Swinnen, Miet Maertens and Jan Wouters (eds.), *Private Standards and Global Governance. Economic, Legal and Political Perspectives* (Edward Elgar Publishing, 2012) 60.

22 See *inter alia* Amparo Arellano Gil, Thomas Colonna, John Hontelez, Marion Karmann and Anakarina Pérez Oropeza, 'Forest Stewardship Council: Transforming the Global Forestry Sector', in Michael Schmidt, Daniele Giovannucci, Dmitry Palekhov and Berthold Hansmann (eds.), *Sustainable Global Value Chains* (Springer, 2019) 481.

23 See Axel Marx and Jan Wouters, 'Global Constitutionalism and Private Governance. The Discrete Contribution of Voluntary Sustainability Standards', in Takao Suami, Anne Peters, Matthias Kumm and Dimitri Vanoverbeke (eds.), *Global Constitutionalism: European and East Asian Perspectives* (Cambridge University Press 2018) 496. For a comparison with public standards regarding the control of organic farming, see Salvatore Squatrito, Elena Arena, Rosa Palmeri and Biagio Fallico, 'Public and Private Standards in Crop Production: Their Role in Ensuring Safety and Sustainability', in *Sustainability* 12:2 (2020), 606.

24 See Tetty Havinga, 'Private Food Safety Standards in the EU', in Harry Bremmers and Kai Purnhagen (eds.), *Regulating and Managing Food Safety in the EU. A Legal-Economic Perspective* (Springer 2018) 11.

timber on the European market.[25] A more mixed response can be found at the WTO, where concerns have arisen – especially in respect of developing countries – that these standards may create unjustified and unnecessary obstacles to trade. The WTO's Committee on Sanitary and Phytosanitary Measures (SPS Committee) has become one of the fora in which the relationship between public international (WTO) rules and private food standards is discussed.[26]

GGL Requires an Understanding of the Great Diversity of Non-State Actors

Many of the standards and norms of GGL are set by non-state bodies: these can be private entities, like in the case of GlobalG.A.P. and the FSC, but they can also be intergovernmental or supranational organizations, or even associations and networks of regulatory agencies, like the International Organization of Securities Commissions (IOSCO). The latter, currently composed of 229 members from more than 195 jurisdictions, presents itself as "the global standard setter for the securities sector".[27] Interestingly, it takes the legal form of a not-for-profit

25 Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market, OJ 2010, L295/23. In 2005, the EU had already adopted a basic regulation to implement its action plan for 'Forest Law Enforcement, Governance and Trade' (FLEGT): Council Regulation (EC) No 2173/2005 of 20 December 2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Union, OJ 2005, L347/1. On the strategic alliance between environmental groups, timber import-dependent forest industries and retailers, which was at the origins of the EU Timber Regulation, see Metodi Sotirova, Maike Steltera and Georg Winkel, 'The emergence of the European Union Timber Regulation: How Baptists, Bootleggers, devil shifting and moral legitimacy drive change in the environmental governance of global timber trade' (2017) 81 *Forest Policy and Economics* 69.

26 For an analysis, see *inter alia* Ming Du, 'WTO Regulation of Transnational Private Authority in Global Governance', in *International and Comparative Law Quarterly* 67:4 (2018), 867; Tracey Epps, 'Demanding Perfection: Private Food Standards and the SPS Agreement', in Meredith Kolsky Lewis and Susy Frankel (eds.), *International Economic Law and National Autonomy* (Cambridge University Press 2010) 73; Jill E. Hobbs, 'Public and Private Standards for Food Safety and Quality: International Trade Implications', in *Estey Centre Journal of International Law and Trade Policy* 11 (2010), 136; Petros C. Mavroidis and Robert Wolfe, 'Private Standards and the WTO: Reclusive No More', in *World Trade Review* 16 (2017), 1; Enrico Partiti, 'What Use is an Unloaded Gun? The Discipline of the WTO TBT Code of Good Practice and Its Application to Private Standards Pursuing Public Objectives', in *Journal of International Economic Law* 20 (2017), 829; Denise Prévost, 'Private Sector Food-Safety Standards and the SPS Agreement: Challenges and Possibilities', in *South African Yearbook of International Law* 33 (2008), 1; Gretchen H Stanton, 'WTO Perspectives on Private Standards', in Axel Marx and others, *supra* note 20, 235; Eva Van Der Zee, 'Disciplining Private Standards under the SPS and TBT Agreement: A Plea for Market-State Procedural Guidelines', in *Journal of World Trade* 52 (2018), 393; Jan Wouters and Dylan Geraets, 'Private Food Standards and the World Trade Organization: Some Legal Considerations', in *World Trade Review* 11 (2012), 479.

27 www.iosco.org/about/?subsection=about_iosco. On the origins of IOSCO as an 'informal organization', see Charles B. Roger, *The Origins of Informality: Why the Legal Foundations of Global Governance are Shifting, and Why It Matters* (Oxford University Press 2020) 140.

legal entity (*personne morale sans but lucratif*) under a private act governed by the law of Québec in Canada, even though the secretariat moved from Montréal to Madrid in 1999.[28] Similarly, the International Association of Insurance Supervisors (IAIS) takes the form of a non-profit association under Swiss law.[29]

The diversity of transnational bodies that set international standards or steer international processes is such that one simply cannot seek clarity, in terms of their legal nature and actions, through use of the traditional categories – in terms of sources, subjects, and so on – of public international law.[30] Sometimes multilateral governmental fora themselves appeal to techniques of domestic law. For example, the Financial Stability Board (FSB), which was created by the G20 in order to strengthen financial regulation in 2009, does not enjoy international legal personality,[31] but has domestic legal capacity as it has, after endorsement by the Los Cabos G20 summit of June 2012, been incorporated as an association under Swiss law.[32]

It follows that to fully grasp the legal dimensions of such global governance actors, one needs a sound comparative knowledge of national private law regulating companies and non-profit associations, foundations, and the like.

Now, one could surmise, in the face of the rise of these non-State standard-setting bodies: *nihil novum sub soli*. Indeed, an age-old actor of international law, the International Committee of the Red Cross (ICRC) – established in 1863 – is also, in essence, a private association governed by Articles 60 and following the Swiss Civil Code.[33] But international lawyers seem to have forgotten about this and only discuss the *sui generis* status of the ICRC as a subject of public international law. Similarly, the International Chamber of Commerce (ICC) was created as an association under French law in 1919 – it recently celebrated its centenary – and, representing more than 45 million companies, presents itself as "the world business organization".[34] Who will contest that the ICC's Inco Terms are among the most important worldwide standards for the sale of goods?[35]

28 Ibid.

29 See Article 1 of its By-Laws: www.iaisweb.org/page/about-the-iais/by-laws//file/78243/2018-by-law-amendments-8-november-2018

30 For an attempt at categorization, see Stavros Gadinis, 'Three Pathways to Global Standards: Private, Regulatory, and Ministry Networks', in *American Journal of International Law* 109 (2015), 1.

31 See Domenico Lombardi, *The Governance of the Financial Stability Board* (Brookings Institution, Issues Paper September 2011); Camilo Soto Crespo, 'Explaining the Financial Stability Board: Path Dependency and Zealous Regulatory Apprehension', in *Penn State Journal of Law and International Affairs* 5 (2017), 302.

32 See International Monetary Fund, IMF Membership in the Financial Stability Board (22 February 2013), www.imf.org/external/np/pp/eng/2013/022213.pdf

33 See Article 2(1) of the Statutes of the ICRC, adopted on 21 December 2017 and in force since 1 January 2018: www.icrc.org/en/document/statutes-international-committee-red-cross-0

34 https://iccwbo.org

35 See recently, Juana Coetzee, 'CISG and Incoterms: reviving the traditions of the lex mercatoria', in Andrew Hutchinson and Franziska Myburgh (eds.), *Research Handbook on International Commercial Contracts* (Edward Elgar Publishing 2020) 159.

GGL Displays a Wide Variety of Hard, Soft, and Informal Law-Making Processes

International law practitioners are familiar with the distinction, however flawed, between hard law and soft law. They are less used to informal law-making, which one sees in a great variety of international processes that cannot neatly be categorized under one of those categories,[36] such as the work of the International Conference on Harmonization (in respect of pharmaceuticals),[37] the Kimberly Scheme on conflict diamonds,[38] the Proliferation Security Initiative,[39] the International Organization for Standardization's 26000 Standard on corporate social responsibility,[40] the Ruggie Guiding Principles on Business and Human Rights,[41] or the Financial Action Task Force (FATF).[42] While one notices a contemporary decline in multilateral treaty-making,[43] informal law-making continues unabated.

As part of a multidisciplinary research project funded by the Hague Institute for Internationalization of Law, Joost Pauwelyn, Ramses Wessel, and the undersigned conceived of the concept of "informal law-making" in order to capture these normative realities. Its definition is as follows:

> Cross-border cooperation between public authorities, with or without the participation of private actors and/or international organizations, in a forum other than a traditional international organization (process informality), and/or as between actors other than traditional diplomatic actors (such as regulators or agencies) (actor informality), and/or which does not result in a formal treaty or traditional source of international law (output informality).[44]

36 See the many case studies conducted in Pauwelyn and others, *supra* note 12.

37 See *inter alia* John Abraham and Tim Reed, 'Trading risks for markets: the international harmonisation of pharmaceuticals regulation', in *Health, Risk & Society* 3:1 (2001), 113.

38 See Virginia Haufler, 'The Kimberley Process Certification Scheme: An Innovation in Global Governance and Conflict Prevention', in *Journal of Business Ethics* 89:4 (2010), 403.

39 See *inter alia* Michael Byers, 'Policing the High Seas: The Proliferation Security Initiative', in *American Journal of International Law* 98:3 (2004), 526.

40 See Wesley S. Helms, Christine Oliver and Kernaghan Webb, 'Antecedents of Settlement on a New Institutional Practice: Negotiation of the ISO 26000 Standard on Corporate Social Responsibility', in *Academy of Management Journal* 55:5 (2012), 1120.

41 See *inter alia* Radu Mares (ed.), *The UN Guiding Principles on Business and Human Rights. Foundations and Implementation* (Martinus Nijhoff Publishers 2012).

42 See on this 'informal trans-governmental network par excellence', Alejandro Rodiles, *Coalitions of the Willing and International Law. The Interplay between Formality and Informality* (Cambridge University Press 2018) 157 ff.

43 See Jan Wouters, 'International Law, Informal Lawmaking and Global Governance in Times of Anti-Globalism and Populism', in Heike Krieger, Georg Nolte and Andreas Zimmermann (eds.), *The International Rule of Law: Rise or Decline? Approaching Current Foundational Challenges* (Oxford University Press 2019) 242.

44 See Joost Pauwelyn, 'Informal International Lawmaking: Framing the Concept and Research Questions', in Joost Pauwelyn, Ramses A. Wessel and Jan Wouters (eds.), *Informal International Lawmaking*, *supra* note 12, at 13.

The "turn to informality" has subsequently received much stronger attention in scholarship, although legal writings remain far behind political science authors in this respect.[45]

GGL Law-making Occurs at Various Levels of Governance

From the global to the inter-regional, regional, national, subnational, and local levels, the law-making spans a variety of governance levels, and they may all interact with each other, top-down and bottom-up, from soft to hard law. As just one example, the FATF has elaborated an authoritative, comprehensive set of recommendations over time to combat money laundering and terrorist financing.[46] These recommendations have *inter alia* been implemented by the EU in its legislation on money laundering, resulting in the adoption of the Fifth Anti-Money-Laundering Directive in July 2018.[47] Its authoritative recommendations are also regularly referred to by the UN Security Council, with a peak of 17 references in Resolution 2462 of 28 March 2019.[48]

Challenges From a Viewpoint of Accountability, Legitimacy, and Rule of Law

GGL raises intricate questions of accountability, democratic legitimacy, and rule of law. One must be vigilant to ensure that transnational normative processes do not escape the 'checks and balances' which have been painstakingly put in place at the domestic level in order to ensure democratic accountability, legitimacy and respect for the rule of law.[49] The problem is an evergreen of international law and the work of international organizations, which are often seen as extended arms and a form of self-empowerment of national governments, much to the dismay of national parliaments.

However, from the case studies conducted as part of our "informal law-making" project (*supra*), it was found that many of the informal law-making mechanisms are actually more transparent, with more input from stakeholders

45 See *inter alia*, next to Rodiles, *supra* note 41 and Roger, *supra* note 26: Felicity Vabulas and Duncan Snidal, 'Organization without Delegation: Informal Intergovernmental Organizations (IIGOs) and the Spectrum of Intergovernmental Arrangements', in *Review of International Organizations* 8:2 (2013), 193; Oliver Westerwinter, Kenneth W. Abbott and Thomas Biersteker, 'Informal Governance in World Politics', in *Review of International Organizations* 16 (2021), 1.

46 See, with the 2020 updates: www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html

47 See Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018, OJ 2018 L156/43.

48 See William Casey King and Richard Gordon, 'Introductory Note to United Nations Security Council Resolution 2462', in *International Legal Materials* 59:4 (2020), 252, at 253.

49 The delicate issues of checks and balances in different legal orders assume an important place in Pitamic's discussion, *supra* note 1.

and more checks and balances between different actors and between the international and domestic level, than traditional treaty-making processes. In addition, whereas traditional international treaties may have to be formally approved by domestic parliaments, this is often a mere rubber stamp, without effective control. In contrast, the interaction between international actors and domestic stakeholders in many informal law-making mechanisms is much deeper. Those mechanisms have often replaced traditional domestic protections with other, more effective, interactions of control, both at home and at the transnational level. One could even argue that they are often based on a 'thicker' consensus amongst a much broader set of actors than traditional international law instruments.

In other words, the assumption that formal law-making is by definition more legitimate or accountable than informal law-making simply no longer holds true.

Nevertheless, strong vigilance is needed, as there are challenges. This can be illustrated by revisiting the processes for the adoption and implementation of the private standards referred to earlier, in particular the food safety standards set by GlobalG.A.P.[50]

Legitimacy can derive from many factors, such as the particular expertise of the governing actor issuing a norm, the level of respect enjoyed by the governing entity in public opinion, the compliance of a norm with norm-making procedures defined by a legal order ('legality'), its congruence with the norms and traditions of the public concerned, or its problem-solving capacity ('output legitimacy'). But in modern norm theory, and taking account of the evolution of the ethos of our societies, a decisive determinant of legitimacy is the democratic accountability of the standard-setting process.

This accountability is both retrospective and prospective. It is *retrospective* in the sense that there must be a relationship in which the general public may require that the standard-setter renders account of its activities and should be able to control it – through a variety of channels. However, a more extensive view of accountability is needed, in which a *prospective* dimension should be added to the retrospective one. While the retrospective conception focuses on the governing entity *rendering account* of its activities to the public, the prospective dimension insists on the necessity for the governing entity to *take into account* the preferences, interests, and concerns of the public in making decisions and issuing norms, through appropriate means. This side of accountability emphasizes the responsiveness which a governing entity must show to the public's concerns. It is most effectively achieved by means of mechanisms of inclusive and egalitarian participation, which can take many forms, such as

50 The following analysis is largely taken from Nicolas Hachez and Jan Wouters, 'A Glimpse at the Democratic Legitimacy of Private Standards. Assessing the Public Accountability of Global G.A.P.', in *Journal of International Economic Law* 14 (2011), 677.

voting procedures to adopt particular rules (directly or through representatives), or public notice and comment procedures prior to making a decision.[51]

What does this mean for a private standard-setter like GlobalG.A.P.? As it cannot rely on the legitimacy bestowed by a public 'mandate', it has to build its democratic legitimacy by displaying accountability to the public. This is a delicate exercise since, as a business-driven initiative, it pursues non-public profit objectives. However, an element which might spur GlobalG.A.P.'s quest for legitimacy, and which may motivate it to adopt best accountability practices, is that, with respect to food safety, GlobalG.A.P. is bound to cohabit with other public and/or private regulatory schemes that regulate the food products market. As all actors in the food market have an interest in displaying the highest commitment to safety to consumers, competition between food safety standards is arguably a source of continuous improvement of the standards, of constant research of public preferences, and therefore, perhaps of increased legitimacy. The cohabitation of several regulatory schemes and governing entities is also, to some extent, a guarantee against capture by a powerful stakeholder group.

In our earlier analyses, we found that GlobalG.A.P.'s prospective accountability practices do fall short of democratic standards: certain categories of stakeholders are awarded direct participation in decision-making (producers and retailers), whereas others are not (consumers, producers which do not have the means to join) and are confined to participate through informal and non-binding consultation procedures. This does not guarantee inclusive and egalitarian participation, and is therefore not necessarily conducive to democratic legitimacy.[52]

In other words, safeguarding the democratic legitimacy, accountability, and rule of law of transnational normative processes is a concern that needs to be taken seriously, and that requires a critical examination of each of the processes concerned.

Final Reflections: How Legal Curricula Should React

How should the curricula of law schools adapt to this emergence of global governance law?

Most law faculties in continental Europe have fairly comparable curricula. When one compares, for instance, the ten highest-ranked law faculties from

51 See in more detail, Tim Corthaut, Bruno Demeyere, Nicolas Hachez and Jan Wouters, 'Operationalizing the Accountability of Informal International Lawmaking', in Pauwelyn, Wessel and Wouters (eds.), *Informal International Lawmaking*, *supra* note 12 at 310.

52 It should, however, be stressed that, regardless of the progress which can still be achieved in this respect, in comparison to other private standard-setting organizations in the food sector, GlobalG.A.P. seems to be a leader in best practices. Its standard-setting process is based on the ISEAL Code of Good Practice for Setting Social and Environmental Standards, a reference in sustainability standard-setting.

continental Europe in the 2018 Times Higher Education Ranking, the following similarities stand out. Law courses on "global governance" are rather exceptional: usually "global governance" is a subject matter for a specialized masters' programmes.[53] Even in the rare cases that programmes on law and global governance are offered, they typically focus on *international* law and global governance.[54] Moreover, specific courses on "law and global governance" or "global governance law" are nearly non-existent: usually the courses in a programme on (international) law and global governance focus on particular subfields of public international law, such as international trade law, human rights law, and international law related to climate change. Moreover, there are hardly any books that can currently serve as teaching materials for a course on global governance law.[55]

As indicated, what these programmes, and legal curricula in general, tend to ignore is that global governance encompasses both international and national law, public law and private law. Most programmes ignore the complexities, both in terms of the phenomenology of global governance norms, but also in terms of the problems of legitimacy, accountability, and rule of law posed by these norms.

Notwithstanding the relative stagnation of traditional international law-making processes, law schools continue to teach primarily traditional (private and public) international law courses and seem to leave new forms of cooperation to international relations scholars. This is a grave mistake. One needs to open the eyes of students, preferably at an early stage of their university programmes, to regulatory dynamics beyond the traditional actors, processes, and outputs. Problem solving in an increasingly diverse and complex network/knowledge society requires action beyond what States can shoulder. We need to better study the multiple sources of knowledge, expertise, and control. The de-centralized, heterarchical nature of the international system, where new processes, actors, and forms of cooperation emerge almost organically, has many challenges, but it also has advantages as compared to more monolithic, state-centred, national legal systems

So, what to do about this? The present author argues in favour of a multidisciplinary course on "global governance law" at the level of the initial (not just advanced!) master, or even during the last bachelor year, of legal studies. When students have had a sound introduction to public and private international law, private law and company law in their earlier bachelor years – which is by no means assured, as quite a number of legal curricula have the unfortunate

53 E.g., the MA diplomacy and global governance at Vesalius College, Brussels. An interesting exception is ESADE's double bachelor degree, which combines a Bachelor in Law and a Bachelor in Global Governance, Economics, and Legal Order.

54 See e.g., the LLM in International Law and Global Governance at Tilburg University.

55 A rare exception is the Hague course of Eyal Benvenisti, later published as a monograph *The Law of Global Governance*, Hague Academy of International Law, 2014.

tendency to schedule international law courses only at the master's level – it makes sense to set up a course at a master's or late bachelor's level that takes the diversity of transnational normative processes, and the many challenges they pose, into account. In this way we will better prepare future lawyers, both those who will go in private practice as well as those who will take on responsibilities in public life, for the quiet revolution of global governance law.

Part III

Law and (Dis)continuity

12 *Rechtsdogmatik* and Change

*Paul Oberhammer**

Apropos Pitamic

It was a true pleasure to study Leonid Pitamic's magistral lecture on "Law and Revolution" for a number of reasons. First and foremost, it is a particular honour to contribute to this project at the occasion of the law faculty's centenary, as I have had so many excellent experiences in Ljubljana, with its Faculty of Law and, most importantly, with colleagues from Ljubljana, especially, but not only, with the excellent work and people in the field of civil procedure. Moreover, this masterpiece of legal thought does not only discuss a salient issue of the early 20th century,[1] but is still worth reading today, both because of its content and because of Pitamic's personality, which seems to be clearly expressed throughout the whole paper – an inaugural lecture *comme il faut*.

The lecture catches the reader's attention by its seemingly paradoxical title. After all, law is not or at least should not be – revolutionary in nature, as the rule of law is all about foreseeability, and a revolution results in quite the opposite. The same is, of course, true for *Rechtsdogmatik*, which is the subject of this contribution.[2] And indeed, Pitamic's subject is not "revolutionary law", but – to put it in rather simple terms – about legal continuity under revolutionary circumstances, in his case the *dismembratio* of the Habsburg empire. He asks how legal continuity can be achieved under such conditions, and his main answer refers to institutional continuity, that is, the courts providing for continuity instead of the legislator.

* I would like to thank Professor Elisabeth Holzleithner, Professor Franz-Stefan Meissel and my assistant Julius Schumann for discussions on the subject.

1 Jan Schröder: "Richterrecht" und Rechtsbegriff im frühen 20. Jahrhundert, in: Jan Schröder: *Rechtswissenschaft in der Neuzeit. Geschichte, Theorie, Methode. Ausgewählte Aufsätze 1976–2009*. 2010, pp. 569ff.

2 Andreas Voßkuhle: Was leistet Rechtsdogmatik?, in: Gregor Kirchhof, Stefan Magen, Karsten Schneider: *Was weiß Dogmatik? Was leistet und wie steuert die Dogmatik des Öffentlichen Rechts?* 2012, p. 112. Note, however, that there have been cases where legal doctrine was abused in order to legitimize revolutionary changes; see, e.g., for a sad example of such thinking, Karl Engisch: *Die Einheit der Rechtsordnung*. 1935, pp. 85ff.

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Dogmatik

In the following section, I would like to discuss academia's potential to respond to change. Academic doctrinal thought was, and to some extent still is, an important factor for the process of determining what the actual law is at a given moment in time, at least in central Europe, in particular in the German-speaking countries. The following remarks have relevance, if any, only for this part of the world. When I refer to "doctrinal" thought, I refer to what we call *Rechtsdogmatik*. It is worth noting that while "legal doctrine" and *Dogmatik* basically do the same – that is, suggesting how to answer legal questions in practice and creating a systematic approach to the law by learning from that process for the benefit of solving future cases and teaching – these two concepts are very different in many respects.[3] As Pitamic correctly pointed out already 100 years ago, we can learn a lot on the role of courts in the law-making process from the common law tradition, and this is still true today. In particular, the role of case law is still not sufficiently reflected in the German-speaking jurisdictions,[4] for example, how it develops under changing circumstances.[5] This deficit is somehow mirrored by the somewhat simplistic approach to the role of legal doctrine, e.g., in the U.S.[6] Moreover, *Dogmatik* is understood as a joint endeavour of academia and legal practice in the German-speaking jurisdictions, as is reflected in the reference to the dichotomy of *herrschende Rechtsprechung* (prevailing case law) and *herrschende Lehre* (prevailing academic doctrine), both forming the *herrschende Meinung* (prevailing opinion) in many court decisions in these jurisdictions.[7] It is a well-known fact that academic legal doctrine does not play a comparable role in other countries, and in particular not in common law jurisdictions, where its practical relevance lies almost entirely in teaching law.

3 See, e.g., Christian Waldhoff: Kritik und Lob der Dogmatik, in: Gregor Kirchhof, Stefan Magen, Karsten Schneider: *Was weiß Dogmatik? Was leistet und wie steuert die Dogmatik des Öffentlichen Rechts?* 2012, pp. 36ff with further references.

4 This is not only true for current legal theory, but also for most continental European accounts of the development of jurisprudence; see Paul J. Du Plessis: A Dialogue between Legal Theory and Legal Practice – Thoughts from the Ius Commune, in: *RabelsZ* 77 (2013), pp. 379ff. Then again, it has also been stated that the practical role of scholarly legal doctrine in the U.S. is still a subject for future research in a relatively recent U.S. publication – see Emerson H. Tiller, Frank B. Cross: What is Legal Doctrine?, in: *Northwestern University Law Review* 100 (2006), p. 517 (533).

5 For an excellent overview on the English development, see Stefan Vogenauer: Zur Geschichte des Präjudizienrechts in England, in: *ZNR* 28 (2006), pp. 48ff.

6 Cf. the critical analysis of Emerson H. Tiller, Frank B. Cross, *Northwestern University Law Review* 100 (2006) pp. 517ff.

7 One might say that *Rechtsdogmatik* is the interface between academia and practice; see Matthias Jestaedt: Wissenschaftliches Recht, in: Gregor Kirchhof, Stefan Magen, Karsten Schneider: *Was weiß Dogmatik? Was leistet und wie steuert die Dogmatik des Öffentlichen Rechts?* 2012, pp. 117ff ("*gemeinsames Kommunikationsformat*").

Discussing the potential of *Dogmatik* to react to change is of course a subject worth a monograph, which would require much more insight in legal history and legal theory than I have. As this chapter is necessarily a rather short one, I thought that this might be the proper essayistic format to share a simple and very sketchy observation that has emerged as a result of my decades dedicated to doctrinal work. Moreover, I have to add another apologetic remark: discussing the potential of *Dogmatik* might create the impression that all this is about defending its precarious role in the law-making process. Indeed, stressing or just discussing the potential of *Dogmatik* can have an inherent tendency of affirming this role which, contrary to the role of the courts, is not expressly provided for by law.[8] I do, however, believe that this is not what I am into here. Rather than affirmatively arguing the relevance of *Dogmatik* on a theoretical level, I prefer to try to be convincing in my doctrinal work – which might be a more honest, straightforward and, in particular, promising way to prove and reaffirm the relevance of *Dogmatik*.[9]

"Tradition" and "Principled Argumentation"

Some authors have a rather narrow concept of *Dogmatik* – for them, it is only about systematic work and developing *Begriffe*[10] (which then, for example, leads to the problematic assumption that Savigny's work was only historical in nature while actual *Dogmatik* started with Jhering[11]). It has, however, been correctly observed that legal certainty always rests on two aspects, one being the contingent content of the law as it has historically developed, and the other the systematic development of terminology and principles (more or less) on this basis.[12] I believe that this is also true for *Dogmatik*, as its actual (and only) *raison d'être* is its potential to provide for consistent answers to legal questions. And if the rule of law is all about foreseeability resulting from such consistency, these two aspects are also necessarily the starting points for ways

8 There are, however, a few exceptions, where this is the case: see, e.g., art 1 para 3 of the Swiss *Zivilgesetzbuch*, which tells the court to follow "*bewährter Lehre*" ("established doctrine") or, even more specific, Article 38(1)(d) of the Statute of the International Court of Justice, which refers to the "teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law".

9 See Oliver Lepsius: Kritik der Dogmatik, in: Gregor Kirchhof, Stefan Magen, Karsten Schneider: *Was weiß Dogmatik? Was leistet und wie steuert die Dogmatik des Öffentlichen Rechts?* 2012, pp. 43ff. While I share his observation that *Rechtsdogmatik* has an inherent tendency of *Selbstermächtigung* (self-empowerment), I do not believe that this is necessarily a problem, as at least academic legal doctrine is always a competitive process; and competition of ideas is what makes our societies stronger.

10 E.g., Thomas Möllers: *Methodenlehre*. 2017, pp. 350ff.

11 Christian Waldhoff, in: Kirchhof, Magen, Schneider, 2012, p. 29.

12 Jürgen Habermas: *Faktizität und Geltung*. 1994, pp. 243ff.

of how to achieve such consistency, that is (in the case of the German-speaking jurisdictions[13]), *Dogmatik*.

In this sense, *Dogmatik* is not only about creating a system of consistent *Begriffe*, but also about a sufficiently complex understanding of the contingencies mentioned before. The insight that any legal order is the result of a necessarily contingent development should not result in a simplistic black letter approach to the results of such a development – this is not the kind of approach the law demands from those who try to make sense of it.[14] Of course, traditional *canones* of interpretation contain, *inter alia*, the historical and the systematic interpretation, but this is not what I want to address here. Rather, I suggest that *Dogmatik* itself aims at being convincing by being consistent in both being based on a (one might say hermeneutic[15]) tradition[16] and on the ongoing process of systemising the law by developing principles and referring to them. While it is easy to see that every lawyer does his or her work on the basis of a certain hermeneutic tradition, it is often underestimated that a thorough understanding of this tradition is an indispensable element of *Dogmatik*. (Those who prefer to avoid being also tradition-based in this sense are most of the times simply not aware of their traditional imprint which legal thought simply cannot avoid.[17])

Both elements – let me call them "tradition" and "principled argumentation" for the sake of briefness – are integral conditions for an understanding of *Dogmatik* that does justice to both *Dogmatik* and, therefore, the law itself.

13 I do not want to suggest that the approaches of the German-speaking jurisdictions are identical in this respect – see, in detail, Paul Oberhammer: Kleine Differenzen – Vergleichende Beobachtungen zur zivilistischen Methode in Deutschland, Österreich und der Schweiz, in: *AcP* 214 (2014), pp. 155ff. Moreover, there are major differences among different fields of law even within the respective jurisdictions, e.g., between private and public law – cf., e.g., Christian Waldhoff, in: Kirchhof, Magen, Schneider, 2012, pp. 32ff. It would go far beyond the scope of this contribution to discuss all this.

14 See Wolfgang Ernst: Gelehrtes Recht, in Christoph Engel, Wolfgang Schön: *Das Proprium der Rechtswissenschaft*. 2007, pp. 34.

15 See, e.g., Horst Dreier: Rechtswissenschaft als Wissenschaft – Zehn Thesen, in: Horst Dreier: *Rechtswissenschaft als Beruf*, 2018, pp. 14ff. See also from a more historical perspective, Matthias Goldmann: *Dogmatik als rationale Rekonstruktion: Versuch einer Metatheorie am Beispiel völkerrechtlicher Prinzipien*, Der Staat Bd 53 (2014), pp. 373 (381ff).

16 It might be true (in particular from a historical perspective), that what is called "tradition" here has a philological and a historical side – as opposed to "principled argumentation", which is more philosophical in nature – see Christian Bumke: Rechtsdogmatik. 2017, pp. 172ff. However, while philology, history and philosophy (and maybe theology) might be the humanities, that have had the strongest influence on the development of *Rechtsdogmatik*, it would not do justice to the *Dogmatik* which has evolved since the 19th century to describe it as a *compositum mixtum* of such humanities. In particular, actual *Dogmatik* does not refer to the findings of such humanities, but is rather a "*monstro simile*" scarfing down and (not in every case) digesting (and quite often not reflecting) external findings in a quite syncretistic and contingent fashion over time.

17 Wolfgang Ernst, in: Engel, Schön, 2007, p. 32.

Of course, they are not independent from each other. In this context, it would be much too simple to say that reading statutes or court decisions based on a certain hermeneutic tradition first creates a mess because all this – i.e., both the sources of law and the hermeneutic tradition – is contingent in nature, and then a supposedly logical principled argumentation creates *ordo ab chao*. Sometimes, this is the case, but sometimes, it is simply a better understanding of the tradition (or its informed deconstruction) that creates consistency, and therefore, something worth being called a "legal order". It would, however, go far beyond the scope of this chapter to reflect the interdependence between "tradition" and "principled argumentation".

Dogmatik in Decline

It is a commonplace that today, the rational potential of *Dogmatik* and, in particular, its practical influence are lower than in the past, i.e., in the 19th and 20th centuries. It is useless to deny that, although it was obviously something of an exaggeration when one author went so far as to declare it dead almost 50 years ago.[18] There is a number of (to a large degree interdependent) reasons for this development. One might think of the growing complexity of society and, resulting from that, the growing amount and complexity of legislation and case law (and the easy electronic accessibility of such sources); the growing specialisation in certain fields of law; the Europeanisation and internalisation of law; the fast pace of change in all this – etc. Of course, the extent to which such circumstances have had a negative influence on the relevance of traditional *Dogmatik* obviously varies from one situation to the other. (It is not the purpose of this contribution to discuss such factors in detail.) Still, our courts cite scholarly writing, but the number of references to case law is steadily growing,[19] and courts such as the European Court of Human Rights or the Court of Justice of the European Union, which became much more important over the past decades, have no tradition of citing academic sources. The same is true, to some extent, for national administrative and constitutional courts, which also became much more important during the last century. Still, many academics take part in legislative work, but it is hard to ignore that the legislative influence of scholars in the 18th and 19th centuries,[20] such as – to mention a few Austrian examples – Joseph von Sonnenfels, Franz von Zeiller, Joseph Unger, Julius Glaser, or Hans Kelsen, has no equivalent today. Still, academic *Dogmatik* is the main source of teaching law in these jurisdictions

18 Ulrich Meyer-Cording: *Kann der Jurist heute noch Dogmatiker sein?* 1973, p. 32.

19 See (already 20 years ago) Elisabeth Holzleithner, Viktor Mayer-Schönberger: Das Zitat als grundloser Grund rechtlicher Legitimität, in: Birgit Feldner, Nikolaus Forgó: *Norm und Entscheidung*. 2000, pp. 338ff.

20 See Jan Schröder: Das Verhältnis von Rechtsdogmatik und Gesetzgebung in der neuzeitlichen Rechtsgeschichte (am Beispiel des Privatrechts), in: Jan Schröder, *Rechtswissenschaft in der Neuzeit. Geschichte, Theorie, Methode. Ausgewählte Aufsätze 1976–2009*. 2010, pp. 477ff.

today, but skills-oriented formats such as moot courts and case-based teaching have become more important recently.

While most people will more or less agree on this – that is, the demise of the relevance of *Dogmatik* and the reasons outlined here – the discussion seems to have a blind spot: all these reasons reflect external factors, one might say a changing environment. But are there reasons why *Dogmatik* cannot adapt to all this change? It was able to lead the way through many changes in the 19th century, but many believe that it has lost some of its potential to master change in the past century. The 19th century brought about many extremely important changes also affecting the law. It would be incorrect to assume that *Dogmatik* had its heyday back then because those were more stable times. One cannot say that, for example, in Austrian or German history, there were fewer changes which were significant for the development of the law in the period between 1848 and 1918 than, for example, in the time since World War II. Nevertheless, academics were at the forefront of the legal development in the second half of the 19th century. What might have changed seems to be – contrary to common assumptions – not the pace of change, but the ability of *Dogmatik* to successfully reduce the complexity resulting thereof, and exactly that ability to reduce complexity in a smart fashion is the actual strength of *Dogmatik*. In a similar context, Wolfgang Ernst has reminded us that "(l)ife has always been equally complex. What changes are the will, the courage and the ability to skilfully reduce the complexity of life".[21]

Have "Tradition" and "Principled Argumentation" Stood the Test of Time?

Doctrinal arguments always contain something like "*in essence*, this case is about . . ."; you always try to identify a point of reference. Such points of reference can be different in nature – one might look for help in concepts of justice or economic approaches, but the actual doctrinal point of reference is always one within the law. *Dogmatik* is about making arguments from a legal point of view. When you try to identify which of at least two rules (in whatever form) is applicable in a certain case, and if you want to obtain consistency (which, after all, is the core of every legal argument), you need to develop a principle on a meta level above these rules. By establishing a consistent order of such principles, you can reduce complexity in the process of both learning and then applying the law. Such a comprehensive system on an adequate level of complexity resulting from this process helps you with future cases, and all these cases provide feedback to the system – and so on. This process, however, does not happen *ex nihilo*, but is always based on the traditional understanding of the law that the people teaching, researching and applying the law have inherited. With that, I refer to the two aspects of "tradition" and "principled

21 Wolfgang Ernst, in: Engel, Schön, 2007, p. 38.

argumentation" which I have pointed out previously. As I have said before, these are not two different methods, but simply the two elements of doctrinal thought, one might say two features of *Dogmatik* which are the inseparable aspects of every argument from a legal point of view.

There are different ways of making such a legal argument. Some believe that the tradition and the principled argumentations derive from a set of values enshrined (in whatever way) in the law (as post-war *Wertungsjurisprudenz* believes) or from certain interests that seek legal protection (as *Interessenjurisprudenz* argues), or simply from the systematic logic of the legal system itself (as, if I understand it correctly, is the position of legal positivism), etc. In striving for consistency, you will always have such points of reference, the final point of reference being the imperative of the *Einheit der Rechtsordnung*. The obvious fact that all this does not lead to full consistency, that this way of arguing is more or less convincing from case to case, and that the *Einheit der Rechtsordnung* is obviously not a fact, does not change all this: if you want to reduce complexity and achieve consistency, you need to do so on the basis of "tradition" and by availing yourself of a "principled argumentation". Accordingly, the *Einheit der Rechtsordnung* is the goal we have to try to achieve,[22] although, of course, nobody can seriously believe that full consistency (or even something close to it) is a realistic outcome. It is simply the normative basis of *Dogmatik*, which rests upon both aspects of *Einheit der Rechtsordnung*, that is *Einheit* and *der Rechtsordnung*. As matter of fact, a legal system will always rest upon both its necessary complexity and, at the same time, the imperative to strive for *Einheit* – and, in the case of German-speaking countries, *Dogmatik* is how *Einheit* and complexity go together within the legal system.[23]

The process of "principled argumentation" bears an obvious resemblance to traditional metaphysics,[24] as it discusses the specific on the basis of the assumption that the general, an essence enshrined in some principle or ideal, is contained or expressed in the specific, and as soon as you find the general in the specific, you have understood what it is about. Moreover, being based on a hermeneutic "tradition" is also not a specific way of legal thinking, but is a feature of every traditional approach in (at least) the humanities.

It does not come as a surprise that lawyers have been applying patterns of argumentation that were common in many other fields in a certain period, and that these patterns show most clearly if you look at the philosophic thought of a given period, as diverse as it may be. I do of course not suggest that lawyers derived *Dogmatik* directly from philosophy or the humanities in general,[25] but it might be fair to assume that legal thinking has a tendency to follow patterns

22 Wolfgang Ernst, in: Engel, Schön, 2007, p. 29.

23 See Niklas Luhmann: *Rechtssystem und Rechtsdogmatik*. 1974, pp. 20ff.

24 Cf. Wolfgang Fikentscher: Wissenschaft und Recht im Kulturvergleich, in: Christoph Engel, Wolfgang Schön: *Das Proprium der Rechtswissenschaft*. 2007, pp. 79ff.

25 Wolfgang Ernst, in: Engel, Schön, 2007, pp. 29ff.

of the *Zeitgeist* of every period. And tradition-based hermeneutics and traditional metaphysics have been out there in continental Europe[26] for quite some time, at least throughout the whole period in which *Dogmatik* has evolved (of course, with their contents developing over time). Jurisprudence is a relatively simple humanity, and it always takes some time until the law follows the *Zeitgeist*. Both said simplicity and said slowness are indispensable features of legal doctrine, as it has to be both simple and reluctant to change its ways very soon after a new idea, ideology or school of thought has come about. Otherwise, it would be unable to provide for consistency and foreseeability in practice. Nevertheless, I believe that traditional *Dogmatik* – based on "tradition" and "principled argumentation" – followed the general ways of thought prevailing until roughly the 19th century. The adoption of the approaches of traditional metaphysics and hermeneutics was a real success story: In doing so, the *historische Rechtsschule* and the *Begriffsjurisprudenz* were the basis for *Rechtsdogmatik*, which developed mainly in the course of the 19th century and became more flexible and refined in the 20th century. This *Dogmatik* provided an excellent tool not only for answering legal questions in a consistent fashion, but also for drafting codes with a high degree of rationality and, last but not least, for effectively teaching law at universities.

Accordingly, basically every argument of traditional *Dogmatik* is based on the following: (1) "this corresponds with something established in the past", and (2) "this is in line with a principle that applies to this kind of situation". It is hard to ignore that both types of arguments have been much more convincing in the past than they are now.

"It was like this in the past" used to convince people to believe many things, such as political power belonging to a certain family, the authority of scripture, or that private law should be based on the civilian tradition. Accordingly, up to and including the 19th century, it was, for example, a convincing argument in private law that one should follow Roman law. This was the common understanding for centuries since the reception of Roman law, during the *usus modernus* and finally under the reign of the *historische Rechtsschule*. Who would be convinced today by somebody arguing that something needs to apply because other people have expressed a certain view 2000 years ago? On the contrary, what people expect, for example, from politics is "reform", "change", "fresh ideas", etc.; religion is expected to help people with their actual lives; and the law is criticised for lagging behind "reality". Referring to traditions is obviously "so last season" today, while arguing that something is "new", a "revolutionary change", "a step into the future", etc. has become a common way of

26 While legal doctrine was to a large extent responsible for providing legal certainty (i.e., foreseeability) in continental Europe, the binding power of precedent had, to some extent, a similar function in common law jurisdictions. It is at least tempting to draw a line between utilitarianism and the adoption of this technique for obtaining consistency; cf. in that sense, Stefan Vogenauer, *ZNR* 28 (2006) pp. 70f.

persuasion. (There are also counter-developments to that promising to reverse change, but they are even more obsessed with change.) The promise of progress is *en vogue* today, not the reference to tradition.

This has also affected the law. For example, in the 19th century, the *historische Rechtsschule* was able to make convincing arguments by reference to ancient traditions, such as the civilian tradition or the allegation that something is a "Nordic" or "Germanic" heritage. Today's *historische interpretation* is rarely more than a quick look into *travaux préparatoires*, and the older they are, the less convincing they are deemed. Moreover, nobody would enact legislation today as the result of historical research; rather, it is generally meant to do away with past concepts. Academic monographs are written by jurists who deal with intellectual constructs developed in the past without even taking notice of that past.

Not only the reference to traditions but also the one to principles went out of fashion in the recent past. It seems to be the common denominator of philosophic thought since the 20th century that it is opposed to metaphysics. As different as they are, practically all major philosophic movements of the 20th century have that in common.[27] This is also reflected in many other fields: Consumerism reigns, and it is focused on the specific product that makes you happy and establishes your status. Millions of people watch videos showing concrete acts such as unpacking products or other routines that do not represent any idea whatsoever. We have got used to the concept that a work of art "is what it is", and not a depiction or expression of some ideal. "Living in the moment" is no longer a reason for doubting somebody's sanity, but rather something many people identify as happiness. People are looking for "experiences" rather than following an ideal. Some are even trying to be "realists". The concrete is much more appealing than the general, and the representation of ideas is much less attractive than "just it".

It is hard to ignore that all this has affected legal thinking, and so "principled argumentation" also has become less attractive over time. In particular, the *Einheit der Rechtsordnung* became suspect. The fact that it does (of course) not "exist in reality" seems to have made it less attractive as a point of reference for doctrinal thought. Referring to general principles became less convincing as well – a law professor criticising a court decision for not being in line with a general principle may face condescending smiles as if he or she has dug out some antiquated stuff from his or her treasure trove of definitions and mnemotechnic verses which he or she childishly defends against the "practice". Prevailing doctrines in legal theory and methodology reflect this development. As in philosophy, referring to a hierarchy of principles, which might be essential for understanding the specific, is opposed by different schools of thought which have otherwise almost nothing else in common. For example, legal realism (to put it very simple) basically denies that one can find answers to legal questions within the law, and therefore would deny the mere possibility of a

27 See, e.g., Theodor W. Adorno: Wozu noch Philosophie, in: *Gesammelte Schriften 10.2, Kulturkritik und Gesellschaft II*. 2003, p. 463.

successful *Rechtsdogmatik* – if it only knew about it. Traditional legal positivism proudly points out that legal doctrine is unable to answer many legal questions and refers them to the courts' discretion (which is, of course, a self-fulfilling prophecy). And even the infamous *konkretes Ordnungsdenken* of the Nazi jurists had clear parallels with Heidegger's anti-metaphysical musings about *Sein*. Economic analysis of the law and behavioural economics proudly confront legal concepts with factual findings. Even private lawyers seemingly engaging in principled argumentation have contributed to its demise, for example by inventing too many principles or by advocating their too-flexible usage. Many academic lawyers have secluded themselves into tiny niches of doctrinal expertise with very specific principles. Some of them deal with new cross-section subjects, where allegedly everything is new and special, and some have started to believe that mere information management (like reporting what the courts do) is a way to spend an academic life. Interdisciplinarity without clearly differentiating the disciplines did not help *Dogmatik* either.

I am aware that all of the this discussion sounds very much like cultural pessimism. This is, however, a sentiment which I do not share. Humanity is much better off today than ever before, and the two paradigm shifts mentioned here have contributed to many improvements. Unfortunately, they have undermined the basic notions of *Dogmatik*, that is, "tradition" and "principled argumentation", in the sense outlined herein. Therefore, they threaten the foreseeability of legal decisions, the consistency of the legal system and, accordingly, the rule of law itself as we know it. It is true that other legal systems – most notably the common law jurisdictions – are doing well without *Dogmatik*. I do not suggest that we should defend our *Rechtskultur* (which is a term often used in a reactionary sense for defending the habits of a legal elite). I do, however, believe that we should not dispose of this cultural resource thoughtlessly, because we will have to find smart ways to reduce the complexity of both law and society also in the future. The law's legitimacy will obviously continue to require consistency.

A Somewhat Optimistic Outlook

It is hard to see how a legal order providing consistency and foreseeability could be based on notions of the "new" and the "concrete". Rather, for example, the *konkretes Ordnungsdenken* of the Nazi jurists has turned out to be a mere lie – it was just a way of replacing "tradition" and "principled argumentation" by arbitrary political decisions or of talking up unjust realities or personal beliefs as "implied teleologies" of a rule or situation. I also doubt whether a "flexible" *Dogmatik* taking into account findings from interdisciplinary research will do the trick. Of course, as already mentioned, *Dogmatik* will and should always be influenced by external insights from other fields of thought. They also have an important critical potential as outside views. (I do believe that *Dogmatik* has such a critical potential as well, but other disciplines hardly avail themselves of this potential.) There have been many instances where this successfully happened in the recent past, such as the implementation of psychological insights in criminal or family law or of

economic approaches in competition or corporate law. Still, one must accept that the consistency of a large human-made system such as the law cannot be obtained by implementing too many new ideas at a fast pace. Whether you like it or not, being a lawyer will always mean being conservative to some extent. People lusting for "revolutionary new ideas" should of course become lawyers, and then live with the inherent stubbornness of the law. In any event, there seems to be no plausible replacement for "principled argumentation". In particular, I doubt that machine learning tools that are able to some extent to predict the outcome of court proceedings could be a future substitute for "principled argumentation", if only because, in a free society, the paradox of deciding should be exercised by interactions between humans.

For the time being, we might look for ways of a better *Dogmatik*. Maybe we should get a better understanding that *Dogmatik* should not be too complex and that, therefore, creating many principles on a multitude of levels might be a fun activity for academics, but not very helpful in practice. We might have cared too much about the "hard cases" and, by doing so, we might have created seemingly very refined, but actually rather bad *Dogmatik*. Of course, we have to be aware of the details, but it may be preferable to refrain from integrating them all into overly complicated doctrinal principles. Rather, *Dogmatik* should help practitioners to sort out what is irrelevant for most of the cases rather than create a system that seemingly gives answers for 100% of the cases, but is too complicated for 99% of them. Finally, it might be worth thinking about whether the formats we use in our work are the right ones to do the job of *Dogmatik*. Systematic doctrinal thought might work better in systematic treatises than in individual contributions on very specific issues. I suggest that we should think about a return of the *System*, which might be a more promising way to help practice than even more article-by-article commentaries. Finally, we should not underestimate the role of teaching and keep striving for smart ways to reduce complexity as a tool of legal education. In doing so, *Dogmatik* will most probably not regain the role it had in the 19th century and large parts of the 20th century, but we might create an academic *Dogmatik*, which will continue to play a helpful role for legal practice and might be able to master change in the days to come. After all, understanding the law we have inherited, the legal contingencies we encounter, and creating manageable principles will most likely remain useful activities. This process will continue to enable us to achieve consistency, to create an actual legal order and, therefore, equality before the law[28] under conditions of complexity for some time.

28 On the context between *Dogmatik* and equality before the law, see Gregor Kirchhof, Stefan Magen: Dogmatik: rechtliche Notwendigkeit und Grundlage fächerübergreifenden Dialogs – eine systematisierende Übersicht, in: Gregor Kirchhof, Stefan Magen, Karsten Schneider: *Was weiß Dogmatik? Was leistet und wie steuert die Dogmatik des Öffentlichen Rechts?* 2012, pp. 162ff.

13 Artificial Intelligence – An Important Part of the Fourth Industrial Revolution (4IR)

Challenges and Chances for Europe

*Joseph Straus**

The Faculty of Law of the University of Ljubljana, my alma mater, titled the conference celebrating its venerable 100th anniversary in March 2020, "Law and Revolution". By choosing this title, the organizers honored the highly esteemed first Dean of the Faculty, Professor Leonid Pitamic, who on the 15 April 1920 inauguration of the first academic year 1919/1920 addressed this complex relationship in a way that even after 100 years has lost nothing in its persuasive power.

Pitamic spoke in the wake of the end of the World War I, i.e., the dissolution of the Habsburg Austro-Hungarian monarchy, the Bolshevik revolution in Russia and the accomplished revolution in Slovenia, followed by the declaration of independence and joining with Croats and Serbs in founding a new state.[1] His deliberations on "Law and Revolution" reflect that background, as they do reflect his endeavor to offer thoughtful and prudent guidelines not only for how to study and apply law, but also what the role of law in the new state should be. Professor Pitamic from the outset characterizes law as "a set of rules sanctioned in a certain way", called legal order, and revolution meaning that this order is overthrown. Pitamic further points out that revolution is a negation of the legal order directed against it, but that it does not negate legal order as such.[2] Revolution was a concept resting "on the essential principle that the rearrangement or overthrow being effected is justified by a system distinct from the one being overthrown".[3] For Pitamic, not revolution but anarchy stands in contradiction to law,[4] and his credo was: "Society and law can only exist in a state of limited

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1 Leonid Pitamic, Pravo in Revolucija (Law and Revolution), in Marijan Pavčnik (ed.), *Pravo in revolucija* (Lexpera 2019), 19–46 (referring to this event at 23). See Chapter 2, p. 15.

2 Ibid., p. 19.

3 Ibid.

4 Ibid, p. 17.

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freedom. How the boundaries defining that freedom are set is a problem of logic and morality and also the problem of the state".[5]

Artificial Intelligence (AI) technologies form an important part of the Fourth Industrial Revolution (4IR), but are themselves based on multiple discoveries and inventions constituting episodes revealing "an anomaly that cannot be aligned with professional expectation, despite repeated effort of normal science". When the profession can no longer await anomalies that subvert the existing tradition of scientific practice, then according to Thomas Kuhn, "begin the extraordinary investigations that lead the profession at last to a new set of commitments, a new basis for the practice of science". Kuhn characterizes such "extraordinary episodes in which that shift of professional commitments occurs" as *scientific revolutions*.[6] Thus, whether a scientific revolution has taken place, i.e., provided a new basis for the practice of science, eventually depends on the professional commitment. However, although scientific revolutions, due to their unpredictability and inherent novelty, constitute a permanent challenge to the positive law, courts as a rule can master it by prudently using the room to maneuver left by statutes. Also as regards scientific revolutions, society and law can exist only in a state of limited freedom and, as pointed to by Pitamic, setting appropriate boundaries is a problem of logic, morality and of the state.[7] The latter, being responsible for the legal order, should take care that the "shuttling" of law avoids the two extremes once mentioned by Nobel Laureat Kary B. Mullis, i.e., "freeing" and "enslaving" us, but provides for an adequate "limited freedom" between the two, advocated by Professor Pitamic.

Introduction

Together with analytics, cloud computing and the internet of things, AI forms an important part of the marriage of physical and advanced digital technologies, which stands for what is commonly understood as the fourth industrial revolution.[8] Industrial revolutions, with their manifold and unpredictable consequences, have always presented great challenges to society. Because of the tendency of the rapid development of science and technology, the very basis of such revolutions, to overwhelm and outdistance the law, legislators are faced with the formidable problem of how to "tame the unleashed genie of science, so that it remains the servant not the master of mankind".[9] However,

5 Ibid, p. 19 [emphases in the original].

6 Thomas S. Kuhn, *The Structure of Scientific Revolutions*, 2nd enlarged ed. (The University of Chicago Press, 1962, 1970), 6.

7 Leonid Pitamic, No. 1, p. 19. In that respect, AI technologies are particularly demanding.

8 Cf. European Patent Office: *Patents and the Fourth Industrial Revolution*. Munich: EPO Publisher (2017), 14.

9 Howard T. Markey, 'Science & Law: The Friendly Enemies', in *IDEA Journal on Law and Technology* 30 (1989), 13–19 (at 15).

AI technology has added a new quality to the old problem: it enables machines, which use algorithms, to learn iteratively from data and think in concepts and eventually turn themselves into a source of new knowledge, generated by AI. Owing to its practically universal applicability, AI puts many long-standing paradigms into question and calls for new solutions. In order to let science and technology generate results that benefit the society at large, legislators more than ever have to interact with scientists, ethicists, economists and numerous stakeholders to reach responsible, prudent and farsighted, future-oriented decisions.

AI State of the Art

Since 1956, when the term AI was coined and defined as "the science and engineering of making intelligent machines, especially intelligent programs" by John McCarthy, an American computer scientist,[10] AI has made remarkable progress. Today it is understood as "a collection of technologies that combine data, algorithms and computing power",[11] and in an exemplary manner it demonstrates its dependence on the interplay of techniques, discoveries and ideas. Computer scientists have developed a method of data analysis that automates analytical model building, which uses algorithms that iteratively learn from data, and which allows computers to find hidden insights without being explicitly programmed where to look, known as *machine learning* (ML).[12] Computer scientists have further developed the *deep learning method*, a form of machine learning that enables computers to learn from experience and understand the world in terms of a hierarchy of concepts. Thus, the computer gathers knowledge from experience. Therefore, there is no need for a human operator to interact with the computer.[13] The use of such methods in supercomputers such as IBM's Deep Blue®, with its enormous speed and storage capacity, allowed the latter in 1997 to beat the chess world champion Gary Kasparov, and signaled the advent of the first stage of AI development, namely that of Artificial Narrow Intelligence (ANI). Although computer power is indispensable for the functioning of AI, even supercomputers such as Deep Blue® or the even much more powerful Chinese Tianhe-2®, which can perform 34 quadrillion calculations per second and can solve complex problems extraordinarily fast, have no perception of things other than the information provided to them by their creators.

10 Cf. Gonenec Gurkaynak, Ilay Yilmaz and Gunes Haksever, 'Stifling Artificial Intelligence: Human Perils', in *Computer Law & Security Review* 32 (2016), 749–758 (at 753).

11 European Commission, White Paper on Artificial Intelligence – A European Approach to Excellence and Trust, Brussels, COM (2020) 65 final (2020), at 2.

12 Cf., e.g., Ivan Bratko, 'Machine Learning and Qualitative Reasoning', in *Machine Learning* 14 (1994), 305–312.

13 Kwang Gi Kim, 'Deep Learning', in *HIR Health Informatics Research* 22 (4) 2016, 351–354 (at 351).

AI is approaching the next stage of its development, namely that of Artificial General Intelligence (AGI), i.e. one that will represent human-level AIs. What for long seemed purely speculative the 2022 advent of Chat GPT, the generative AI large language model (LLM) from the AI research firm Open AI, now looks much more realistic.[14] It would go beyond the skills of this writer to mention more than a few of the achievements that characterize the current status of AI. A very important opener of new AI applications is the use of Artificial Neural Networks (ANN), an "information processing paradigm that is inspired by the way biological systems, such as the brain, process information".[15] Shimon Ullman describes ANN "as a highly reductionist approach to model cortical circuitry" and observes that "in its basic current form, known as 'deep network' (or deep net) architecture, this brain-inspired model is built from successive layers of neuron-like elements, connected by adjustable weights, called 'synapses' after their biological counterparts".[16] ANNs, like humans, learn by example. ANNs have

> the ability to derive meaning from complicated or imprecise data, can be used to extract patterns and detect trends that are too complex to be noticed by either humans or other computer techniques. A trained neural network can be thought of as an "expert" in the category of information it has been given to analyze.[17]

The enormous advantage of this approach is best demonstrated by the AlphaZero program using a deep neural network, which convincingly defeated a world champion program in the games of chess and shogi (Japanese chess), as well as Go. The AlphaZero algorithm starts from random play and with no domain knowledge given, except the game rules. AlphaZero, unlike the state-of-the-art programs which are based on powerful engines that search many millions of positions, leveraging domain expertise and sophisticated domain adaptations, learns the necessary move probabilities and value estimates entirely from self-play and uses them to guide its search in future games.[18]

14 Cf. Glenn Zorpette, 'GPT-4, AGI, and the Hunt for Superintelligence: Neuro Expert Christof Koch weighs AI Progress against Potential Threats', in *IEEE Spectrum* 19 April 2023. According to Gonenec Gurkaynak, Ilay Yilmaz and Gunes Haksever, the third stage of AI will be Artificial Superintelligence (ASI), which will be "much smarter than the best human brains in practically every field, including scientific creativity, general wisdom and social skills", (ibid., n. 10), quoting Nick Bostrom, *Superintelligence: Paths, Dangers, Strategies* (OUP 2014).

15 Christos Stergiou and Dimitrios Siganos, *Neural Networks* (2014), http://srii.sou.edu.ge/neural-networks.pdf (accessed 4 July 2018).

16 Shimon Ullman, 'Using Neuroscience to Develop Artificial Intelligence', in *Science* 363 (2019), 692–693.

17 Christos Stergiou and Dimitrios Siganos, ibid. (n. 8).

18 David Silver et al., 'A General Reinforcement Learning Algorithm Masters Chess, Shogi, and Go Through Self-Play', in *Science* 362 (2019), 1140–1144.

The following selection of articles published in the *Science*, *Nature* and *Cell* magazines, may illustrate what AI technology has already achieved: "A Deep Learning Approach to Antibiotic Discovery",[19] "Computers Turn Neural Signals Into Speech",[20] "FDA Approves Stroke-detecting AI Software",[21] "Machine Learning Classifies Cancer",[22] "FDA Backs Clinician-free AI Imaging Diagnostic Tools",[23] "Machine Learning for Molecular and Material Science",[24] "Artificial Intelligence in Cancer Therapy",[25] "AI Shows Promise for Breast Cancer Screening",[26] "Antibiotic Discovery with Machine Learning",[27] "Omics and AI Advance Biomarker Discovery for Liver Disease"[28] and "Swarm Learning for Decentralized Artificial Intelligence in Cancer Histopathology".[29]

AI's Debated Aspects

AI, along with old-type concerns such as loss of jobs, safety endangered, discrimination generated, and the like, provokes also many new concerns, such as loss of self-determination and self-control, or even the moral panic that AI would present a threat to society's capacity for empathy. Philosophers critically observed that, according to the logic of AI, there is no freedom of will, because machines follow the program. If they fail, this is due to the anomalies of the system. The same philosophers expressed concerns because some software-controlled systems have probabilistic functions, which assign a probability distribution of successor states to a state, rather than a fixed successor. As a consequence, "learning" robots, meaning probabilistic and not any more deterministic machines, can be constructed, resulting in a suspension of the categorical difference between human and machine. "The alternative is not a choice between determination and probabilism, but between determination and freedom".[30] Social scientists questioned the idea that AI's goal must be

19 Jonathan M. Stokes et al., *Cell* 180 (2020), 688–702. They report the discovery of a new antibiotic Halicin that is capable of killing 35 powerful bacteria, by using a deep-learning algorithm.
20 Kelly Servick, *Science* 363 (2019), 14.
21 *Report Nature Biotechnology* 35 (2017), 604–605.
22 Derek Wong and Stephen Yip, *Nature* 555 (2018), 446–447.
23 Mark Ratner, *Nature Biotechnology* 36 (2018), 673–674.
24 Keith T. Butler, et al., *Nature* 559 (2018), 547–555.
25 Dean Ho, *Science* 367 (2020), 982–983.
26 Etta D. Pisano, *Nature* 577 (2020), 35–36.
27 Cesar de la Fuente-Nunez, *Nature Biotechnology* 40 (2022), 833–834.
28 Tiffany Wu et al., *Nature Medicine* 28 (2022), 1131–1132.
29 Oliver Lester Saldanha et al., *Nature Medicine* 28 (2022), 1232–1239.
30 Julian Nida-Rümelin, *Digital Humanism*, Max Planck Research 2/19 (2019), 10–15 (at 12). As noted in a *Nature* Editorial, ". . . many of the behaviors of LLMs emerge from a training process, rather than being specified by programmers. As a result, in many cases the precise reasons why LLMs behave the way they do, as well as the mechanisms that underpin their behavior, are not known – even to their own creators" ('Understanding ChatGPT is a Bold New Challenge for Science', in *Nature* 619 (2023) 671–672).

autonomy, implying the conjecture "that every aspect of learning or any other feature of intelligence can in principle be so precisely described that a machine can be made to simulate it". In their understanding, AI's goal and mission were not, "and need not to be, to replace humans with machines, but to build machines that can work in tight interdependence with people". This would require that "engineers need to respect and learn from social scientists who are studying the complexities of human interaction with one another and with technology".[31] "Human-centered AI" recently stands for rejecting the idea that autonomous machines could "exceed or replace any meaningful notion of human intelligence, creativity and responsibility".

To what extent software engineers already cooperate with social scientists is difficult to assess; however, engineers are certainly aware that current ML algorithms, which are widely used in many sensitive areas, despite their potential to cause harm, still do not provide their users with an effective means for precluding undesirable behavior. In order to provide relief for this serious problem, ML algorithms whose goal is not to produce a solution with a given set of properties, but to define the goal of the designer, which is to produce an algorithm with a given set of properties, were designed. Such ML algorithms, according to their designers, provide their users with the ability to easily (that is, without requiring additional data analysis) place limits on the probability that the algorithm will produce any specified undesirable behaviour. They apparently do not just present a replacement for ML algorithms in existing applications, but should also pave the way for new applications for which the use of ML was previously deemed to be too risky. Although these newly designed ML algorithms do not address the problem of imbuing intelligent machines with a notion of morality or human-like values, and do not solve the problem of avoiding undesirable behavior that the user never considered,[32] they certainly constitute a great step forward in improving the safety of AI applications.

Because of its obvious interference with privacy, if applied in public areas, the use of AI in facial recognition technology from the outset has faced great scepticism and even decisive challenge. Since it has become known that the US company *Clearview AI, Inc.* has collected and stored in its private database three billion faces from predominantly publicly accessible sources, and developed an app whose computer code includes programming language to pair it with augmented reality glasses, the use of AI for facial recognition has provoked a strong negative reaction worldwide. The critics, among other things, pointed out that the algorithms "were trained on and created by those with Caucasian-featured faces, which reinforces race-based biases in policing". More

31 Justine Cassell, 'Artificial Intelligence for a Social World', in *Issues in Science and Technology* (2019 Summer), 29–36 (at 30).

32 For details, see Philips S. Thomas et al., 'Preventing Undesirable Behavior of Intelligent Machines', in *Science* 366 (2019), 999–1004.

than 600 law enforcement agencies in the US have already started to use the Clearview app. Among Clearview clients are also private companies. The US states of Oregon and New York, as well as a number of US cities, reacted to these developments and have banned facial recognition technology for policing and government use.[33] Also the EU Commission considered a temporary ban of three to five years on the use of facial recognition technology in public areas.[34] In China, however, the use of AI for face recognition also in public areas is omnipresent. The fact that one of the largest data factories in China, the private company known under the initials MBH, alone employs 300.000 workers across the country for the labelling of faces, the necessary preparatory work for face recognition, conveys some idea of the extent to which AI is used for face recognition in the country.[35]

AI Economic Considerations

The economic importance for business and the actual use of AI technology transpire from a Special Report of *The Economist* entitled "GrAIt Expectation", published in 2018.[36] Companies such as Johnson & Johnson, a consumer goods firm, and Accenture, a consultancy, use AI to sort through job applications and pick the best candidate. The casino and hotel group Caesars uses AI to guess customers' likely spending and on this basis offers personalized promotions to draw them in. The media and information firm Bloomberg uses AI to scan companies' earnings and automatically generates articles. AI makes it possible for the mobile operator Vodafone to predict problems with its network and with users' devices. Amazon uses AI for guiding robots in its warehouses and for optimizing packing and delivery, as well as detecting counterfeit goods and powering its smart speaker/assistant, Alexa. Companies in every industry use AI to monitor cyber security and other risks. *The Economist*'s report emphasizes the "Techtonic shifts" resulting from the use of AI. Without AI for product recommendations, targeted advertising and forecasting demand, tech leaders, such as Google and Amazon in the West and Alibaba and Baidu in China, would not be as big and successful as they

33 For the entire debate on the Clearview activities and reactions thereto, see Beryl Lipton, 'Records on Clearview AI Reveal New Info on Police Use', www.muckrock.com/news/archives/2020/jan/18/clearview-ai-facial-recogniton-records (accessed 20 January 2020) (2020); Jennifer Valentino-DeVries, Gabriel J.X. Dance and Aaron Krolik, 'The Secretive Company That Might End Privacy as We Know It', in *The New York Times* (2020), www.nytimes.com/2020/01/18/technology/clearview-privacy-facial-recognition.html (accessed 26 February 2020).

34 Éanna Kelly, 'EU Makes Move to Ban Use of Facial Recognition Systems', in *Science Business* (2020), https://sciencebusiness.net/news/eu-makes-move-ban-use-facial-recognition-systems (accessed 21 January 2020).

35 Technology Quarterly: Technology in China, *The Economist*, 4 January 2020 under "A New Trinity" at 9.

36 (2018), 3–12 (at 3, 4).

are. Therefore, non-tech companies, worried that without appropriate use of AI they could be outdistanced, also started to acquire promising young tech firms. In 2017, firms worldwide spent about US $21.8 billion on mergers and acquisitions related to AI.[37] Finally, the entire potential economic-value creation from AI in the next 20 years, according to estimates of McKinsey, will amount to some US $40 trillion.[38]

If one looks at patent statistics as an indicator for developments in AI-related technologies in geographic terms, then, as regards companies, among the top 20 applicants 12 are from Japan, three from the USA, two from China, two from Korea and one from Europe (Siemens ranking 11th). However, IBM with 8.290 and Microsoft with 5.930 inventions are in leading positions. Of interest is also the fact that the Chinese Academy of Sciences (CAS) ranks 17th, and the Korean Electronics and Telecommunications Research Institute (ETRI) 20th.[39] Patent statistics for the top 500 applicants reveal high engagement of academic institutions in AI research and in patenting AI-related inventions. Among them are 167 universities and public research institutions, of which 110 are Chinese, 20 are from the US, 19 from Korea and four from Japan and Europe (of which highest ranking is the German Fraunhofer Institute at 159th, followed by the French Alternative Energy and Atomic Energy Commission in 185th position).[40]

The dominant position of Chinese academic institutions, which not only represent some 60% of listed academic institutions but also occupy the first ten ranks, with CAS in the lead, does not come as a surprise. Peking University in Beijing first started to offer AI courses for undergraduates in 2004, and by now some 30 Chinese universities are heavily engaged in AI teaching.[41] According to an analysis of the Allen Institute for Artificial Intelligence in Seattle, China's share of authorship of the 10% most-cited AI papers has continuously increased, and in 2018 reached 26.5%, behind only the United States at 29%, whose share is declining.[42]

China also has world-leading companies in computer vision, speech recognition and natural-language processing, such as Magvii and SenseTime

37 Ibid., referring to PitchBook, a data provider.

38 Reproduced in *The Economist*, ibid. Figure "Ballooning" at 5. These "pre" – Chat GPT and other LLMs generative AIs estimates may soon turn too modest. In 2023 alone some US $ 27bn flowed into private AI companies such as Open AI, and experts predicted, e.g., that sales of AI chips for data centres by 2027 would amount to some US $ 400 bn (cf. Richard Waters, 'The AI Revolution's Slow First Year', in *Financial Times* 30/31 December 2023, 6).

39 World Intellectual Property Organization (WIPO), *Technology Trends 2019 Artificial Intelligence* (WIPO 2019), Figure 4.1 at p. 60.

40 Ibid., 16.

41 David Cyranoski, 'Chinese Firms Enter the Battle for AI Talent', in *Nature* 563 (2018), 260–261.

42 Cf. Sarah O'Meara, 'China's Ambitious Quest to Lead the World in AI by 2030', in *Nature* 572 (2019), 427–428.

(privately owned start-ups for facial recognition), Unisound, iFlytek and Face++.[43] Chinese government is a big sponsor of AI technology. In 2018 it announced an investment of US $2.1 billion in an AI industrial park, and it plans to become a world leader in the AI field by 2030.[44] Not surprisingly, in a symposium held in Washington, D.C. on 5 November 2019, Senator Charles Schumer proposed that the US government create an agency that over five years would invest US $100 billion on basic research in AI, "To keep pace with China and Russia in a critical research arena and support work that U.S. companies are unwilling to finance".[45]

AI OECD Principles

In view of its economic, technological and social consequences, governments realized that the application of AI technology necessitates some internationally agreed-upon ethical guidance. Therefore, on 22 May 2019, 36 countries, members of the Organization for Economic Cooperation and Development (OECD), and Argentina, Brazil, Colombia, Costa Rica, Peru and Romania, signed up to the following OECD Principles on Artificial Intelligence:

(1) AI should benefit people and the planet by driving inclusive growth, sustainable development and wellbeing;
(2) AI systems should be designed in a way that respects the rule of law, human rights, democratic values and diversity, and they should include appropriate safeguards – for example, enabling human intervention where necessary – to ensure a fair and just society;
(3) There should be transparency and responsible disclosure around AI systems to ensure that people understand when they are engaging with them and can challenge outcomes;
(4) AI systems must function in a robust, secure and safe way throughout their lifetimes, and potential risks should be continually assessed and managed; and
(5) Organizations and individuals, developing, deploying or operating AI systems, should be accountable for their proper functioning in line with the above principles.

43 Cf. Sarah O'Meara, ibid. According to *The Economist*, 4 January 2020, Magvii and SenseTime are two of the most valuable startups, worth US $ 4bn and US $ 7.5bn respectively, Technology Quarterly Report, "Technology in China" under "A New Trinity", at p. 9.

44 David Cyranoski, *Nature* 572 (2019), 260–261.

45 Cf. Jeffrey Merwis, 'Top Democrat Wants Big AI Push', in *Science* 366 (2019), 787. However, Schumer's proposal, introduced in the US Senate jointly with Senator Todd Young as a Bill for an "Endless Frontier Act", ended, far from the original proposal in the US Innovation and Competition Act, which in 2021 passed the Senate and is still under consideration as H.R. 4521 in the House of Representatives (cf. Samuel Hammond, 'How Congress Ruined the Endless Frontier Act', in *Niskanen Center* (2021), www.niskanencenter.org/how-congress-ruined-the-endless-frontier-act/ (accessed 20 July 2022).

The OECD also recommended that governments facilitate public and private investment in research and development (R&D) in order to spur innovation in trustworthy AI. They should foster accessible AI ecosystems with a digital infrastructure, technologies and mechanisms to share data and knowledge and create a policy environment that will open the way to deployment of trustworthy AI systems. People should be equipped with AI skills, and workers should be supported to effect a fair transition and cooperation across borders and sectors to share information, develop standards and work towards responsible stewardship of AI.[46]

In June 2019, China's National New Generation of Artificial Intelligence Governance Committee postulated harmony, fairness and justice, respect for privacy, safety, transparency, accountability and collaboration as ethical principles to control the area of AI development.[47]

Europe "Discovers" AI

The European Commission also realized the necessity to adopt measures to cope adequately with the technological change generated by AI technology. In a communication on "Artificial Intelligence for Europe" of 25 April 2018,[48] it announced it was devoting €1.5 billion to AI research funding through 2020. According to the communication, for boosting the EU's technological and industrial capacity and AI uptake across its economy, the EU as a whole (public and private sectors combined) should aim to invest in AI research and development at least €20 billion by the end of 2020, and then €20 billion per year for the following decade.[49] The Commission also offered a kind of "inventory" of European AI-related achievements and capabilities and announced plans for a broad range of measures necessary to ensure that "EU can make a difference – and be the champion of an approach that benefits people and society as a whole". For achieving that goal, the Commission declared that it was time to make significant efforts to ensure that:

- *Europe is competitive in the AI landscape*, with bold investments that match its economic weight. This is about supporting research and innovation to develop the next generation of AI technologies, and deployment to ensure that companies – in particular small and medium-sized enterprises making up 99% of business in the EU are able to adopt AI.

46 Cf. Forty-Two Countries Adopt New OECD Principles on Artificial Intelligence, www.oecd.org/science/forty-two-countries-adopt-new-oecd-principles-on-artificial-intelligence.htm (accessed 3 September 2019). For the full text of AI principles of OECD see Recommendation of the Council on Artificial Intelligence, OECD Legal Instruments (OECD 2019).

47 Cf. Sarah O'Meara, ibid. (n. 36).

48 Doc COM (2018) 237 final.

49 Ibid., p. 6.

- *No one is left behind the digital transformation.* AI is changing the nature of work: jobs will be created, others will disappear, most will be transformed. Modernization of education, at all levels, should be a priority for governments . . .
- *New technologies are based on values.* The General Data Protection Regulation was a major step for building trust, essential in the long term for both people and companies. This is where the *EU's sustainable approach to technologies* creates a competitive edge, by embracing change based on Union's values.[50] As with any transformative technology, some AI applications may raise new ethical and legal questions, for example, related to liability or potentially biased decision-making. The EU must therefore ensure that AI is developed and applied in an appropriate framework, which promotes innovation and respects the Union's values and fundamental rights as well as ethical principles such as accountability and transparency. The EU shall lead this debate on the global stage.[51]

On 19 February 2020, the EU Commission published the "White Paper on Artificial Intelligence – A European Approach to Excellence and Trust",[52] aimed at setting out policy options on how to achieve the twin objectives of promoting the uptake of AI and addressing the risks associated with certain uses of this new technology. According to the White Paper, trustworthiness is a prerequisite for AI's uptake, because AI as a digital technology is a central part of every aspect of people's lives; people should be able to trust it.[53] The EU Commission emphasizes that a common European approach to AI is necessary to reach sufficient scale and avoid fragmentation of the single market.[54] To this aim, the White Paper contains two main "building blocks". A policy framework setting out common EU measures necessary to mobilize public and private resources to achieve an "ecosystem of excellence" along the entire value chain, starting in research and innovation and to create the right incentives to accelerate the adoption of solutions based on AI, including by small and medium-sized enterprises; and a regulatory framework with key elements that will create a unique "ecosystem of trust", ensuring compliance with EU rules, including the rules protecting fundamental rights and consumers' rights, in particular for AI systems operating in the EU that pose a high risk.[55] The

50 As set forth in Article 2 of the Treaty on EU, i.e., respect of human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities, "The Member States share a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail" (ibid.).
51 Introduction – Embracing Change (all emphases in original) (ibid.).
52 Doc COM (2020) 65 final.
53 Ibid., p. 1.
54 Ibid., p. 2.
55 Ibid., p. 3.

proposed legislation on European Data Governance (Data Governance Act)[56] should, *inter alia*, ensure fair access to data to make a broad uptake of AI possible, especially for small and medium-size enterprises.

However, the centre piece of EU Commission's AI legislative initiative was the proposal for a 'Regulation of the European Parliament and the Council Laying down Harmonised Rules on Artificial Intelligence' (Artificial Intelligence Act) of 21 April 2021.[57] Based on Article 114 TFEU the Commission in 85 Articles and 89 (!) Whereas clauses poured its White Paper ideas into a very detailed legal form that constitutes a core part of the EUs digital market strategy. Aimed at establishing harmonized rules on the use of AI systems, the proposal, following a risk-based approach, established a list of prohibited AI. It differentiates between an unacceptable, a high, and a low or minimal risk. The long list of prohibited AI practices starts with that which deploys subliminal techniques beyond a person's consciousness or exploit specific vulnerability of specific vulnerable groups in order to distort their behavior in a manner that is likely to cause them or other person psychological or physical harm. Of particular interest are prohibitions of AI-based social scoring for general purpose done by public authorities, and the use of "real-time" remote biometric identification systems in publicly accessible space for the purpose of law enforcement, unless certain limited and detailed exceptions apply.[58] Article 52 provides for transparency obligations for AI systems that interact with humans, are used to detect emotions or determine association with (social) categories based on biometric data, or generate or manipulate content ("deep fakes"). As regards the governance system, the regulation establishes a "European Artificial Intelligence Board" (the "Board"), composed of representatives from Member States and the Commission.[59]

Europe in a Global AI Context

Prior to addressing the "appropriate ethical and legal framework" envisaged by the Commission, a glance at the Commission's 2018 assessment of the *EU's Position in a Competitive International Landscape* seems necessary. Whereas the Commission admitted that Europe is behind in private investment in AI (€2.4–3.2 billion in 2016), compared with Asia (€6.5–9.7 billion) and North America (€12.1–18.6 billion), it claimed that Europe is "home to a world-leading AI research community, as well as innovative entrepreneurs and deep tech startups". It emphasized that Europe accounts for the largest share of the top 100 AI research institutions worldwide, having 32 in the global top 100 as regards AI-related research paper

56 Proposal of 25 November 2020 (COM (2020) 767 final).

57 Doc COM (2021) 206 final.

58 Article 5 in para 1 enumerates and specifies five groups of prohibited AI practices and in paras 3–4 sets forth specific rules for their application.

59 Details regulated in Articles 56–58.

citations (vs 30 from the US and 15 from China). It went on by pointing to Europe's strong industry, "producing more than a quarter of the world's industrial and professional service robots (e.g., for precision farming, security, health, logistics)" and leading in manufacturing, healthcare, transport and space technologies, which all increasingly rely on AI.[60] While it is true that with KUKA, ABB and Comau, Europe has large and successful producers of industrial robots, that Siemens and Phillips[61] are strong in healthcare and Bosch[62] in automotive applications, as evidenced in patent statistics, European research institutions are practically not among the applicants for AI-related patents.

Even more worrying than the poor patenting activity of European companies is that no single European company is among the world's leading digital companies, which have accumulated unprecedented cash piles, market capitalization and volumes of information even on ordinary people, and which increasingly control the infrastructure of the information economy.[63] Even Microsoft has recently called on governments and companies around the world to share more data with other organizations to prevent what it warned would be a concentration of digital power in the hands of the US, China and a small number of giant tech companies.[64]

EU's Legal and Ethical AI Ramifications

The EU Commission in its 2018 communication paid great attention to ensuring an appropriate AI *legal and ethical framework*. As regards the legal framework, the communication pointed to provisions of the General Data Protection Regulation (GDPR)[65] already ensuring a high standard of personal data protection. Among others, it referred specifically to Article 22 (1) investing the "data subject" with

60 Cf. Doc COM (2018) 237 final, p. 4. Cf. also the Annexes to Commission's Communication of 21 April 2021 (COM (2021) 205 final), under "13. Maintain Europe's lead: Strategy for Robotics in the world of AI", at pp. 44–46.

61 Phillips ranks 24th among global AI patent applicants (WIPO n. 33 Fig 4.1 at p. 60).

62 Bosch is in 21st place among the global AI patent applicants (WIPO ibid.).

63 Cf. 'The Rise of the Superstars' in *The Economist*, 17 September 2016, special report "Companies", at p. 3. According to this report, the cash piles of Apple, Google, Amazon, Microsoft and Facebook are equivalent to 10% of GDP in the US and 47% in Japan. Google processed 4 billion searches a day and Amazon had close to one-third of the market for cloud computing. If one adds to the US digital giants the Chinese Alibaba, Baidu, Tencent, Huawei and ZTE, Samsung from Korea and, e.g., Toshiba, NEC, Fujitsu, Hitachi and Canon from Japan, it becomes "visible" that technological knowledge, financial means and the control of aggregated amount of data, decisive for digital economy, are all located outside Europe.

64 Cf. Richard Waters, 'Microsoft Throws Weight behind Data Movement', in *Financial Times*, 21 April 2020, 5. In view of these facts, the White Paper's statement: "Each wave of data brings new opportunities for Europe to position itself in the data-agile economy and to become a world leader in this area" (Doc COM (2020) 65 final, at p. 4), renders the entire paper moot.

65 Regulation (EU) 2016/679 of the European Parliament and of the Council of 17 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ L119/1, 4.5.2016.

the right "not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her".[66] An accompanying Staff Working Document on *Liability for Emerging Digital Technologies*[67] offered, among other things, an overview of safety rules relevant for emerging digital technologies at the EU level, and addressed the principles of extra-contractual liability rules applicable in the same context. It further contained case studies dealing with AI power devices and systems (autonomous unmanned aircraft [drones] and autonomous cars), and the Internet of Things (smart home systems and cyberattacks),[68] and pointed to aspects of the 1985 Product Liability Directive[69] necessitating a further analysis. The annexed "List of EU-legislation" reveals that the EU already has 64 directives and regulations dealing with liability, safety, etc.! The White Paper addresses new risks, which AI technologies present for users when the technologies are embedded in products and services, for instance, as a result of flaws in the object recognition technology installed in an autonomous car,[70] and which an improved legislative framework could address.[71]

The EU Commission paid great attention to also ensuring an appropriate *ethical framework*. Its statement that "Spearheading the ethics agenda, while fostering innovation, has the potential to become a competitive advantage for European businesses on the global marketplace",[72] makes it clear that "ethics" is key to supporting "secure and cutting-edge AI made in Europe". Therefore, a High-Level Expert Group on Artificial Intelligence (AI HLEG), as an independent body composed of some 50 members from industry, universities, research institutions and business associations, was established. Its task was to draft: (1) AI Ethics Guidelines and (2) Policy and Investment Recommendations.

Already on 8 April 2019, the AI HLEG published "Ethics Guidelines for Trustworthy AI".[73] The Guidelines are the sole responsibility of the HLEG and their use is voluntary. According to the Guidelines, a trustworthy AI means an AI that should be *lawful*, complying with all applicable laws and regulations; *ethical*, ensuring adherence to ethical principles and values; and *robust*, both from a technical and social perspective, bearing in mind that even with good intentions, AI systems can cause unintentional harm. However, the Guidelines do not deal with the aspect of lawfulness. To the Group's understanding, "AI

66 Doc COM (2018) 237 final, p. 14.
67 Doc SWD (2018) 137 final.
68 Ibid, 11–17.
69 Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ L210/29, 7.8.1985.
70 Doc COM (2020) 65 final, p. 12.
71 Ibid., 14.
72 Doc COM (2018) 795 final, under F. "Ethics by design and regulatory framework", p. 17.
73 European Commission, Brussels 2019. For Members of the AI HLEG, see p. 39 of the document.

systems need to be *human-centric*, resting on a commitment to their use in the service of humanity and the common good, with the goal of improving human welfare and freedom".[74] Therefore, the AI HLEG wants AI systems to get a competitive advantage by embedding trustworthy AI in their products and services, which entails "seeking to *maximize* the *benefits of AI systems* while at the same time *preventing and minimizing their risks*".[75]

Starting from legally enforceable fundamental rights such as respect for human dignity, freedom of the individual, respect for democracy, justice and the rule of law, equality, non-discrimination and solidarity, and citizens' rights, the Group developed four ethical principles, called *ethical imperatives* – respect for human autonomy, prevention of harm, fairness and explicability – always to be adhered to by AI practitioners.[76] For example, respect for "human autonomy" requires that "Humans interacting with AI systems must be able to keep full and effective self-determination over themselves, and be able to partake in the democratic process".[77] The Guidelines further provide a non-exhaustive list of requirements as guidance on the implementation and realization of trustworthy AI, which includes the following systemic, individual and societal aspects: human agency and oversight, technical robustness and safety, privacy and data governance, transparency, diversity, non-discrimination and fairness, environmental and societal well-being and accountability.[78] As regards the "human oversight", the Guidelines point to the possibility to achieve it "through governance mechanisms such as a human-in-the-loop (HITL), human-on-the-loop (HOTL), or human-in-command (HIC) approach", i.e., through the capability of human intervention during the design cycle of the machine learning system and the human capability to oversee the overall activity of the AI system.[79] "Accountability/auditability", according to the Guidelines, entails "the enablement of the assessment of algorithms, data and design processes", which, however, "does not necessarily imply that information about business models and intellectual property related to the AI system must always be openly available".[80]

The Guidelines also provide for technical and non-technical methods for implementing trustworthy AI. Whereas the non-technical methods, i.e., regulations, codes of conduct, standardization, certification, accountability via governance frameworks, education and awareness to foster an ethical mindset, stakeholder participation and social dialogue and diversity and inclusive design teams,[81] are known, already well-tested means for handling societally sensitive

74 Ibid., Executive Summary p. 2.
75 Ibid., 4 (emphasis added J.S.).
76 Ibid., 10–14.
77 Ibid., 12.
78 Each specifically explained, ibid., 14–21.
79 Ibid., 16.
80 Ibid., 19–20. This is, to the knowledge of this writer, the first mentioning of the term "intellectual property" in an AI-related document of the EU Commission or sponsored by it.
81 Ibid., 22–24.

technologies, the envisaged technical methods are themselves an AI product. They should "translate" requirements for trustworthy AI "into procedures and/or constraints on procedures, which should be anchored in the AI system's architecture". According to the Guidelines, this could be accomplished

> through a set of "white list" rules (behaviors or states) that the system should always follow, "black list" restrictions on behaviors or states that the system should never transgress, and mixtures of those or more provable guarantees regarding the system's behavior.[82]

Methods to ensure values-by-design would provide precise and explicit links between the abstract principles that the system is required to respect and the specific implementation decisions:

> The idea that compliance with norms can be implemented into the design of the AI system is key to this method. Companies are responsible for identifying the impact of their AI systems from the very start, as well as the norms their AI system ought to comply with to avert negative impacts.[83]

In a Press Release of 9 December 2023 titled "Artificial Intelligence Act: Deal on Comprehensive Rules for Trustworthy AI",[84] the European Parliament informed that "Parliament and Council negotiators reached a provisional agreement on Artificial Intelligence Act". The reached political deal should ensure "AI in Europe is safe, respects fundamental rights and democracy, while business can thrive and expand". As transpires from the Press release, the bill, by and large, follows the 2021 Commission's regulation proposal as regards the banned AI applications, law enforcement exemptions, obligations for high-risk systems and guardrails for general AI systems. The reached compromise received mixt comments. Whereas Margrethe Vestager, EU's competition and digital chief told the Financial Times that the proposed AI Act would "not harm innovation and research, but actually enhance it", and will "give 'legal certainty' to start-ups",[85] French President Emmanuel Macron seems skeptical. In a speech given in Toulouse he commented the compromise as follows: "We can decide to regulate much faster and much stronger than our major competitors. But we will regulate things that we will no longer produce or invent. This is never a good idea."[86]

82 Ibid., 21.
83 Ibid.
84 https://www.europarl.europa.eu/news/en/press-room/20231206IP (accessed 17 December 2023).
85 Cf. Javier Espinoza, 'EU's Vestager says AI Law Will Give "Legal Certainty to Start-Ups"', in *Financial Times* 30/31 December 2023, 2.
86 Quoted from John Thornhill, 'Europe Should Worry Less and Learn to Love AI', in *Financial Times* 15 December 2023, 19.

AI and Intellectual Property

In view of the huge public and private investments in developing AI-related technologies and the heavy patenting activities of all major players in AI, be it industry or academic research institutions or universities, reported earlier, the long total absence of intellectual property aspects in the EU Commission's AI-related documents gave reason for serious concerns. Despite persistent doubts as to their economic benefits, intellectual property rights, especially patents play a decisive role as incentives and discrete backing of long-lasting research efforts and are very important means for securing high-risk investments.[87] Eventually, patents provide for competitive advantages and secure markets. It is obvious that AI-related patents are sought after and fulfil exactly those aims! Only in October 2020, the Committee on Legal Affairs of the European Parliament in its Report on Intellectual Property Rights for the Development of Artificial Intelligence Technologies (2020/2015 (INI)),[88] emphasized the key importance of these rights for the field, and criticized the Commission for not having addressed this issue in its "White Paper" of 2018.

The key patent offices worldwide since at least the 1990s have granted patents for the so-called AI core inventions, e.g., new neural structures, or improved machine learning models, or algorithms, and inventions applying AI to other fields of technology, based on standards generally applied to the patenting of computer-implemented inventions.[89] The European Patent Office (EPO) has granted patents for AI-related inventions whenever the software makes a technical contribution, e.g., in the field of medical devices, the automotive sector, industrial control, communication/media technology, automated natural language translation, voice recognition and video compression.[90] A Survey of the US Patent and Trademark Office (USPTO) of October 2020[91] has revealed that the vast majority of national and foreign applicants in the area of AI views the patent laws in force and the patent granting practices of the key patent offices in that area as adequate and not in need of any legislative changes. A consensus seems to exist that only a natural person can be an inventor and that machines,

87 For empirical data in the area of biotechnological inventions, see Joseph Straus, 'Intellectual Property Rights and Bioeconomy', in *Journal of Intellectual Property Law & Practice* 12 (2017), 576–590 (at 577–582).

88 PE650.527v02-00, A9-0176/2020, published on 2 October 2020.

89 For details of the practice of the European Patent Office (EPO), the Japanese Patent Office (JPO) and the Chinese State Intellectual Property Office (SIPO), see J. Straus, 'Will Artificial Intelligence Change Some Patent Law Paradigms?', in *Zbornik znanstvenih razprav*, LXXXI, 11–61 (at 19–28) with further references and Kathleen Wills, 'AI Around the World: Intellectual Property Law Considerations and Beyond', in *JPTOS* 102 (2022), 186–202 (at 186–194).

90 Cf. EPO Examination Guidelines (2020) Part G-II 3.6 2020, and Yann Ménière and Heli Pihlajamaa, 'Künstliche Intelligenz in der Praxis des Europäischen Patentamts', in *GRUR* (2019), pp. 333–336.

91 USPTO (2020) *Public Views on Artificial Intelligence and Intellectual Property Policy*, Washington D.C., October.

at least at this stage and for the foreseeable time, do not and will not autonomously generate patentable inventions.[92] Similar findings were published in an extensive Report commissioned by the EU Commission, which has examined the state of copyright and patent protection in Europe for AI-assisted outputs in general and in the three priority domains: science (in particular meteorology), media (journalism) and pharmaceutical research as regards the European Patent Convention (EPC) and the EPO practice.[93] As the WIPO statistics show, US, Chinese, Japanese and Korean patent owners, who control an enormous amount of data, the lifeblood of AI, also dominate the patent landscape and will – should European companies, the EU Commission and EU Member States not revise their attitude towards the use of patents in this area[94] – also dominate the future European market of AI-related technologies.

Also in the area of copyright, if AI-controlled machines generate "artistic" works, issues of ownership, authorship and creativity arise. Although adopted at an early stage of AI development, the UK,[95] the Irish[96] and the New Zealand[97] copyright laws assign the copyright in "works generated by a computer in circumstances such that there is no human author" to "the person by whom the arrangements necessary for the creation of the work are undertaken". So far, no other legislator has adopted any explicit rules addressing these AI-related copyright issues. According to Gerald Spindler, at present the copyright does not protect AI as a concept or as an algorithm. In Spindler's understanding,

92 Cf. for more Joseph Straus, 'Artificial Intelligence and Patenting – Some Lessons from "DABUS" Patent Applications', in *EIPR* 44(6) (2022), 348–358 (at 349–351), also pointing to some necessary adaptations of such patent law notions as prior art, the person skilled in the art and inventive step.

93 Jacqueline Allan (ed.), *Trends and Developments in Artificial Intelligence: Challenges to the Intellectual Property Rights Framework* (European Union Publisher 2020). Contrary to these findings of the report commissioned by the EU Commission and also contrary to the findings of the USPTO survey, the Committee on Legal Affairs of the European Parliament in its 2020 Report (cf. supra n 82) proposes to create an operational and fully harmonized regulatory framework in the field of AI technologies in the form of a regulation to avoid fragmentation of the European digital single market and promote innovation. The motives of this suggestion are certainly laudable and some reasons given are convincing, but nonetheless the idea may not stand scrutiny. An attempt to successfully draft a regulation, which should take into account, for example, the degree of human intervention, the autonomy of AI, the importance of the role and the origin of the data and wrap these and other sophisticated considerations in a legally binding and enduring, but flexible form, seems nearly mission impossible. This would lead to protracted and controversial discussions within different EU fora and unnecessarily politicize the topic. The unavoidable long-lasting discussions would generate legal uncertainty, i.e., exactly the opposite of intended and could eventually even fail.

94 That Chinese government is heavily supporting patenting activities of Chinese institution is no secret. It is less known that almost one-third of US patented inventions (in 2017 45.220) relies on federal research investment (cf. Lee Fleming et al., 'Government-funded Research Increasingly Fuels Innovation', in *Science* 364 (2019), 1139–1141).

95 Copyright, Design and Patents Act 1998 c 48, § 178.

96 Copyright and Related Right Act 2000, part 5, § 2 Art No. 28/2000 (IV).

97 Copyright Act 1994 (2022 version) s2 (1).

the AI as a code is protected based on the EU Directive 2009/24/EC of 23 April 2009 on the Legal Protection of Computer Programs.[98] Moreover, if AI is adapted from a database, the structure of that database can enjoy protection under the EU Directive 96/9/EC of 11 March 1996 on the Legal Protection of Databases.[99] Spindler also foreshadows that future AI developments may well result in a situation in which it will no longer be possible to attribute the activities of AI to the "author", which will require new legal solutions.[100] In line with Spindler, at present the view seems to prevail that results which AI-controlled machines "produce" are not works protected by copyright.[101]

Conclusions

Since AI has become operational in practice, the world has changed and the Earth is facing technological, ethical, socio-economic and even political challenges. Countries and regions show a diverse level of preparedness to meet these challenges adequately. Whereas the solid figures on investment in AI developments and patenting of AI-related inventions identify China, the US, Japan and Korea as the main players in the field, Europe excels particularly with plans for future investments in AI-related technologies and the existing regulations and ethical commitments. Interestingly, China, a pioneer in AI education, has plans to lead the world in AI governance through development of standards, including standards on ethics and social issues related to AI.[102] Authors who criticize the "hands-off approach" of the US resulting in ceding the leadership to other countries, see the EU with its mandatory General Data Protection Regulation as having the first-mover advantage, and China "aggressively writing standards for emerging technologies to benefit its own firms".[103] The problem for Europe may be that it will have difficulties

98 OJ EU No L111/16, 5.5.2009.

99 OJ EU No L77/20 27.3.1996.

100 Gerald Spindler, 'Copyright and Artificial Intelligence', in *IIC* 50 (2019), 1049–1051 (at 1050). On the EU situation, cf. also Giuseppe Abbamonte, 'The Rise of the Artificial Artist: AI Creativity, Copyright and Database Right', in *EIPR* 43 (2021), pp. 702–709.

101 Cf., e.g., Daniel Gervais, 'La machine en tant qu' auteur', in *Propriété Intellectuélé* 72 (2019), 7–12. Jane C Ginsburg and Luke Ali Budiardjo, 'Authors and Machines', in *Berkeley Technology Law Journal* 34 (2019), 343–448, offer, e.g., a detailed discussion to whom allocate authorship when individuals use machines to create works. On delineating human authorship in common law copyright laws in the area of AI, cf. Bram van Wiele, 'The Human-Machine Synergy: Boundaries of Human Authorship in AI Assisted Creations', in *EIPR* 43 (2021), 164–171; and Kathleen Wills, supra n 83 (2022), 195–198. For an extensive discussion of Complexities involving issues of authorship and ownership in copyright law in works created by the use of AI cf. Enrico Bonadio and Luke McDonagh, 'Artificial Intelligence as Producer and Consumer of Copyright Works: Evaluating the Consequences of Algorithmic Creativity', in *Intellectual Property Quarterly* 2 (2020), 112–137. For a more philosophical view on the problem, cf. Chiara Ambrosio, 'Unsettling Robots and the Future of Art', in *Science* 365 (2019), pp. 38–39.

102 Cf. Keith B. Belton et al., 'Who Will Set the Rules for Smart Factories?', in *Issues in Science and Technology* (2019), 70–76 (at 72).

103 Ibid., 71 and 74.

in exploiting its "first mover advantage" and have an impact on developments of international standards, without the Europe-developed AI technologies having a decisive share in the global market of AI-related technologies.[104]

The EU Commission's optimistic claim that "The main ingredients are there for the EU to become a leader in the AI revolution, in its own way and based on its own values",[105] for the time being lacks a solid factual basis.[106] Europe will only realize the chances that AI technology offers if it firmly stands by its commitment to invest billions of public and private funds in development, research and take up of AI technology. This means investing in and nurturing all three essential AI elements, i.e., data, algorithms and computing power, including a competitive digital infrastructure! In all these areas, Europe is in urgent need of catching up with its global competitors and stopping the increasingly looming data divide. To incentivize private investment and establish a serious European global digital player, the EU should follow the Airbus model, the only real global player originating from a European initiative. The EU should take care and actively support the still-existing real "main ingredients", such as Ericsson, Nokia, Philips, Siemens, SAP and the many start-ups, before it is too late. The COVID-19 crisis has brutally demonstrated what it means to be dependent! The "trustworthiness" is an important, essential ethical, legal and technical ramification for the beneficial practical application of AI technology and its public acceptance. It requires not only ethical and legal rules but also investment in developing and implementing the necessary algorithms. However, no matter how important, the trustworthiness is, it is not an end in itself, and it does not solve substantive problems, but it makes their solutions by AI acceptable to society.

104 Also the White Paper in its summary makes it clear that Europe has not yet reached that stage of development, by stating: "For Europe to seize fully the opportunities that AI offers, it must develop and reinforce the necessary industrial and technological capacities" (Doc COM (2020) 65 final p. 25).

105 Doc COM (2018) 237 final p. 19 (emphasis in original).

106 This claim reminds one of the substantially missed goals, proclaimed in 2000, that by 2010 the EU will become "the most competitive and dynamic knowledge-based economy in the world" investing 3% of GDP into R&D, www.europeandatajournalism.eu/eng/News/Data-news/R-D-Europe-s-knowledge-economy-in-trouble (accessed 28 April 2020). According to Eurostat's News Release 5/2019 of 10 January 2019, R&D expenditure in the EU increased slightly to 2.07% of GDP in 2017, compared to 2.18% of China, https://ec.europa.eu/eurostat/documents/2995521/9483597/9-10012019-AP-EN.pdf/856ce1d3-b8a8-4fa6-bf00-a8ded6dd1cc1 (accessed 28 April 2020).

14 Law and (R)evolution at Work

The Impact of Artificial Intelligence

Jeremias Adams-Prassl *

"Positive law and revolution are, from a logical point of view, mutually exclusive", Dean Pitamic noted in his 1920 opening lecture: "Revolution means . . . that [the legal] order is overthrown".[1] That argument is made, of course, in the context of different times and challenges. But what about modern-day revolutions, driven by rapid technical advances in computing, including the advent of Artificial Intelligence, including in particular ever-more sophisticated machine learning techniques? Can our current norms cope, or at least adapt? Is a fundamentally new regulatory regime required? Or is the challenge less clear-cut, requiring *both* the careful adaption of existing norms *and* regulatory responses to novel market failures?

This chapter explores these questions facing the European Union and Member States alike in the context of rapid advancements in automation which are revolutionising labour markets. It focuses on a comparatively overlooked aspect of debates surrounding automation and the future of work: the rise of algorithmic management, enabled by hitherto infeasible forms of data collection and processing. As AI-driven decision-making is quickly becoming an important element of most employer functions, from hiring workers through to daily performance monitoring, received models of the legal regulation of employment relationships are faced with complex challenges – some of which, including notably management accountability for key workplace decisions, may require a fundamental rethink of existing norms.

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1 See Chapter 2, p. 11.

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Introduction

The Future of Work is an age-old fascination: with every new wave of technological innovation comes a series of thorny questions about its impact on the labour market. Will jobs be replaced by the new technology? If not, how will they be reshaped? What are the broader implications, both for individual workers and legal regulation more generally? Recent technological advances have brought many of these questions back to the fore, notably in the context of the gig economy, enabled by mobile phones equipped with powerful processors, fast internet connections, and highly accurate satellite navigation.[2] The labour market challenges inherent in a world of platform-based labour intermediation are considerable, from worker classification and collective rights protection through to health and safety, tax, and social security provisions. These issues have rightly been at the forefront of courts' and policy makers' attention, both domestically and at the international level.

At the same time, however, a detailed exploration of the gig economy soon encounters a fundamental *innovation paradox*. Whilst it is undoubtedly true that key (technological) elements behind the rise of the gig economy are completely new phenomena, their impact on work organisation can more accurately be characterised as the logic continuation and extrapolation of long-existing trends in non-standard work, as explored in a recent ILO report:

> over the past few decades, in both industrialized and developing countries, there has been a marked shift away from standard employment to non-standard employment . . . [including] temporary employment, part-time work, temporary agency work and other multi-party employment relationships, disguised employment relationships and dependent self-employment.[3]

Can the same conclusions hold true for the rise of artificial intelligence in general, and the deployment of increasingly sophisticated machine learning algorithms in particular? This chapter argues that they do not: at least some of the changes which this latest wave of automation will bring to the world of work require a fundamental rethink of key elements of the traditional apparatus of employment law and labour market regulation. This is not, however, due to the much-vaunted rapid displacement of employment and the consequent need to tackle mass technological employment. Instead of taking away workers' jobs, I suggest, advances in AI-driven decision-making will first and foremost change their managers' daily routines, augmenting and eventually replacing human day-to-day control over the workplace: we are witnessing the rise of the "algorithmic boss".

2 For a full overview, see the rich collection of articles in *Comparative Labor Law and Policy Journal* 37 (2016).

3 International Labour Office: *Non-Standard Employment Around the World: Understanding Challenges, Shaping Prospects*. ILO 2016, p. 2.

Reshaping Labour Markets

Whilst Artificial Intelligence has been at the forefront of recent debates, the impact of technology on labour markets is not limited to this particular facet of automation. The notion of technological unemployment, *viz* the idea that rapid automation would leave large numbers of the population idle and without access to gainful employment, has a long pedigree, reaching back nearly a century. This section briefly looks at some of the leading proponents of technological unemployment, before turning to an exploration of the reasons why – at least to date – their predictions have not come true.

A Brief History of the Future of Technological Unemployment

Amidst the economic depression of the 1930s, John Maynard Keynes wrote a note about the *Economic Possibilities for our Grandchildren*. Where others saw stagnation and decline, he predicted prosperity and development. Unprecedented technological improvements in manufacture and transport were key to this vision. In the long term, the resulting productivity gains would bring manifold improvements in living standards for all. In the short term, however, "the very rapidity of these changes is hurting us and bringing difficult problems to solve":

> We are being afflicted with a new disease of which some readers may not yet have heard the name, but of which they will hear a great deal in the years to come – namely, *technological unemployment*. This means unemployment due to our discovery of means of economising the use of labour outrunning the pace at which we can find new uses for labour.[4]

Similar fears have been voiced throughout the past century. President Kennedy, for example, regarded maintaining full employment "as the major domestic challenge, really, of the '60s, . . . when automation, of course, is replacing men".[5]

In a 2013 paper looking at the US labour market, Carl Frey and Michael Osborne made a similarly startling prediction: as a result of advances in machine learning, just under half of total US employment was at a "high risk" of being automated in the near future. Their model suggested that workers employed in management, business, and finance had little to worry about. Job losses would be concentrated at the bottom end of the labour market: "computerisation will mainly substitute for low-skill and low-wage jobs . . . most workers in

4 John Maynard Keynes: Economic Possibilities for Our Grandchildren, in: *Essays in Persuasion*. Palgrave Macmillan, London 2010, pp. 321, 325.

5 President John F Kennedy, News Conference 24 (14 February 1962), www.jfklibrary.org/Research/Research-Aids/Ready-Reference/Press-Conferences/News-Conference-24.aspx archived at https://perma.cc/LDS6-Y8X7.

transportation and logistics occupations, together with the bulk of administrative and support workers, and labour in production occupations, are at risk".[6]

The predictions, then, seem clear: given the exponential growth of machine learning and artificial intelligence, the gig economy is but a transitional phenomenon, with the majority of low-skill platform-based work soon to be handed over to algorithms and robots. With the advent of self-driving cars and laundry robots, emerging business models will leave large swathes of the workforce unemployed.

The consistent application of employment law standards might even create additional pressures to hasten this transition: the cost imposed on platforms will incentivise innovation – not least in the low-wage sector. As Professor Cindy Estlund puts it, "Automation is an entirely lawful – indeed, almost unassailable – way to avoid the costs of employing people." The cost of employment protection, she argues, will be felt particularly harshly by low-income workers: "Especially at the bottom of the labor market, raising the floor on wages, benefits, and working conditions strengthens the business case for automation of technically automatable jobs".[7]

This is correct as a matter of labour economics – as long as jobs *are* automatable. The extent to which machine learning can grapple with long-established forms of work, however, is much more contested than might appear at first glance.

Challenging the Narratives

For the time being, the reality of work could not be further from Keynes' vision of "three-hour shifts or a fifteen-hour week". What happened? Why are we still at work? The economic literature points to a number of factors – income or capitalisation effects central amongst them. Technology makes us more productive, reducing prices and raising real income. As we become better off, our appetite for more products and services creates new job opportunities in emerging industries: think of the autoworker retrained as a computer engineer.

MIT economist David Autor is one of the leading sceptics when it comes to grand claims of automation and job destruction. With computers everywhere, he argues, it is tempting to assume that they can take over most jobs. "But that leap of logic is unfounded". Modern algorithms are vastly superior to workers when it comes to routine tasks which can be distilled into a clear set of instructions, such as crunching the numbers in a complex financial model, but many aspects of the modern labour market are much harder to automate than we assume, if they can be automated at all.

6 Carl Frey, Michael Osborne: *The Future of Employment: How Susceptible are Jobs to Computerisation*. Oxford Martin School, Oxford 2013, pp. 38, 42.

7 Cynthia Estlund: What Should We Do After Work? Automation and Employment Law, in: *New York University Public Law and Legal Theory Working Papers* 578 (2017), pp. 21, 23. See now also *Yale Law Journal* 128 (2018), p. 254.

This is Polanyi's paradox, named after Michael Polanyi's observation that "We know more than we can tell". Human intuition, it turns out, is crucial across the labour market, including the bottom end. Autor argues that

> the tasks that have proved most vexing to automate are those demanding flexibility, judgment and common sense – skills that we understand only tacitly. At a practical level, Polanyi's paradox means that many familiar tasks, ranging from the quotidian to the sublime, cannot currently be computerized because we don't know "the rules".[8]

In the long run, no sector of the economy will remain beyond algorithms' reach. As long as the routine nature of the task is central to its automation, however, technology is likely to advance much more rapidly in other sectors of the economy,[9] including legal discovery and due diligence: once the preserve of well-paid junior lawyers, locked away for weeks on end to wade through crates of documents, it has quickly become dominated by language- and pattern-recognition software.[10]

This challenge to the unemployment narrative should not, however, be mistaken as an assertion that the rise of digitalisation in general, and AI in particular, will have no impact on existing employment models: from lowering transaction and monitoring cost and reshaping information asymmetries, to increasing job polarisation, the impacts will be profound.[11]

In a remarkably prescient note, David Autor in 2001 explored the consequences of "wiring the labour market".[12] Rather than bringing about mass unemployment, however, it appears that the immediate consequence of automation has been a "(re-)wiring of the firm": as the cost of data collection and processing continue to fall, employers are increasingly able to deploy technology to monitor – and control – the workplace to a hitherto unimaginable degree.

8 David Autor: Polyani's Paradox and the Shape of Employment Growth, in: NBER Working Paper No. 20485 (2014), pp. 129, 136.

9 Despite being "routine" in the sense of regular, many tasks "automated" through gig economy platforms, for example, are hardly routine in the sense of clear and predictable routines: whether it involves cleaning behind a corner with cables strewn in different directions, or keeping parents and children happy, I struggle to see the immediate possibilities of automation.

10 Jane Croft: Artificial Intelligence closes in on the work of junior lawyers, in: *Financial Times*, (4 May 2017, www.ft.com/content/f809870c-26a1-11e7-8691-d5f7e0cd0a16, archived at https://perma.cc/MH5X-UBVU.

11 A. Adams: Technology and the Labour Market: the Assessment, in: *Oxford Review of Economic Policy* 3 (2018), p. 349. This article draws on a number of papers commissioned for a special edition of the *Oxford Review*, exploring the impact of technology on the labour market.

12 Autor, D.H.: Wiring the Labor Market, in: *Journal of Economic Perspectives* 15 (2001) 1, pp. 25–40.

Automating Employer Decisions

What does this mean in practice? Ben Waber, CEO of one of the first start-ups active in the field, has written extensively about the rise of "people analytics", *viz*

> how sensing technology and big data about organizations in general, can have massive effects on the way companies are organized. From changing the org chart to changing coffee areas, no aspect of organizations will be untouched by the widespread application of this data.[13]

The impact of data-driven Human Resource Management, he argues, will by no means be limited to large corporations:

> The people analytics system would essentially be "management in a box" for small business . . . with only a few sensors and some basic programs, [they] could get automated help setting up their management structure and generating effective collaboration patterns. They could even receive feedback on their progress . . . [as well as] automated suggestions on org structure, compensation systems, and so on.[14]

Whilst Waber's vision of universal people analytics has not (yet) come to fruition, the underlying trends identified in his work are quickly becoming pervasive. As early as 2015, the Economist Intelligence Unit highlighted "explosive big data IT growth" in HR, identifying "major investments in IT capabilities to support workforce analytics/planning".[15]

The first, and perhaps starkest, illustration of algorithmic management could be seen in the gig economy, with platforms relying on sophisticated rating mechanisms to manage their workforce. Designed, at first glance, to provide consumers and workers with accurate feedback about other platform providers, it quickly became apparent that ratings had little informational value, given their clustered distribution.[16] Instead, as Tom Slee has argued, reputation algorithms were designed to exercise control over platforms' workforces, operating as

> a substitute for a company management structure, and a bad one at that. A reputation system is the boss from hell: an erratic, bad-tempered and unaccountable manager that may fire you at any time, on a whim, with no appeal.[17]

13 Ben Waber: *People Analytics*. FT Press, Pearson 2013, p. 178.

14 Ibid., p. 191.

15 https://eiuperspectives.economist.com/strategy-leadership/future-business-human-resources/infographic/big-roles-big-data-hr

16 Tom Slee: *What's Yours is Mine: Against the Sharing Economy*. O/R Books 2015.

17 Ibid. This is confirmed by internal Uber documents, which suggest that, in 2014, fewer than 3% of drivers were "at risk of being deactivated" as a result of a rating below 4.6 stars (out of 5): James

Rather than merely signalling quality, then, the real point of rating algorithms in the gig economy was to exercise employer control in myriad ways. Platform-based work thus served as an early laboratory for the development of algorithmic management tools. Today, on the other hand, it has spread across industries and workplaces. As opposed to the futuristic predictions explored in earlier sections, the advent of algorithmic management is not something we might speculate about: it is already taking place.

Start-ups and established software providers compete in offering software that promises to support and potentially automate management decision-making across all dimensions of work, including the full socio-economic spectrum of workplaces, as well as the entire life cycle of the employment relationship: whether it is in factories or offices, universities or professional services firms, the exercise of employer functions from hiring and managing workers through to the termination of the employment relationship can already be automated.[18]

When it comes to the *inception of the employment relationship*, for example, AI-driven software now allows prospective employers to conduct extensive screening of an applicant's online presence. Software provider *FAMA* promises to screen workers' online presence in unprecedented breadth and depth:

> Standard background checks don't catch everything they should. While traditional checks help verify important information, few screening methods can ensure that current and future employees are aligned with

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Cook: Uber's internal charts show how its driver-rating system actually works, in: *Business Insider UK*, 11 February 2015, http://uk.businessinsider.com/leaked-charts-show-how-ubers-driver-rating-system-works-2015–2, archived at https://perma.cc/5UPM-SWFN. It might be argued that this is a result of the pressure of the rating system keeping the worker pool at a high standard, with lower-performing bands excluded from the market. As Slee explains, however, this is not the case: "J-curve rating distributions [where nearly all data points are at the high end of the scale], like those of the Sharing Economy reputation systems, show up whenever people rate each other" (Tom Slee: *What's Yours is Mine: Against the Sharing Economy*. O/R Books 2015, p. 101).

18 In previous work, I have defined a "function" of being an employer as one of the various actions employers are entitled or obliged to take as part of the bundle of rights and duties falling within the scope of the open-ended contract of service: Jeremias Prassl: *The Concept of the Employer*. Oxford University Press, Oxford 2015, pp. 24–25. In trawling the established tests of employment status such as control, economic dependence, or mutuality of obligation for these employer functions, there are endless possible mutations of different fact scenarios, rendering categorisation purely on the basis of past decisions of limited assistance. The result of this analysis of concepts underlying different fact patterns, rather than the actual results on a case-by-case basis, is the following set of functions, with the presence or absence of individual factors becoming less relevant than the specific role they play in any given context – the "equipollency principle" (*Äquivalenzprinzip*): L. Nogler: Die Typologisch-Funktionale Methode am Beispiel des Arbeitnehmerbegriffs, in: *ZESAR* 10 (2009), pp. 459, 463. Whilst this analysis was developed primarily on the basis of Common Law jurisdictions, subsequent work suggests that the approach is capable of being similarly developed in Civilian jurisdictions: see, e.g., Jeremias Prassl, Martin Risak: Uber, TaskRabbit, and Co.: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork, in: *Comparative Labor Law and Policy Journal* 37 (2016) pp. 619–651.

> your mission and values. Even fewer can predict whether they'll exhibit toxic behavior. As sexual harassment, bigotry, and other workplace issues move to the forefront of our society, companies that rely on standard background checks risk brand damage and lost authenticity. Fama brings compliant, AI-based employment screening to help you create a productive, welcoming workplace and get you the information you need.[19]

The deployment of recruitment algorithms is not limited to background screening: the entire process, from analysing CVs through to ranking candidates, making offers, and determining salary levels can be automated – and increasingly is, with sometimes deeply problematic consequences: in early 2019, media reports suggested that Amazon had been forced to abandon its automated recruitment tool after the machine learning algorithm had begun systematically to reject female applicants for engineering roles within the firm.[20]

Once employees are hired, they might find themselves under the watchful eye of the algorithmic boss: the day-to-day *management of the enterprise-internal market* (another core employer function) can similarly be automated to a surprising degree. One of the most-discussed providers in this context are *Humanyze*, a company coming out of Ben Waber's and colleagues' work at MIT. In order to facilitate information-gathering in the workplace, the company has developed a badge to be worn by participating employees during their working days. Whilst the "Humanyze badge does not measure or record content, web activity, or personal activities outside the office", it does offer "sensors to measure whether the participant is in motion or still, their proximity to other badged users and beacons, whether the participant is talking or not talking, and the frequency and duration of in-person interactions". (Though, employees are assured, "No, the Humanyze Badge does not track [you] in the bathroom".[21])

The information thus gathered is then analysed "to uncover informal communication networks. These communication networks are fundamental to understanding how work gets done on your team and within your organization". Management "no longer have to rely on surveys or observations to understand what's working (and what's not). [Humanyze] metrics quantify the previously un-measurable factors for team success, like collaboration and communication, that are essential for productivity and performance".[22]

Workforce analytics software, finally, can even be relied upon in exercising the employer's power of *terminating the employment relationship*. When faced with allegations of retaliatory dismissals in response to concerted trade union activity in one of its warehouses, Amazon revealed the extensive use of

19 www.fama.io/about

20 www.independent.co.uk/life-style/gadgets-and-tech/amazon-ai-sexist-recruitment-tool-algorithm-a8579161.html

21 www.humanyze.com/resources/data-privacy/

22 www.humanyze.com/solutions#process

algorithmic management: the claimant's employment had been terminated for a lack of productivity, as determined by a neutral algorithm. Local warehouse management, the company's defence asserted, had had no input, control, or understanding of the details of the system deployed.[23]

Concentrating Control

Present space limitations prohibit a further exploration of how the exercise of the full range of employer functions can – and has – become automated through the advent of people analytics. The picture emerging from the rich literature on point is clear[24]: management automation enables the exercise of hitherto impossibly granular control over every aspect of the working day. This, however, is not merely a return to (digital) Taylorism: the kinds of data considered, the probabilistic patterns relied upon in machine learning, and new forms of exercising control all differ fundamentally from the traditional management structures around which employment law has been designed.

A combination of real-time data collection and machine-learning analysis allows employers to monitor and direct their workforce on a continuous basis – whilst dispersing responsibility to algorithms. Driven by unpredictable and fast-evolving parameters, management decisions become difficult to record, or even explain. The remaining sections of this chapter explore the ensuing *control/accountability paradox*, looking first at the concentration of control, before turning to the diffusion of responsibility.

Data

The first element in the rise of people analytics is the gathering of hitherto unimaginable quantities of *data*: fine-grained information about individual employees. There are three broad sources of data in the modern workplace: digital information, sensors, and a growing trend of employee self-tracking. As regards digital information, first, a large number of providers offer software solutions that allow employers to capture employees' digital activities, from keystroke logs through to screenshots taken at regular (yet random) intervals.[25] Information about phone calls, emails, and other communication channels can similarly be recorded. Even where the actual substance of such communications is not disclosed or analysed, so-called metadata (for example, the duration and frequency of calls between specific individuals, or the size and timing of email attachments sent to external recipients) can easily be captured.

23 www.theverge.com/2019/4/25/18516004/amazon-warehouse-fulfillment-centers-productivity-firing-terminations

24 See, e.g., Edoardo Ales, Ylenia Curzi, Tommaso Fabbri, Olga Rymkevich, Iacopo Senatori, Giovanni Solinas (eds.): *Working in Digital and Smart Organizations: Legal, Economic and Organizational Perspectives on the Digitalization of Labour Relations.* Palgrave McMillan, 2018.

25 https://support.upwork.com/hc/en-us/articles/211068518-Use-Your-Work-Diary

In addition to these digital crumbs, increasingly sophisticated sensors (such as Humanyze's badge, as discussed in the preceding section) allow the capture of physical information: Uber famously pioneered the use of its drivers' iPhones to measure how quickly individuals accelerate and/or break, thus capturing smooth and abrupt driving patterns.[26] Surveillance, crucially, is not limited to employer-imposed monitoring: whether through the use of fitness trackers or health apps on our telephones, there is an increasing trend of self-monitoring or self-tracking, the results of which can easily be combined with data gathered in the workplace.[27]

In addition to the sheer quantity of information that can be captured, the reliance on these sources raises two further concerns: first, that the traditional boundary between the workplace and individuals' private lives is rapidly breaking down. Information about an individual's weekend activities can easily be combined with measures of Monday morning productivity, revealing patterns far beyond traditional employer concerns. Second, even where information is collected and stored in anonymised form, as information is increasingly organised in machine-readable formats, data sets from different sources can – at least in principle and subject to data processing consent and privacy laws in jurisdictions such as the European Union – easily be combined to build large employee databases, and – again, at least in principle – quickly identify individuals within a firm.

Processing

Recording and organising large amounts of data in and of itself is not enough, however: key to the rise of people analytics is the availability of increasingly powerful tools to process and analyse what has been captured. The rise of artificial intelligence in general, and machine learning in particular, has become the object of intense discussion in legal and policy debates beyond the scope of the present enquiry. It is important to note that (domain-specific) artificial intelligence is not a novel concept, or even a new term.[28] Historically, however, the technology was mostly restricted to so-called expert systems, where a series of decisions were coded into a complex decision tree.[29]

More recently, the advent of large data sets and precipitous drops in the cost of processing power have fuelled the rise of machine learning – probabilistic analyses of large data sets, relying on sophisticated statistical modelling to spot patterns

26 https://eng.uber.com/telematics/

27 Gina Neff, Dawn Nafus: *Self-Tracking*. MIT Press Essential Knowledge series, 2016.

28 Some of the classic early citations include John McCarthy, Marvin Minsky, Nathaniel Rochester, Claude E. Shannon: *A Proposal for the Dartmouth Summer Research Project on Artificial Intelligence*. 1955; and Alan Turing: Computing Machinery and Intelligence, in: *Mind* 49 (1950), p. 433.

29 For an illustration in the employment context, see, e.g., the UK Government's employment status tool, www.gov.uk/guidance/check-employment-status-for-tax

or correlations in the data.[30] This is a crucial step away from our traditional understanding of algorithms: Machine learning is designed to rely on a constant evolution and redefinition of parameters – algorithmic control is no longer just confined to experiences taught through training data sets and pre-programmed analytical routines.[31] The results are ever-changing decision structures: as increasing amounts of data are collected about individual employees and every aspect of their working lives scrutinised on an ongoing basis, the factors considered relevant for key metrics such as productivity or innovation will continue to change.[32]

Control

In a first wave of people analytics, the emphasis was on augmenting managerial decision-making power: machine learning algorithms would scour big data sets for important insights into the workplace, from the arrangement of physical spaces to productive and unproductive team behaviours, and then provide the automation to management in order to inform their choices.

At least from a technical perspective, however, there is nothing inherent in the capabilities of such software to limit itself to informing traditional managers: in principle, at least, their actual decisions can be fully automated.[33] Amazon's Baltimore warehouse, discussed earlier, is a case study in point:

> Amazon's system tracks the rates of each individual associate's productivity and automatically generates any warnings or terminations regarding quality or productivity without input from supervisors. . . . If an associate receives two final written warnings or a total of six written warnings within a rolling 12-month period, the system automatically generates a termination notice.[34]

The use of algorithmic management to sanction workers was pioneered in the gig economy, with platforms "keen to detect and prevent any 'gaming' of their systems by individuals: [D]rivers are penalized for rejecting lower paid work in favor of higher paid work, which is illustrative of another constraint on their 'freedom' as independent entrepreneurs".[35] For some time, Uber also insti-

30 Nick Polson, James Scott, *AIQ: How Artificial Intelligence Works and How We Can Harness its Power for a Better World*. Bantam Press, 2018.

31 D. Heaven (ed.): *Machines That Think*. New Scientist, 2017.

32 Ian Goodfellow, Yoshua Bengio, Aron Courville: *Deep Learning*. The MIT Press, 2016.

33 In jurisdictions covered by the European Unions' General Data Protection Regulation, such an approach would not be legal, given a right to have a "human in the loop", i.e., not to be subject to fully automated decisions: see GDPR, Article 22.

34 The Verge (legal documents as linked in article), (n).

35 Alex Rosenblat, Luke Stark: Algorithmic labor and information asymmetries: a case study of Uber's drivers, in: *International Journal of Communication* 10 (2016), pp. 3758, 3761, 3762, 3766.

gated brief deactivation periods of up to 10 minutes as an immediate sanction for a driver's repeated refusal to accept unprofitable rides.[36]

* * *

Taken together, the increasing availability of data, sophisticated machine learning processing, and algorithmic control are key ingredients in a fundamental change which is not merely on the horizon as a distant future vision, but already becoming reality in workplaces across the socio-economic spectrum, as the warehouse example demonstrates. The algorithmic boss can hover over each worker like a modern-day Panoptes, the all-seeing watchman of Greek mythology: from vetting potential entrants and assigning tasks, to controlling how work is done and remunerated, and sanctioning unsatisfactory performance – often without any transparency or accountability. As US District Judge Chen put it, citing Michel Foucault, "a state of conscious and permanent visibility . . . assures the automatic functioning of power".[37]

Diffusing Responsibility

From a legal perspective, this dramatic increase in control might at first be thought to be welcome: most employment law systems place significant emphasis on control and/or subordination as a key factor in determining when a relationship should come within the scope of protective norms. At the same time as dramatically concentrating employer control, however, key elements of algorithmic management can also be relied upon to diffuse responsibility: questions as to who should be liable – the employing enterprise? the designers of the software? the providers of contaminated training data? – can no longer necessarily be tackled with the traditional tools of employment law. This is the fundamental technical challenge in the rise of people analytics.

The scope of employment law has been a vexed question for decades: in most legal systems, control and subordination are central criteria in the definition

36 Dough: Fired from Uber: why drivers get deactivated, and how to get reactivated, in: *Ride Sharing Driver*, 21 April 2016, www.ridesharingdriver.com/fired-uber-drivers-get-deactivated-and-reactivated/, archived at https://perma.cc/3MQL-4TWD; Kari Paul: The new system Uber is implementing at airports has some drivers worried, in: *Motherboard*, 13 April 2015, http://motherboard.vice.com/read/the-new-system-uber-is-implementing-at-airports-has-some-drivers-worried, archived at https://perma.cc/CV8P-EM7U; 10 minute timeout, in: *Uber People*, 1 March 2016, http://uberpeople.net/threads/10-minute-timeout.64032/, archived at https://perma.cc/AS3C-94EP. As part of a recent settlement in the United States, drivers there now enjoy marginally more clarity, even though temporary deactivation for low acceptance rates is still explicitly mentioned: Uber: *Uber community guidelines*, www.uber.com/legal/deactivation-policy/us/, archived at https://perma.cc/8MR4-GFDL. In other cities, temporary deactivation has been replaced by a simple logout.

37 Citing Michel Foucault: *Discipline and Punish: The Birth of the Prison* (ed. Alan Sheridan). Vintage Books 1979, p. 201.

of the employee (who enjoys legal rights and protection), her employer (who is subject to the corresponding duties), and the contract of employment between them.[38] Drawing on Coase's Theory of the Firm, Deakin and Wilkinson have demonstrated how this legal model plays a similarly crucial role in the economics of labour market regulation:[39] employment law is the trade-off site between the benefits of control imposed on employees and the cost of protective obligations imposed on employers in return. Individual instances of managerial control are attributed to the employer's (legal) personality in order to ensure accountability and facilitate enforcement.[40]

A vast literature on "atypical work" has explored the problematic implications of this approach in work arrangements which deviate from the received paradigm of stable, open-ended employment for a single employer.[41] Examples include the "fissuring workplace",[42] where employer control is exercised by multiple parties through outsourcing agreements, the use of temporary agency work, or complex corporate groups; and false self-employment, where employer control is contractually denied through the fiction of independent contractor status.[43] Once the reality of control is thus camouflaged, so-called atypical or non-standard workers may no longer enjoy access even to basic protective norms such as minimum wages or discrimination law.[44]

Crucially, however, the mechanisms which hide the reality of employer control in "non-standard work" are fundamentally legal ones: from the use of corporate personality (e.g., in the incorporation of subsidiary agency companies)[45] to contract law (e.g., in inserting independent contractor or self-employment clauses in traditional employment contracts),[46] the problem is one of "'armies of lawyers' contriving documents . . . which simply misrepresent the true rights and obligations on both sides", as Employment Tribunals have repeatedly highlighted.[47]

38 Bernd Waas, Guus Heerma van Vosss (eds.): *Restatement of Labour Law in Europe*: Volume I. Hart 2017.

39 Simon Deakin, Frank Wilkinson: *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution*. Oxford University Press, Oxford 2005, pp. 15, 86–87.

40 Paul Davies, Mark Freedland: The Complexities of the Employing Enterprise, in: Guy Davidov, Brian Langile (eds.): *Boundaries and Frontiers of Labour Law*. Hart Publishing 2006.

41 For an overview, see, e.g., Einat Albin, Jeremias Prassl: Fragmenting Work, Fragmented Regulation: The Contract of Employment as a Driver of Social Exclusion, in: Mark Freedland et al. (eds.): *The Contract of Employment*. Oxford University Press, Oxford 2016, p. 209.

42 David Weil: *The Fissured Workplace: Why Work Became so Bad for so Many and What Can Be Done to Improve it*. Harvard University Press 2014.

43 See, e.g., *Autoclenz Limited v Belcher and ors* [2011] UKSC 41; Alan Bogg: Sham self-employment in the Supreme Court, in: *Industrial Law Journal* 41 (2012), p. 328.

44 International Labour Organisation (ILO): *Non-Standard Employment around the World: Understanding Challenges, Shaping Prospect*. Geneva 2016.

45 Hugh Collins: Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws, in: *Oxford Journal of Legal Studies* 10 (1990), p. 353.

46 ILO: *Regulating the Employment Relationship in Europe: A Guide to Recommendation No 198*. Geneva 2013, p. 33.

47 *Aslam and Farrar v Uber*, Case No. ET/2202550/2015, at para. [73] (London Employment Tribunal, Judge Snelson).

In principle, at least, this makes it relatively straightforward to respond to evasion: existing legal mechanisms create the difficulty in ascribing responsibility to the controlling employer, and existing legal mechanisms can be relied on to restore it. Doctrines such as sham contracting or the primacy of facts allow courts to look through self-employment clauses and focus on the reality of employer control; and the corporate veil may be pierced to combat fraudulent abuse by controlling parent entities.[48]

The challenge arising from the advent of people analytics, on the other hand, is radically different: algorithmic management does not rely on legal mechanisms to obfuscate control in order to evade responsibility – rather, diffuse and potentially inexplicable control mechanisms are inherent in the use of increasingly sophisticated rating systems and algorithms.

Conclusion

The rise of algorithmic management is slowly but definitely becoming a focal point of academic analysis and broader policy debates surrounding the future of work. The patterns of discourse are reminiscent of those surrounding the early days of what was then frequently referred to as the "sharing economy". Once more, we are faced with starkly conflicting messages, juxtaposing the promise of the future of work with dire predictions of (algorithmically perfected) exploitation. In reality, of course, there are elements of truth in both accounts: we should be very weary of easy regulatory solutions proposed by proponents on either side, whether it's complete deregulation on the one side, or a luddite phantasy of smashing technology on the other.

The real challenge lies in harnessing the unequivocal potential in the trends which will shape tomorrow's work, whilst ensuring that no one is left behind in enjoying decent and sustainable working conditions. More fundamentally, this requires that we avoid falling into the trap of (technological) determinism: none of the trends identified in this chapter come as the result of some inexorable logic. Historical evidence strongly suggests that technological progress makes work easier, safer, and more productive. At the same time, however, it opens up the possibilities of abuse, from privacy-invading surveillance to precarious, highly pressured work.

What is essential, then, is a real sense of agency, of the power and the path dependence of regulatory choices. Where our efforts are focused depends on legal and economic incentives, which ultimately determine whether technology is deployed in support of decent work – or whether it presents a real threat to it. It is hoped that the challenges highlighted in this article will contribute a few first steps towards that task.

48 The reality of litigation and enforcement will of course be significantly more complex: Jeremias Prassl: *The Concept of the Employer*. Oxford University Press, Oxford 2015, ch 5, ch 6.

Part IV

Law and the Changing Social World

15 (R)evolution of Social Security Law in a Changing World

From Protecting the Poor to Workers and Finally Every Member of the Society?

Grega Strban

The law of social security has developed in an independent branch of law, characterised by the principle of solidarity. Although, it is and it has to be one of the most rapidly changing areas of law, certain reminiscences of its past development can be detected even today. They might range from providing security only to deserving poor and providing the best protection to workers, who are as such included in the society. However, the patterns of organising work and mobility have changed, and so has the standard social security beneficiary. If real security should be provided and revolutions in society avoided, maybe the time has come for a more European, rather than pure national solidarity. Social security is one of the fundamental human rights and should be guaranteed to everyone.

Introductory Thoughts

Distinctive fields of social security law (which might be defined slightly distinctive in each country)[1] show certain common characteristics. In societal reality, a number of relevant problems exist and legal norms are attached to them. At the same time, there is an inherent connection within such group of legal norms, connected with common legal principles. Hence, it is possible to naturally systematise the *corpus* of social security law. There are needs and interests for practical application of such norms and for their theoretical processing and development, by applying also the (horizontal and vertical)[2] comparative

1 For instance, *Sozialrecht* in Germany is understood distinctively from *droit social* in France or from *pravo socialne varnosti* in Slovenia. Grega Strban: Terminološke zagate pri vsebinskem razlikovanju izrazov v pravu socialne varnostil, in: Mateja Jemec Tomazin, Katja Škrubej, Grega Strban (eds.): *Med jasnostjo in nedoločenostjo, Pravna terminologija v zgodovini, teoriji in praksi.* GV Založba, Ljubljana 2019.

2 Horizontal comparative method may be applied at distinctive vertical levels, e.g., among national laws and among the laws of international and European organisations. Vertical comparative method is used when (some or more) national laws are compared with the laws of (some or more) international and European organisations. More Ulrich Becker: Rechtsdogmatik und Rechtsvergleich im Sozialrecht, in: Ulrich Becker (ed.): *Rechtsdogmatik und Rechtsvergleich im Sozialrecht I.* Nomos 2010.

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method between distinctive (national, international and European) legal orders. The law of social security has rather recently been recognised as a separate branch of law.[3] However, it is important that societal relations are legally regulated and needs of people recognised as of right.

In the present chapter the underlying social security principle of solidarity is discussed. Based on this principle, it is explored how social security law has developed from protecting the poor to protecting the workers or economically active persons (and members of their families) in general, and whether the goal of recognising the fundamental human right to social security to everyone as a member of society has already been achieved. Moreover, as the motto of the centenary celebration is linked to the inaugural lecture of the first dean of the Law Faculty of the University of Ljubljana, Leonid Pitamic, titled *Law and Revolution*, it is tested to what extent such development has been or needs to be revolutionary or evolutionary. Summary thoughts and possible future developments conclude the deliberation on the topic of (r)evolution of social security law.

Solidarity as *Essentiale* of Social Security

The notion of social security is composed of two parts. The first one is *social*. It derives from a Latin word *socius* and means relating to society, public, taking into account also interest of others or the society as such. It is the opposite of particular, individual or private.[4] Hence, social systems are public systems intended to mitigate and regulate living conditions of insured persons or inhabitants in general.[5]

Already dean Pitamic argued that there is no society without rules.[6] Society is established only when there is something supra-individual that transcends the beliefs and purpose of individuals, is common and binds all and all are subjected to it. And when such purpose becomes binding, it becomes a rule. Hence, the notion of society is a normative one. Complete freedom of each individual cannot present society. Hence, society and a person could only live in limited freedom. How these limitations are set is a matter of logic, moral and the State.[7] We could add that it is also a matter of human rights, not only the ones each individual person has, but also those who could only be realised

3 Marijan Pavčnik: *Teorija prava*, 5th ed. GV Založba, Ljubljana 2015, p. 451; Hans F. Zacher: Entwicklung einer Dogmatik des Sozialrechts, in: Ulrich Becker, Franz Ruland (eds.): *Hans F. Zacher, Abhandlungen zum Sozialrecht.* C.F. Müller 2008, p. 331; Becker, 2010, p. 12.

4 *Socius* means associate, colleague, also the divine friend and companion of man, www.merriam-webster.com/dictionary/socius (accessed 15 June 2020).

5 Anjuta Bubnov Škoberne, *Grega Strban: Pravo socialne varnosti.* GV Založba, Ljubljana 2010, p. 40.

6 Contrary was believed by UK Prime Minister Margaret Thatcher. In 1987 she argued that "There is no such thing as society", www.margaretthatcher.org/document/106689 (accessed 15 June 2020).

7 Leonid Pitamic: *Pravo in revolucija. Tiskovna zadruga v Ljubljani*, Ljubljana 1920, reprinted in *Časopis za kritiko znanosti* 18 (1990) 132/133, p. 19. See Chapter 2, p. 12.

together with others. Paradoxically, more coercion might provide more freedom, e.g., with establishing mandatory social security systems, people might be more free from income loss or its reduction due to certain risks of living, such as disease, old-age or reliance on long-term care.

The responsibility of the State for organising social, public systems is not new. It could be traced back to the French Revolution and adoption of the *Déclaration des droits de l'homme et du citoyen* (1789). Article XII of the Declaration emphasises that the guarantee of the rights of man and of the citizen necessitates a public force. Such force should be instituted for the advantage of all and not for the particular utility of those in whom it is trusted. Moreover, Article XIII of the Declaration foresees an indispensable common contribution for the maintenance of the public force and for the expenditures of administration. Such contribution must be equally distributed to all the citizens, according to their ability to pay.

The other element of social security is *security*. One of the fundamental duties of the modern State is to provide security to its inhabitants. Security encompasses not only state or public security, personal and legal security, but also income security.

Hence, the purpose of social security is to provide income security and social inclusion in cases of reduced or lost income or increased costs, which cannot be mastered by an individual and his/her family alone. The cornerstone of every social security system is a process of broader or narrower social solidarity. Social security has to cover persons with different levels of (social) risk and distribute burdens among them.

Some argue that the notion of solidarity stems already from Roman law.[8] During the French Revolution, the slogan of liberty, equality and brotherhood (fr. *liberté*, *égalité*, *fraternité*) was developed. These values were incorporated also into the Universal Declaration of Human Rights (UDHR). In its first Article, it can be read that all human beings are born *free* and *equal* in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of *brotherhood*. In the times of promoting (substantive, material and not only formal) gender equality, it would be only equitable to add also in the spirit of sisterhood, or siblinghood, or maybe a more general term of *solidarity* could be used instead.[9]

Solidarity has gained importance also in EU law, where it is expressly mentioned. The EU Treaty emphasises the values, which are common to all

8 More precisely from *obligatio in solidum* (Latin phrase that means in total or on the whole). It regulates the situation, when two or more debtors vouch for the entire (total or whole) obligation of one of them. Janez Kranjc: *Rimsko pravo*, 3rd ed. GV Založba, Ljubljana 2017, p. 564.

9 More Grega Strban: Constitutional protection of the right to social security in Slovenia, in: Alexandre Egorov, Marcin Wujczyk (eds.): *The Right to Social Security in the Constitutions of the World: Broadening the moral and legal space for social justice*. ILO, Geneva 2016, p. 243.

Member States[10] in a society characterised not only by pluralism, non-discrimination, tolerance, justice, and equality between women and men, but also solidarity. Among distinctive forms of solidarity, solidarity between generations is stressed and should be promoted.[11]

Moreover, the Charter of Fundamental Rights of the EU, which has the same legal value as the Treaties, explicitly mentions solidarity as an indivisible and universal value of the Union.[12] In a special chapter, titled Solidarity, the Charter regulates the rights to social security, social assistance and healthcare.[13] Although the Charter does not introduce new competencies of the EU,[14] it is an important guidance in interpretation of the EU law, also by the Court of Justice of the EU (CJEU).[15]

Solidarity in a more specific sense also plays a role when it comes to the influence of basic economic freedoms and the EU competition law on national social security systems. According to the CJEU, systems based on solidarity (or carriers of such systems) cannot be qualified as undertakings and are exempted from the application of competition law.[16]

Hence, the substance of social solidarity might not be a legal category *per se*, but it is legally recognised and has major legal impact. It stems from the core of (so called distributive) justice.[17] Difficulties in defining solidarity stem from distinctive moral, social and political beliefs, which find their way into legislative acts in particular and legal regulation in general. Therefore, sometimes the "principle" of solidarity is used, which denotes its constitutional substance. Also the Slovenian Constitutional Court has established that one of the main characteristics of the social nature of the Slovenian State and the right to social security is the principle of solidarity. At the same time, it has not used the opportunity to clarify what solidarity is.[18]

10 The values are human dignity, freedom, democracy, equality, the rule of law and human rights. Article 2 of the EU Treaty, Consolidated Version [2016] OJ C 202/13.

11 Article 3 of the EU Treaty.

12 Second paragraph of the preamble of the Charter of Fundamental Rights of the EU [2016] OJ C 202/389.

13 Title IV, Articles 34 and 35 of the Charter of Fundamental Rights of the EU.

14 Article 6 of the EU Treaty and Article 51 of the Charter of Fundamental Rights of the EU.

15 E.g., C-34/09 *Zambrano*, EU:C:2011:124 or C-571/10 *Kamberaj*, EU:C:2012:233 or C-243/19 *Veselības ministrija*, EU:C:2020:872.

16 More in cases C-159/91 *Poucet et Pistre*, EU:C:1993:63, but also in some other cases like C-437/09 *AG2R Prévoyance*, EU:C:2011:112, C-350/07 *Kattner Stahlbau*, EU:C:2009:127, or in the field of social security of migrant workers C-345/09 *van Delft and Others*, EU:C:2010:610. Solidarity is expressly mentioned, e.g., also in case C-140/12 *Brey*, EU:C:2013:565.

17 Janez Kranjc: Amicum an nomen habeas, aperit calamitas, in: *Pravna praksa* 28 (2009) 11, p. 92. On distributive justice already, Aristotle in Nicomachean Ethics.

18 E.g., decision U-I-36/00, SI:USRS:2003:U.I.36.00, OdlUS XII, 98, or decision U-I-137/03, SI:USRS:2005:U.I.137.03, OdlUS, XIV, 30.

Within certain forms of solidarity, it could be further distinguished among vertical and horizontal solidarity and solidarity between the generations. Vertical solidarity is organised among persons with higher and persons with lower income. It can be observed at the financing and at the benefits side of social security. Horizontal solidarity is based on other personal circumstances, rather than income. It is organised among women and men, healthy and sick persons, individuals and couples with children and without them. Solidarity between the generations is most evident in the repartition pension insurance systems, health insurance schemes and long-term care schemes (although long-term care is predominantly, but not exclusively, linked to old age).[19]

Whichever form of solidarity is discussed, it can be argued that solidarity is connecting people within a certain society. Societies with better connections, i.e., more solidarity, could also be more economically successful. Hence, not only more solidarity is required during times of economic or financial crisis, but more of it is required during times of economic growth and even more in larger, multinational societies, such as the EU.

Solidarity is therefore an *essentiale* of social security and a *differentia specifica* between social and private income security schemes.[20]

Protecting the Poor

Before social solidarity was introduced, protection has been provided by (extended, rural) families.[21] From the late antique period, the role of the church has been emphasised. Christianity bound individuals for the love of their fellow humans.[22] In the Roman state, Christianity was recognised as a

19 Some authors are discussing also the so-called reverse (or perverse) solidarity, when people with lower income actually contribute towards the benefits of wealthier members of the society. Examples could be higher tax benefits in voluntary supplementary pension insurance or paying a pension next to a full salary, without any income loss or reduction (and hence materialisation of a social risk). Solidarity is intrinsically linked to self-responsibility. Grega Strban: Solidarnost in samoodgovornost, in Marko Kambič, Katja Škrubej (eds.): *Odsev dejstev v pravu, Da mihi facta, dabo tibi ius, Liber amicorum Janez Kranjc. Pravna fakulteta Univerze v Ljubljani*, Ljubljana 2019, p. 391.

20 When organising private insurances, covering private risks, certain reciprocity between insured persons may exist, but solidarity among distinctively endangered insured persons is as a rule absent.

21 The perception of family has undergone important changes. The Ancient Roman family was a complex social structure that was based mainly on the nuclear family. However, it could also include various other members or combinations thereof, such as extended family members, household and freed slaves. Jane F. Gardner: *Family and Familia in Roman Law and Life*. Clarendon Press 1998. Later in Europe, family traditionally meant a nuclear family, comprising two married parents (with the focus on the male as the breadwinner) and their children. Recent developments show that this traditional view is no longer valid, as various models of living together (or apart) or alone have developed. Grega Strban, Bernhard Spiegel, Paul Schoukens: *The application of the social security coordination rules on modern forms of family*, MoveS Analytical legal report 2019 (EC 2020), p. 15.

22 Eberhard Eichenhofer: *Sozialrecht*. Mohr Siebeck 2000, p. 12.

state religion. The church has, at the beginning voluntarily, and later in the times of Karl the Great in France, also legally binding, taken over offering assistance to the poor. For this purpose, special taxes have been raised.[23]

The first-known legislative acts of protecting the poor were adopted at the beginning of the 17th century. The Act for the Relief of the Poor, popularly known as the Elizabethan Poor Law or the Old Poor Law, was passed in 1601 and created a poor law system for England and Wales. A combination of bad harvest and growing hardship resulting from the French war had produced much distress.

The resulting increase in expenditures on public relief was so great that a new Poor Law was enacted in 1834, based on a harsher philosophy that regarded pauperism among able-bodied workers[24] as a moral failing.[25] Those applying for assistance had to prove their willingness for work by accepting work in a "workhouse".[26] The Poor Law Report (which preceded the reform) established the principle that the position in a "workhouse" should be less eligible as that of the position of the lowest paid person in work.[27] Consequently, the assistance rate for unemployed was fixed below the lowest wage level determined by the wage laws and circumstances made unattractive. These laws imposed an obligation on every parish to take care of its poor, though this had much less to do with compassion than with the need to preserve order and stability.[28]

The distinction between deserving poor (e.g., elderly, sick, children or disabled) and undeserving poor (e.g., able-bodied persons searching for work) might be detected even today. For instance, if an unemployed person refuses what is deemed to be suitable employment, all social security (and social assistance) benefits might be lost. Or, if such person does not agree to the employment plan or active employment policy measure, an enforceable, one-sided, authoritative administrative decision might be issued. Also, in the EU law, there is always certain mistrust towards unemployed people, whose right to free movement within the Union, while receiving unemployment benefit, is restricted.[29] Moreover, many restrictions to free movement of economically

23 Grega Strban: *Temelji obveznega zdravstvenega zavarovanja*. Cankarjeva založba, Ljubljana 2005, p. 18.

24 Able-bodied paupers were considered as those "who could work but would not". Conversely, the impotent poor (the sick, elderly, those unable to work) were classed as those "who would work, but could not", www.historyhome.co.uk/peel/poorlaw/plaa.htm (accessed 15 June 2020).

25 See www.britannica.com/event/Poor-Law (accessed 15 June 2020).

26 Anthony Brundage: *The English Poor Laws 1700–1930*. Macmillan 2001.

27 Conditions in workhouses were to be made very harsh to discourage people from wanting to receive help, https://spartacus-educational.com/Lpoor1834.htm (accessed 15 June 2020).

28 Seewww.parliament.uk/about/living-heritage/transformingsociety/livinglearning/19thcentury/overview/poverty(accessed 15 June 2020).

29 Article 64 Regulation (EC) 883/2004 on the coordination of social security systems, OJ L 166 30.4.2004 with amendments. See also proposal for its revision, Strasbourg, 13.12.2016, COM(2016) 815 final.

non-active EU citizens, who might be in need of social assistance, can be detected.[30]

Protecting the Workers

The situation changed in the second half of the 19th century. Industrialisation attracted large numbers of workers to the cities. Therefore, professional mobility was great (doing a lot of different work), but geographical mobility was low (all stayed in the cities).

Before industrialisation, protection to working people was offered by mutual assistance associations in the form of occupational associations and brotherhoods.[31] In the Slovenian territory, some of them were regulated by legislative acts, such as the 1845 Mining Act or the 1859 Craftsmen Order. However, their protection was incomplete (*lex imperfecta*, since no sanction has been foreseen, if the employer did not join the scheme) and not well functioning.[32]

After the industrial revolution in Europe, with the so-called workers' (or social) question, it became evident that workers were in need of greater protection than economically active persons of previous times. People were fleeing from rural areas to the cities, which led to dissolution of larger families who could provide protection to their members.[33] Additionally, the relation with the employer was limited to the exchange of labour and pay, which was not enough to cover all the employees' expenses (so-called pauperism).[34] In addition, poor relief was not offered to workers, who despite working long hours could not provide for themselves and their families.

Poor education, improper living arrangements and social deterioration due to rising unemployment, lowering of wages and prolonging working hours were characteristics of the time in Europe. The State wanted to abstain from economic intervention (according to the principle of *laissez faire, laissez passer*);[35] however, the State was forced to intervene due to social alienation and material hardship of the rising number of inhabitants.

Interestingly, the first State to intervene was not Britain, where the industrial revolution commenced. Structural elements, such as a lack of protection due to new forms of mobility, working and living conditions, as well as cultural

30 Stefano Giubboni: Free Movement of Persons and European Solidarity. A Melancholic Eulogy, in: Herwig Verschueren (ed.): *Residence, Employment and Social Rights of Mobile Persons*. Intersentia 2016, p. 75.

31 Already in 1452, the Brootherhood of Slovenians St Hieronim in Videm was established. Marko Pavliha: *Zavarovalno pravo*. Gospodarski vestnik, Ljubljana 2000, p. 48.

32 Strban, 2005, p. 19.

33 Eichenhofer, 2000, p. 13.

34 Alan Kidd: State, Society and the Poor: In *Nineteenth-Century England*. Palgrave Macmillan 1999.

35 On the State, Leonid Pitamic: *Država*. Družba Sv. Mohorja 1927.

elements, such as rising self-respect, upheaval of workers, providing legitimacy of public schemes, were first combined in Germany.[36] The initial purpose of the German Chancellor and Prussian Prime Minister Otto von Bismarck was not to improve the legal (and social) position of workers. As many politicians, he desired to retain power and was searching for a way to calm workers' movements. The solution was found in social insurances. Their establishment in Germany (and in the world) was announced by the message of the German Kaiser and Prussian King Wilhelm I (*Kaiserliche Botschaft*), read in the Parliament by Bismarck. With this act the obligation of the State to provide social security was established. At the same time, its emancipation of mere poverty relief was recognised.[37]

In the 1880s, the first legislative acts were passed, establishing statutory (mandatory, legislative) health insurance, accidents at work and occupational diseases insurance, and pension and invalidity insurance (e.g., with retirement at the age of 70). Social insurances were followed as a good example across Europe, also in the Austrian-Hungarian Empire (including the Slovenian territory)[38] and even Britain. The latter passed the National Insurance Act in 1911, with which unemployment insurance was established for the first time.[39]

After the World War I, social protection of workers was emphasised, e.g., on the Slovenian territory with the Workers' Insurance Act from 1922.[40] Social health insurance, accidents at work, and old age and death insurances were regulated.[41] Minimum requirements for insurance of all workers were determined; however, continuance of every social insurance which offered equal or better benefits to the workers was allowed. Hence, civil servants, miners, foundry workers, railway and national bank workers (and some others, like farmers) were excluded from its personal scope.

After World War II, social security systems matured. They were developing in slightly different directions, following distinct historical conditions and structural and cultural elements in respective countries.[42] Some of the common

36 Jos Berghman: The invisible social security, in: Wim Oorschot, Hans Peeters, Kees Boos (eds.): *Invisible social security revisited, Essays in Honour of Jos Berghman*. Lanoo Campus 2014, p. 37.

37 Peter A. Köhler, Hans F. Zacher, J.-Ph. Hesse (eds.): *Un siècle de Sécurité Sociale 1881–1981*. Universite de Nantes et le Max-Planck-Institut für ausländisches und internationales Sozialrecht 1982.

38 Strban, 2005, p. 21.

39 Bentley B. Gilbert: The British National Insurance Act of 1911 and the Commercial Insurance Lobby, in: *Journal of British Studies*, 4 (1965) 2, p. 127.

40 Jože Bohinjec (ed.): *Zavarovanje delavcev in nameščencev*. Published by the author, 1939, p. 118.

41 Unemployment insurance was announced, but introduced only in 1930s. With the Regulation on job brokerage. Kresal, 1998, also www.ess.gov.si/o_zrsz/predstavitev/zgodovina/kraljevina_shs (accessed 15 June 2020).

42 E.g., in the UK a national health service was introduced in 1946, based on Sir Beveridge's Report. William Beveridge: *Social Insurance and Allied Services*. HMSO 1942.

features were greater legal regulation instead of legally less regulated social assistance (juridification), and deprivatisation or socialisation of certain risks of life, broadening of personal coverage through solidarity.[43]

The personal scope of social security was also broadened with workers' family members. Self-employed persons became covered by some social security schemes, designed especially for them[44] or by general schemes.

Nevertheless, not only in some States, but also in some international organisations and the EU, (full-time) workers still enjoy the best social protection. For instance, in Slovenia part-time work is still recalculated to a full-time equivalent, which might present another difficulty, i.e., unequal treatment of women and men.[45] Self-employed persons might not be mandatorily covered in certain social security schemes or have limited benefits, under the condition social security contributions have been paid (which cannot be a requirement for workers).

The most important ILO social security (minimum standards) convention No. 102 from 1952 still considers a worker (a man with a wife and two children) as a standard social security beneficiary.

Under the EU law, a special chapter of the Treaty on the Functioning of the EU (TFEU) regulates free movement of workers.[46] Oddly enough, this chapter now covers not only employed but also "self-employed workers". Although, for the latter chapters on freedom of establishment and to provide services might be of greater importance.[47] Also the Free Movement or Citizens' Directive (2004/38/EC) gives priority to workers (and some other economically active persons). In the EU Social Security coordination law, a distinction is still made between "activity as an employed person" and "activity as a self-employed person". It should not be forgotten that the EU has been primarily designed as an economic community, where one of the production factors in the internal market was work.

Moreover, the concept of work is still perceived in a very physical manner. For instance, the CJEU emphasises the importance of location of economic

43 Helmar Bley, Ralf Kreikebohm, Andreas Marschner: *Sozialrecht*. Luchterhand 2001, p. 16.

44 Such as in Belgium. More www.missoc.org (accessed 15 June 2020).

45 See CJEU cases C-385/11, *Elbal Moreno*, EU:C:2012:746, or C-161/18, *Villar Láiz*, EU:C:2019:382.

46 Chapter 1 of Title IV TFEU, OJ C 202, 7.6.2016. See also Regulation (EU) 492/2011 on freedom of movement for workers within the Union, OJ L 141, 27.5.2011 and Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers, OJ L 128, 30.4.2014.

47 The reason for their inclusion is to provide an explicit legal basis in the Treaty for social security coordination for self-employed persons. Grega Strban: Social rights of migrants in the European Union, in: K. Malfliet, A.I. Abdullin, G.R. Shaikhutdinova (et al.); open ed. R. Sh. Davletgildeev: *Regional aspects of integration: European Union and Eurasian space*. Statut 2019, p. 68.

activity.[48] The question is, can such concept still be upheld in a world where people organise their work in an increasingly virtual manner? Virtual work as often applied in telework or platform work makes long-distance work relations possible, where employers and employees are well-connected online but remain geographically distant from each other. Also, mini-jobs could be performed in more than one Member State, and at the end might turn out not to be so mini anymore. Or, self-employed persons might not be covered by all social insurances or for all benefits. EU social security coordination has yet to adjust to a new social reality, not forgetting that non-standard workers are workers, who also enjoy the freedom of movement within the Union.[49]

However, in modern societies not only workers and (traditional) self-employed persons are economically active. So, the question emerges, does social security of workers suffice, or do we (again) need new forms of social protection, which might cover all members of society?

Protecting Everyone as a Member of Society?

Social rights are undoubtedly part of indivisible human rights, which belong to every human being. At the universal level, they are enshrined in the UDHR, and among them is the right to social security. Contrary to some other human rights, which set at the forefront an individual as such, social human rights consider an individual in a broader context. Therefore, the right to social security should be enjoyed by everyone as a member of society and is indispensable for his/her dignity and the free development of his/her personality.[50]

UDHR shows the relationship between the theory of natural law[51] (individual perception of freedoms, directly based on human reason and conscience) and social human rights (enjoyed by a person as a member of society). The latter could be described as fruits of the 20th century on the tree of the 18th century.[52]

Of course, the question might arise, who should be considered among "everyone" and how "society" should be defined. Both concepts might change over time and in place. Nevertheless, it could be argued that no personal circumstance should prevent a person from being considered as a member of

48 Case C-137/11, *Partena*, EU:C:2012:593. Insisting on *lex loci laboris* (even if no or limited social security is provided) in C-382/13, *Franzen and others*, EU:C:2015:261, C-95/18, *van den Berg and Giessen*, EU:C:2019:767.

49 Grega Strban (ed.): Dolores Carrascosa Bermejo, Paul Schoukens, Ivana Vukorepa: *Social security coordination and non-standard forms of employment and self-employment: Interrelation, challenges and prospects, MoveS Analytical report 2018* (EC 2020).

50 Article 22 UDHR.

51 Leonid Pitamic: Naturrecht und Natur des Rechts, in: *Österreichische Zeitschrift für öffentliches Recht*, 1956, N.F., 7, p. 190.

52 Peter A. Köhler: *Sozialpolitische und sozialrechtliche Aktivitäten in der Vereinten Nationen*. Nomos 1987, p. 274.

society and thus covered by social security. Hence, women and men, healthy and sick, able-bodied and disabled, young and old, persons with or without children, employed and unemployed, migrants and non-migrants, persons of different races, colour and beliefs should be covered.[53] Not only formal equality, but material, substantive equality, with positive measures for certain groups should be guaranteed.[54]

Moreover, society could no longer be limited to local communities or regions or even States as the ones primarily responsible for providing social security.[55] The patterns of (organising) work have changed, and so have the patterns of mobility. There are many short-term movements, especially within the EU. Maybe social security coordination rules have become too complex[56] and sometimes even not used for the purpose they have been designed (e.g., social security rules on posting and simultaneous employment). Maybe the time has come to develop a truly European social security system.[57] Occasionally, some attempts in these directions are already made, e.g., with the European unemployment benefit scheme (EUBS)[58] or European social security pass (ESSPASS).[59]

Only replacing some of the current social security schemes, e.g., insurance-based with residence-based schemes, or with universal basic income (UBI),[60] might be a too simple solution, possibly causing more difficulties than providing solutions. Paradoxically, one of the major arguments against UBI is the principle of equality. Although it should provide for more equality of

53 UN, Economic and Social Council, Committee on Economic, Social and Cultural Rights, General Comment No. 19, The right to social security (art. 9), E/C.12/GC/19, 4 February 2008.

54 Grega Strban: *Gender Differences in Social Protection*, MISSOC Analysis 2012/2 (EC 2012).

55 Obligation of the States is enshrined in Article 71 ILO Convention No. 102. The European Social Charter (Article 12 of the initial and the revised version) obliges the State parties to ensure the effective exercise of the right to social security.

56 Which can especially be observed in cross-border healthcare cases. Even if regulated by various EU legal instruments, loopholes might still exist (e.g., helicopter transfer to a private clinic). Grega Strban (ed.): Gabriella Berki, Dolores Carrascosa Bermejo, Filip Van Overmeiren: *Access to Healthcare in Cross-border Situations*, FreSsco Analytical Report 2016 (EC 2017).

57 Danny Pieters, Paul Schoukens: The thirteenth state revisited, in: Elisabeth Brameshuber, Michael Friedrich, Beatrix Karl: *Festschrift Franz Marhold*. Manz 2020, p. 807.

58 Michael Coucheir (ed.): Grega Strban, Harald Hauben: *The Legal and Operational Feasibility of a European Unemployment Benefits Scheme at the National Level*, Special Report No. 145 (CEPS 2016).

59 ESSPASS is a project designed to make it easier for individuals to exercise their social security rights in another Member State. This initiative is part of the European Pillar of Social Rights Action Plan. https://ec.europa.eu/social/main.jsp?catId=1545&langId=en (accessed 28 December 2023).

60 Tested, but stopped in Finland: www.theguardian.com/world/2019/feb/08/finland-free-cash-experiment-fails-to-boost-employment rejected in a referendum in Switzerland www.theguardian.com/world/2016/jun/05/swiss-vote-give-basic-income-every-adult-child-marxist-dream (both accessed 15 June 2020).

opportunities, it might result in social injustice. Treating equal groups distinctively is perceived as unjust. At the same time, treating distinctive groups equally is unjust as well. Additionally, the more we would depart from its genuine and unconditional structure and shape it as a selective, conditional, categorical, partial, segmented, non-individualised or temporary income, the closer we would come to the already existing social security systems.[61] Therefore, more effort should be invested in modernising the existing social security systems, rather than fundamentally changing their structure.

(R)evolution(s) in the Law of Social Security?

As Heraclitus of Ephesus argued, the only constant in life is change.[62] The same goes for society or societies, if we perceive it as a non-universal unit. The question might be, are changes in social security law of revolutionary or evolutionary nature? Revolution in law would mean that the existing legal order is overturned (in Slovenian of that time, *prekucnjen*)[63] and replaced with a new one. Revolution cannot be against any legal order. Hence, it could only be positive and reformatory.[64] Another question might be, is there a right to revolution, when the legal system is unjust, or becomes unjust if it does not follow societal changes? Such right might exist under natural law, rather than under positive law, against which revolution is led.[65]

Therefore, revolutions in the law of social security are not a common occurrence. We might perceive the period of establishing the new legal order (and social responsibility of the State) after the French Revolution, or after World War I, or World War II, or after Slovenian independence from former Yugoslavia as legally revolutionary, although the continuity of the majority of legal rules has been provided for (as long as the rules were not opposing the new legal regime).[66]

Moreover, other periods in history might be perceived as revolutionary in the law of social security, such as juridification, deprivatisation or socialisation of certain risks at the beginning of the 17th century, or even more so at the end of the 19th century when a "top-down" State responsibility for social security (based on social insurances)[67] was established. Hence, as revolutionary might also be perceived when new rules and new legal regimes are established where none have existed before.

61 Renata Mihalič, Grega Strban: *Univerzalni temeljni dohodek*. GV Založba, Ljubljana 2015.
62 See www.ancient.eu/Heraclitus_of_Ephesos (accessed 15 June 2020).
63 Pitamic, 1920, p. 19.
64 If it would be negative, i.e., denying any legal order, it might lead to anarchy. Ibid.
65 Ibid., p. 21.
66 For this purpose, acts on notification of succession have been passed.
67 International Covenant on Economic, Social and Cultural Rights recognises "the right of everyone to social security, including social insurance" (as one of the paths of its realisation).

However, it could hardly be argued that there is a "constant revolution" in the law of social security. Struggle against the existing rules and substitution by new legal rules might be inherent to this specific field of law. Nevertheless, social security law might be more often (if not constantly) subject to (smaller or larger) evolution(s). The latter has justification in the existing legal order, where certain rules might be modified or replaced with new ones, in order to follow the societal developments and ultimately avoid revolution.

Not only is European society growing older, but the patterns of work, mobility and hence, living in general have changed. The rule of law, a cornerstone of every modern society and its legal order, demands from the legislature to follow such societal changes with its normative action, also in the field of social security law.[68] This should be done in a democratic manner,[69] respecting all human rights (also the right to social security and the right to social and medical assistance).

Another question might be, whether "revolution in reverse" would be possible and desirable. Revolutionary was when private protection was replaced by social protection. Reverse revolution might occur when the paradigm would be changed again, this time from social to private protection. It might transcend the mere evolution of the existing social security law, since the core, the structure of income security would change. One of the evergreen questions is, who should be responsible for such income security. Should it be legal subjects under public law, e.g., such as the State, regions or local communities, or should it be (again) left to the legal subject under private law, e.g., the individual him- or herself, his or her employer and private insurances.[70]

Trends towards more private security could be detected not only in national law, but also in the EU law. In both cases they might relate to pensions or healthcare. For instance, should public pensions be reduced and private saving reinforced?[71] Should private providers be allowed to make profits while delivering private services for public healthcare system?[72] Should we have access

68 Slovenian Constitutional Court decision No. U-I-69/03, SI:USRS:2005:U.I.69.03, OdlUS XIV, 75 and U-I-307/11, SI:USRS:2012:U.I.307.11, Official Journal RS, No. 100/11 and 36/12.

69 Cf. also Danny Pieters: Social security and democracy, a separate chapter in the present publication.

70 Grega Strban: Country report on Slovenia, in: Ulrich Becker, Danny Pieters, Friso Ross, Paul Schoukens (eds.): *Security: A General Principle of Social Security Law in Europe*. Europa Law Publishing 2010, p. 401.

71 Cf. Resaver pension fund for mobile researchers, www.resaver.eu, or more emphasis to capitalised funds in national legislation, www.missoc.org (both accessed 15 June 2020). Ulrich Becker, Peter A. Köhler, Yasemin Körtek (eds.): *Die Alterssicherung von Beamten und deren Reformen im Rechtsvergleich*. Nomos 2010.

72 The Slovenian Constitutional Court annulled legislative provision stating that everyone (public or private provider), should deliver healthcare on the account of mandatory health insurance on a non-profit bases. Decision No. U-I-194/17, SI:USRS:2018:U.I.194.17, Official Gazette RS, No. 1/2019 and OdlUS XXIII, 14.

to private providers in another Member State at the account of the national public healthcare system, possibly jumping the que while doing so?[73]

It has to be stressed that diminishing social protection does not lead to enhancement of private protection. It might simply mean that many people remain unprotected.[74] Therefore, we should be able to learn from the history and past revolutions, in order not to establish the circumstances in society which might lead to another revolution in society and in law (of social security). People tend to be very sensitive, especially to changes of pension and healthcare systems in their respective countries.[75] Privatising of old age, sickness or other general risks of life would be inadmissible.

Concluding Thoughts

Historical developments show that revolution, also in the law of social security, might occasionally be required. Some may even believe that starting fresh (or even resetting the society) would be the best solution. However, individuals and societies are not a *tabula rasa*. We live in certain time and space and are influenced by many (endogenous and exogenous) factors.[76]

Therefore, the social security law is more often or constantly in need of evolution, adaptation of the existing legal rules to the ever-changing societal relations, including the so-called 4.0 industrial revolution,[77] which has to be responded to by 4.0 social security. Historically, the personal and material scope of social security has been gradually broadened. Not only the poor, but also workers, self-employed persons and members of their families have been included in a growing number of social security schemes.

We should continue building on the historical (r)evolutions and avoid reverse (r)evolutions and fundamentally changing or resetting the social

73 Grega Strban, Gabriella Berki, Dolores Carrascosa Bermejo, Filip Van Overmeiren, 2017.

74 E.g., in the US in 2018, 27.9 million non-elderly individuals were uninsured for healthcare, an increase of nearly 500,000 from 2017, www.kff.org/uninsured/issue-brief/key-facts-about-the-uninsured-population/ (accessed 15 June 2020).

75 E.g., recent protests in France, www.theguardian.com/world/2020/feb/03/self-employed-workers-protest-paris-france-pensions-row-deepens-strike or Greece, www.france24.com/en/20200218-thousands-protest-in-greece-against-pension-overhaul (both accessed 15 June 2020), or pension reform referendum in Slovenia. Grega Strban: Slovénie, Après avoir été rejetée lors d'un référendum, la réforme des retraites reste à faire, in: *Liaisons sociales Europe*, 2011, No. 291, p. 2.

76 *Ad absurdum*, it is not possible to change one nation with another one. We have witnessed in the past how that could (but should not) end.

77 From the first industrial revolution (mechanization through water and steam power) to the mass production and assembly lines using electricity in the second, the fourth industrial revolution will take what was started in the third with the adoption of computers and automation and enhance it with smart and autonomous systems fuelled by data and machine learning. Marr, Bernard, *What is Industry 4.0?*, *Here's A Super Easy Explanation For Anyone*, www.forbes.com/sites/bernardmarr/2018/09/02/what-is-industry-4-0-heres-a-super-easy-explanation-for-anyone/#1d7a433a9788 (accessed 15 June 2020).

security systems. There is plenty of effort still required to enable access to social security to every economically active person[78] or everyone as a member of society and to provide adequate benefits (while committing to adequate obligations) in social security. Moreover, society should no longer be perceived as a society of a local community, region or a State, since people are no longer confined to such communities. It should be broadened to supranational societies, such as the EU, and with time maybe also to the entire human society under the auspices of the UN.

Whichever form of society we choose, income protection should be the task of such society, i.e., social protection should be guaranteed, based on solidarity as the connecting tissue among its members. Without such connection there is hardly any society at all. Moreover, social security should be perceived as socially just, enabling equality of opportunity and not serving only privileged (wealthier) groups in the society.[79] Like it or not, general risks of life, such as sickness, disability, old age, unemployment, parenthoods, reliance on long-term care or specific situations of need may affect every member of the society. Hence, it is only normal that they should be properly socially addressed in order to guarantee the fundamental human right to social security to everyone.

78 Cf. the Council Recommendation on access to social protection for workers and the self-employed (2019/C 387/01), OJ C 387/1, 15.11.2019.

79 UN proclaimed 20 February as the World Day of social justice www.un.org/en/observances/social-justice-day (accessed 15 June 2020).

16 Social Security and Democracy

Danny Pieters

The Conceptual Framework

The European Union and its member states are fundamentally committed to both democracy and social security.

Already in the preamble of the Treaty of the European Union, this commitment is expressed:

> DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, *democracy*, equality and the rule of law,
>
> CONFIRMING their attachment to the principles of liberty, *democracy* and respect for human rights and fundamental freedoms and of the rule of law,
>
> CONFIRMING their attachment to *fundamental social rights* as defined in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers. (italics added)

The requirement for member states to have a democratic form of government and the resolution to protect social fundamental rights, amongst which the right to social security, is then developed in several articles of the Treaty itself.

The same commitment to democracy and social security is present in many constitutions of the member states. Let us take the example of Slovenia. The first two articles of the Constitution of the Republic of Slovenia already express the fundamental commitment of the state to both democracy and social protection. In article 1 we read: "Slovenia is a democratic republic". Followed by article 2, stating: "Slovenia is a state governed by the rule of law and a social state". The commitment to social security is then repeated in article 50 of the constitution on the right to social security, worded as follows:

> Citizens have the right to social security, including the right to a pension, under conditions provided by law.

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> The state shall regulate compulsory health, pension, disability, and other social insurance, and shall ensure its proper functioning.
>
> Special protection in accordance with the law shall be guaranteed to war veterans and victims of war.

Article 51 proceeds with recognising a right to health care. Subsequent articles guarantee special protection of disabled persons (Article 52), as well as family, motherhood, fatherhood, and especially children (Articles 53 to 56). These provisions may influence how the social security system is shaped, but have impact also beyond this scope.[1]

Apparently, drafters of these and similar constitutional texts, and lawyers in general, consider that democracy and social security go together well, even strengthen each other. However, is this correct? Is this a happy marriage indeed? Or is the relationship between democracy and social security somewhat more problematic? These are the core questions we would like to address in this contribution. To do so, we shall subsequently deal with the following topics:

- Can you have a democracy without social security?
- Can you have social security without democracy?
- How does democracy impact social security?
- What about the internal democracy of social security?
- How do individual rights question democratically taken social security decisions?

It is certainly not the ambition of this chapter to exhaustively deal with all aspects of the relationship between social security and democracy; we have selected those topics that in our opinion could lead to some conclusions relevant for the future. However, before delving into these questions, it is important to dwell somewhat longer on the two main concepts at stake here: democracy and social security.

First, a word about democracy. There is very extensive literature on the concept of democracy. Democracy is usually defined as a form of government of, for, and by the people. Often it is added that democracy is not the same as the dictatorship of the majority but that a state becomes really democratic if the rights of people and of minorities are decently protected. The rule of law and the alternation of power are seen as characteristic for democracy as well: who today is in the opposition should have the opportunity to be in the majority tomorrow and *vice versa*.

One distinguishes representative democracy and direct democracy. Sometimes one also adds participative democracy. In the case of direct democracy,

1 Grega Strban: Country report on Slovenia, in: Ulrich Becker, Danny Pieters, Friso Ross, Paul Schoukens (eds.): *Security: A General Principle of Social Security Law in Europe*. Europa Law Publishing, Groningen 2010, p. 402.

the population is asked to give its opinion directly by way of referendum or a people's assembly. In the case of representative democracy, the people speak through the representatives they elect. Participative or deliberative democracy are container concepts which express the will to involve the population directly in government and policy-making by appointing a number of people from that population in a way different from elections. This can be done by merely drawing lots, but mostly one will also attach importance to the representative nature of the selected persons; they have to be ready to enter into the debate and thus have to be politically interested and, if possible, politically educated. Hence, these initiatives of participative or deliberative democracy often include quite a lot of steering, which undermines the credibility of this form of democracy.

Most states today claim to be democracies, but they sometimes give quite different meanings to the concept. Yet the idea of democracy, especially in its liberal form, is under criticism by some for being inefficient and lacking in character.

Where in (representative or direct) democracies the majority of the people wants to violate the human rights of certain people or groups, democracy is being perverted. On the other hand, one has to recognise that human rights are also mostly not absolute and can be subject to limitations: the question is, however, how far these limitations should go and what should justify them. Also, on these questions, visions may differ between the various legal orders. This is by the way also the case for the contents of the universally proclaimed human rights. In a genuine democracy, human rights are taken seriously, but that does not mean that there will never be tensions between democratically decided policies and the respect for human rights.

So far about democracy, let us turn now to the other key concept of this contribution: social security. Earlier we defined social security as "the body of arrangements shaping the solidarity with people facing (the threat of) a lack of earnings (i.e., income from paid labour) or particular costs",[2] and this in the case of defined "social risks", such as old age, sickness, invalidity, reliance on long-term care, unemployment, maternity and paternity, etc. Crucial in this definition are the concepts of solidarity and "social risk".

Solidarity implies a community of feelings or action within a group – a commitment towards the members of the group. This means that solidarity will always have its limits: some people will be within the solidarity circle, others not. In other words, every solidarity system, every social security arrangement will define its personal scope. That solidarity circle may include all citizens or all residents of the country or region or municipality; it may single out the group of workers, wage earners, self-employed, etc. of a country, or it may even use other criteria still to define the solidarity circle. We stress this

2 Danny Pieters: *Social Security: An Introduction to the Basic Principles.* Kluwer Law International, Alphen aan den Rijn 2006, p. 2.

solidarity aspect, as it will be interesting to compare this solidarity circle with the circle in which democratic participation is organised.

The other important concept is that of "social risks". A social risk distinguishes itself from other eventualities which may cause a loss of income or additional costs (e.g., a separation or the burning of the house), by the fact that at a given point in time within a given society, the decision was taken not to leave the consequences of that eventuality on the sole shoulders of the victim, but to bear the burden in solidarity. Or as we put it earlier:

> [the] recognition of a need for social protection as a 'social risk' depends on the convictions commonly accepted within a society and expressed in the passing of legislation establishing schemes that cover the corresponding eventualities. Such a recognition of certain needs for social protection as social risks may alter in the course of time: some needs are ever less recognised as constituting a (distinct) social risk whereas others are ever more likely to be recognised as such.[3]

This means that already the concept itself of "social risk" and thus of "social security" is intimately linked to decision-making in a group or in a state. In a democracy, we may suppose that this decision-making will be democratic.

No Democracy Without Social Security?

Can we have a democracy without social security for the citizens? Is it possible to create a democratic "paradise" in a social desert? There are plenty of arguments to be provided for affirming that you cannot have a developed democratic society without a decent social protection, a good social security system for the members of such a society. Some even go a step further and state that a minimum level of income is necessary for having the capacity and autonomy to exercise political rights properly, hence that some form of redistribution is part of the concept of ("egalitarian") democracy.[4] In other words, for this minority of political scientists, the concept itself of democracy implies a social policy that redistributes income. However, we rather prefer to stick to the aforementioned political-institutional approach of the concept of democracy. This doesn't take away the fact that in order to have a genuine participation of all in the political decision-making process, it is necessary that each person should dispose of the means to be able to conduct a decent life. And here of

3 Ibid., p. 35.

4 David Beetham: *Democracy and Human Rights*. Polity Press, Cambridge 1999, pp. 95–103; Michael Coppedge, John Gerring, David Altman, Michael Bernhard, Steven Fish, Allen Hicken, Matthew Kroenig et al.: Conceptualizing and Measuring Democracy: A New Approach, in: *Perspectives on Politics* 9 (2011) 2 pp. 247–267; Carl Henrik Knutsen, Simone Wegmann: Is democracy about redistribution?, in: *Democratization Journal* 23 (2016), https://doi.org/10.1080/13510347.2015.1094460, p. 4.

course, social security plays a crucial role! In this respect it was not surprising that when interviewing CEOs and other leaders of Western European social security institutions, we found out that the second most important common concern related to the relationship between democracy and social security; most of them stated in the interviews we took from them that they saw social security as a pillar of democracy.

> Social security gives people more equal opportunities to participate in society; it makes an inclusive society possible. If democracy is not the dictatorship of the majorities of the day, but also cares about the human rights of all, including the weaker and the marginal people, social security can indeed be considered to be a pillar of democracy.[5]

Concluding, we may say that even if it would go too far to pretend that a decent social security system is part of the notion of democracy as such, it goes without saying that in order to be healthy, democracy needs citizens freed from the fear of not being able to cope the next day. Or to put it differently, if we want all persons to be able to think and contribute to decision-making, i.e., to participate in democracy, then it is essential to provide them with some security in relation to the major risks for their livelihood. Otherwise, the danger is great that they will be guided by the maxim "*primum vivere, deinde philosophari*".

No Social Security Without Democracy?

If we can accept that a mature democracy cannot do without a decent social protection of its citizens, we still can ask ourselves whether the opposite is true as well. In other words, we need to question whether you cannot have a decent social security without democracy. As we shall see hereafter, significant policy research has shown that you effectively can have good social security protection without having a democratic government.

We could start by recalling the origins of the first social insurances introduced in Germany in the second quarter of the 19th century by Chancellor Bismarck, who certainly cannot be labelled as a democratic ruler. A similar remark could be made in relation with the introduction of social security programs in countries such as the Soviet Union under Lenin or in pre-war imperial Japan.[6] Some authors have even linked the initial adoption of social

5 Paul Schoukens, Danny Pieters: *Social Security Quo Vadis? Interviews with social security administration CEOs in 15 Western European countries.* IBM Global Social Segment, Washington 2007, p. 85.

6 Of course, social security can also be introduced in a democratic setting, as teaches us, e.g., the UK or Scandinavian examples.

security programs in and outside of Europe to the ambition of the rulers to prevent the demands for political rights.[7]

But there is more. Already in 2002, Mulligan, Gil and Sala-i-Martin[8] established that "Social Security policy varies according to economic and demographic factors, but that very different political histories can result in the same Social Security policy". The effect of democracy was found to be little and partial.

> If there is any observed difference, democracies tend to spend a little less of their GDP on Social Security, grow their budgets a bit more slowly, and cap their payroll tax more often, than do economically and demographically similar non-democracies.[9,10]

Since then some other authors have tried to get a better understanding of the relationship between non-democracies (or autocracies) and social protection. Andre Cassini (2017)[11] argues that autocracies need some legitimacy and often cannot base this anymore on personal charisma, tradition or ideology (as they did in the past), but will be compelled to direct their legitimation on the realisation of pragmatic claims of the population, most notably the fulfilment of the people's will and material needs.[12] Therefore, it is important for them to "deliver" as far as social services are concerned. In their paper "Party Institutionalisation and Welfare State Development" (2017),[13] Rasmussen and Knutsen have stressed the importance of institutionalised parties for the welfare state both in democracies and non-democracies. By institutionalised parties they mean (political) parties in which decisions "are taken according to clear, stable rules and informed through well-organised contact points and networks linking party elites with broad constituencies outside the core organisation". The decision-making power is allocated "to core party institutions at the national level, well-specified and organisationally determined roles for involved actors, hierarchical arrangements that allow for effective decision-making" etc.[14] Rasmussen and Knutsen conclude that "highly institutionalised parties have both the incentives and the capacity to enact more universal and generous social policy programs covering against various risks". Bottom-up

7 Isabela Mares, Matthew E. Carnes: Social policy in developing countries, in: *Annual Review of Political Science* 12 (2009) 12, pp. 93–113.

8 Casey B. Mulligan, Ricard Gil, Xavier Sala-i-Martin: Social Security and Democracy, in: NBER Working Paper Series, No. 8958, www.nber.org/papers/w8958.

9 Ibid., p. 27.

10 The situation of Greece was different: the social security spending increased considerably after the fall of the Colonel Regime. Ibid., pp. 28–29.

11 Andrea Cassini: Social services to claim legitimacy: comparing autocracies' performance, in: *Contemporary Politics* 23 (2017) 3, pp. 348–368.

12 Ibid., p. 349.

13 Magnus B. Rasmussen, Carl Henrik Knutsen: Party Institutionalization and Welfare State Development, paper presented to the APSA Conference 2017.

14 Ibid., pp. 2–3.

they are able to widen their circle of constituents and elicit information about their demands; top-down they are able to overcome veto players inside and outside their organisation and to effectively implement policies. They empirically show that indeed party institutionalisation makes for more encompassing, universal and generous welfare states.[15] Earlier studies had explained the origins of the welfare state focusing on some aspect of working-class organisation or social democratic parties[16] or a combination of impartial and effective state institutions and working-class mobilisation.[17] The analysis of Rasmussen and Knutsen finds "that working-class organisation and state structures matter for welfare development, but neither factor cancels out the result that party institutionalisation is a key driver of welfare development".[18]

Can authoritarian, or electoral autocratic, governments provide better social security than democracies? As such, this question needs to be approached with caution, as democracies may perhaps not necessarily perform better than some non-democracies, and there is no evidence that democracies necessarily perform worse. Much will depend upon the receptivity for the preferences and wishes of society, the ability to translate them in a broader approach and then to overcome resistance when deciding and implementing social reforms. We shall examine the impact of democratic decision-making upon social security and social security reform in the next segment.

Impact of Democracy Upon Social Security

To discuss the impact of democracy upon social security in all its aspects would exceed the limits of present contribution. We would like, however, to highlight some aspects of that impact. We consider most relevant:

- The reflection of the people's preference concerning social security through policy-making in direct and representative democracies
- The different time dimension between the impact of social security and political decisions
- The different personal scopes of social security and political representation

Let me start the discussion of the impact of democracy upon social security with a rather anecdotal finding. Every year, many foreign students take part in our classes on social security. Most of them, when they arrive, have a rather critical attitude concerning their own national social security. Yet when they start discussing fundamental options to be taken by any social security system,

15 Ibid., p. 21.
16 Evelyne Huber, John D. Stephens: *Development and Crisis of the Welfare State: Parties and Policies in Global Markets*. The University of Chicago Press, Chicago 2001.
17 Bo Rothstein, Marcus Semanni, Jan Teorell: Explaining the welfare state: power resources vs the Quality of Government, in: *European Political Science Review* 4 (2012) 4, pp. 1–28.
18 Rasmussen, Knutsen, 2017, p. 22.

with students from other countries, most of them quickly end up defending the basics of their own social security system as the best choice. In a way, this seems to show that for the major lines, democracy works in social security; in other words, it is because the people of various countries have other preferences, and because democracy translates these in actual social security options, that we have different social security systems in Europe and in the world.

Some qualitative research corroborates this elementary finding. In a recent qualitative research, carried out by KU Leuven researchers, three focus groups were asked about which criteria should prevail in social welfare distribution. Their findings suggest

> the existence of an institutional logic to welfare preferences, as the participants to some extent echoed the normative criteria that are most strongly embedded in the institutional structure of their country's welfare regime. Whereas financial need was the guiding criterion in liberal UK, reciprocity was dominant in corporatist-conservative Germany.[19]

Therefore, if we can accept as a starting point that in a democracy it is likely that the overall preferences of a majority of the people will somehow be translated in the way the social security is built,[20] we have to examine the impact of democracy upon social security somewhat more closely.

Let us start with the country of direct democracy by excellence. In Switzerland,[21] the impact of direct democracy upon social security has been remarkable: social insurances have been introduced later in the country, their tax financing has been kept limited and the social action of the state remained modest as a consequence of the use of popular vote and referenda. Social issues accounted for about 13% of the total number of popular votes between 1848 and 1989 and between 1990 and 2014, this figure raised to 30%. Only once a popular initiative for more social protection was successful in all those years. Far more successful were the referenda to abolish social security reforms introducing new social protection, or to undo reductions of existing social benefits.[22] All in

19 Tijs Laenen, Federica Rosetti, Wim van Oorschot: *Why deservingness theory needs qualitative research. An analysis of focus group discussions on social welfare in three welfare regimes.* Paper presented at the 2018 Annual Conference of ESPAnet in Vilnius, 2018, pp. 1 and 22.

20 At the same time, it has to be recognised that also a vice versa effect might exist, i.e., certain structural settings, including the specific shaping of the social security system, might influence the preferences of people.

21 Herbert Obinger et al.: Switzerland. The marriage of direct democracy and federalism, in: Herbert Obinger, Stephan Leibfried, Francis G. Castles: *Federalism and the Welfare State. New World and European Experiences*, New York, pp. 263–306; Uwe Wagschal, Herbert Obinger: *Der Einfluss der Direktdemokratie auf die Sozialpolitik*, ZeSArbeistpapier, Bremen 1999.

22 E.g., in 2017 raising of the retirement age for women (equalising it with the one of men at 65 years of age) was rejected by the voters. Similarly, a guaranteed income plan was rejected on a referendum in 2016.

all, one can conclude that direct democracy has had a conservative impact upon social security in Switzerland. Interestingly, Slovenia used to be compared to Switzerland in terms of direct democracy with its numerous referendums. Similarly, the pension reform has been rejected at a referendum in Slovenia as well.[23]

In most democratic countries, the impact of direct democracy is little or even absent: the expression of the preferences of the population is mediated through political elections for parliament. Most democracies are representative. We have seen the importance of institutionalised parties at play. Here we might encounter a specific problem of our times: in many European countries, traditional parties have lost quite a lot of the share they had in the electorate. This is especially true for the social-democratic parties, but also traditional centre and centre-right parties have lost many seats in the Western European parliaments over recent decades. New parties emerged, often lacking the same connections to civil society; in some countries that used to have single-party governments, coalitions were needed to form a government or minority governments emerged. All this could lead to greater difficulties to adapt social security to the real needs and preferences of the time.

If we take a closer look at both democracy and social security, we have to notice some basic differences that might have an important consequence for the impact of democracy upon social security.

Social security is about providing security against the social risks, i.e., about taking steps now to make the future more secure. This time dimension is essential to the concept of social security and appears most clearly in the pension schemes, but is not absent in, e.g., social health care schemes or unemployment benefit schemes. In the latter, we take measures now for when we (or others) become in need of health care, get reliant on long-term care or become unemployed. Obviously, pensions show most clearly the time dimension: whether in repartition-based or funded schemes, social security pension schemes guarantee an income in a number of years from now. In repartition-based systems, this expected income is basically linked to the evolution of the local labour market and the income out of work in the future, and in a funded system the future income to be expected is linked to the evolution of the financial markets. In both cases, the future remains uncertain. In both cases, although most prominently in a repartition logic, social security pensions are characterised by inter-generational solidarity, between the actual generation of workers or citizens and their counterparts twenty, thirty, forty years later. Similarly, if a government decides to change pension arrangements for the future, these changes will only show their full impact two, three, four decades later: when pensions will start to be fully determined by the new rules. This time dimension of various decades is in sharp contrast with the time dimension shown by democratic decision-making. Leading figures in parliament or government, those who really make the policy decisions, will in today's democracies seldom be

23 Grega Strban: Slovénie, Après avoir été rejetée lors d'un référendum, la réforme des retraites reste à faire, in: *Liaisons sociales Europe – Wolters Kluwers France*, No. 291 (2011), p. 2.

longer than ten years on the political steering wheel. Politicians are confronted with elections every two, three or four years. Proposals made by them, social policy decisions taken by them, measures implemented by them, will be evaluated at the next elections. The impact of their social security policy may, however, need many more years, if not a number of decades to become clear. So it is a fundamental challenge for a decent politician to make an innovative proposal now, take a needed decision now, implement decided social changes now, whereas the fruits of these actions may come many years if not decades later, when they will not be in charge anymore and when even their immediate successors may already have disappeared from the top political arena. Likewise, it is far too easy for a politician to come up with ideas or decisions in the social security area which sound great from a social perspective, but leave the bill entirely on the shoulders of those who will have to make the necessary financial means available in a number of years or decades later. When many Western European countries' social security systems, especially pension schemes, were confronted with major financial problems since the 1970s, this was often blamed on external factors such as the oil crisis, demographic decline etc., whereas we believe that it had (also) much to do with the "maturation" of arrangements, especially pensions created in the period after World War II which were far too generous, but the bill for which was presented in full only since the 1970s.

Another relevant difference between the ambit of democracy and social security relates to the group of people concerned.

Earlier we defined democracy as a form of government of, for and by the people. We added that democracy is not the same as the dictatorship of the majority but that a state becomes really democratic if the rights of people and of minorities are decently protected. In a representative democracy, all nationals, and sometimes even all residents, participate in the decision-making. Social security systems may be universal, basically covering all residents, or professionally organised, covering all wage earners, or groups of self-employed, some civil servants, etc. When in a democracy all residents decide upon who is to make the relevant policy decisions and social security is universal, both personal scopes overlap. This is, however, not the case in most countries. Political rights are often reserved for the persons who have citizenship, sometimes including even citizens living abroad. Social security is often organised on a professional basis and thus concerns a group far smaller than the entire population. Moreover, as a consequence of, amongst other things, the coordination treaties[24] and European regulations,[25] social security may apply to non-residents.

24 E.g., Grega Strban: The existing bi- and multilateral social security instruments binding EU States and non-EU States, in: Danny Pieters, Paul Schoukens (eds.): *The Social Security Coordination Between the EU and Non-EU Countries.* Intersentia (Social Europe series, vol. 20), Antwerpen, Oxford 2009, p. 85.

25 E.g., Paul Schoukens, Danny Pieters: The Rules Within Regulation 883/2004 for Determining the Applicable Legislation, in: *European Journal of Social Security* 11 (2009) 1–2, p. 81.

Decisions on social security issues will consequently be taken by (those representing) another group of persons, usually a larger group of people. Here two problematic features may appear: political decision-makers may exclude some people from their social security arrangements or may create a very privileged social security for other groups. As far as the exclusion of some groups is concerned, we will have to ask ourselves whether we are not confronted with unlawful discrimination, i.e., whether the political majority has a good justification to exclude these groups. As far as privileged social security arrangements are concerned, the question seems less legal and more political: why did a majority of political decision-makers in a democratic setting create privileged arrangements? At the end of the day, also here the question is one inquiring for good reasons to have the different treatment.[26]

In some countries, the mismatch between the people socially insured and those taking part in the political elections may be even bigger than usual as a consequence of many foreigners living and working in the country or many workers living abroad. This is especially an issue for smaller democracies, such as the microstates Andorra, Monaco or San Marino.

In order to somewhat overcome the difference in personal scope of political elections and social security systems, some countries decided to organise some form of elections amongst the socially insured persons. More about this in the next section.

Democracy Within Social Security

In the ILO Convention number 102 concerning Minimum Standards of Social Security, which is the instrument actually defining the scope of social security on the international level, we find an article, which did not get so much attention, but that is directly relevant to us here, i.e., article 72, which reads as follows:

> 1. Where the administration is not entrusted to an institution regulated by the public authorities or to a Government department responsible to a legislature, representatives of the persons protected shall participate in the management, or be associated therewith in a consultative capacity, under prescribed conditions; national laws or regulations may likewise decide as to the participation of representatives of employers and of the public authorities.
>
> 2. The Member shall accept general responsibility for the proper administration of the institutions and services concerned in the application of the Convention.

26 Such political decisions might be reviewed by the (constitutional) courts of law.

In Article 72 (1) of ILO Convention Number 102, the convention expresses its vision on the democratic legitimacy of the social security administration:

- Either there is direct political responsibility of the social security administration to the legislature;
- Or there is representation of the socially insured persons in the management of the social security institution;
- Or the socially insured people are associated with the management of the social security institution in a consultative capacity.

Article 72 (2) adds that the state remains finally responsible for the proper administration of social security anyhow. In other words, whatever the form of administration, the political decision-makers remain in charge.

Let us take a closer look at how some countries have organised the internal democracy of social security. We shall do so on the basis of the comparative tables of the Mutual Information System on Social Protection (MISSOC).[27]

In some countries, social insurance institutions are administered jointly by the representatives of the employers' organisations and the trade unions; that is, for instance the case in countries such as Belgium, Luxembourg and France; in some countries such as Greece or Spain (for the supervising councils), a tripartite structure was preferred, including representatives of the state administration. In Slovenia the Pension and Invalidity Insurance Institute is governed by representatives appointed by the trade unions, the employers' association, the pensioners and the government; the board of the Health Insurance Institute consists of elected representatives of the insured persons and the employers. The Employment Service is also self-governed by representatives of employers' organisations, trade unions, employees of the Employment Service and the government.[28] Whether bi- or tripartite representation in one- or two-tier self-governing bodies, the decisive question might be which groups can form a majority and actually make decisions.[29]

Exceptionally social security elections were or are organised to designate the representatives of the socially insured in the major social insurance institutions. This is, e.g., still the case in Germany; in France, social security elections were abolished. Let us shed some more light on both countries' experience.

27 See www.missoc.org/missoc-database/organisation. Twenty five years ago we already examined in a comparative way the special relationship between health care and democratic participation in Danny Pieters, Paul Schoukens: *Democratic participation and health care.* Maklu, Antwerpen, Apeldoorn 1993.

28 See www.missoc.org/missoc-database/organisation/slovenia.

29 Grega Strban, Luka Mišič: Social Partners in Social Security: Two Common Forms of Recognition and Selected Issues, in: Jan Pichrt, Kristina Koldinská (eds.): Labour Law and Social Protection in a Globalized World, Changing Realities in Selected Areas of Law and Policy, in: *Bulletin of Comparative Labour Relations* – 103, Kluwer Law International, 2018, p. 43.

In Germany, *Selbstverwaltung*, the self-administration of (self-governed) social insurance schemes, has existed since the middle of the 19th century and has been one of the main features of the social insurances as created by Bismarck. The social security administrations of pensions, sickness, accident and care insurances are governed by elected "social parliaments" and boards.[30] These "social security elections" take place every six years.[31] The socially insured and pensioners as well as (on separate lists) the employers participate in these elections. One votes on lists, not on persons; lists are presented by the trade unions and other associations of socially insured persons and/or pensioners. Real election campaigns do not take place, and the public debate and media attention are rather modest. The participation rate in the 2005, 2011 and 2017 elections was about 30% of the socially insured persons having the right to vote. Moreover, in some smaller social security institutions, no election takes place as the number of candidates presented does not exceed the number of mandates to be elected; also the employer's representatives are appointed in this way, called "peace elections" (*Friedenswahl*).

The basic idea in this system of co-determination (*Mitbestimmung*) is that those who pay or have paid for the social insurance should also make the decisions. As in Germany, employee and employer's contributions are in principle equal, because both have an equal representation in the "social parliaments". The "social parliaments" elect their boards and the managers of the institution, decide the budget of the institution, make the fundamental decisions concerning the internal organisation, nominate the members of the complaint board and will be consulted by the government in an early stage of any social security reform. They will decide upon rehabilitation measures offered and may determine partially the level of the contributions in the sickness insurance. In doing so, they guarantee the independence of their social security institution from state and government. Yet it has to be added that these institutions and their "social parliaments" function within a legal framework, established by the lawmakers and government, i.e., by the political level. Questions relating to the conditions and level of most benefits, most contributions, etc. remain in the domain of political decision-making.

France[32] introduced social security elections after World War II: the leadership of the social security institutions was elected by the wage earners, with three-quarters of the seats in their boards. This system was abolished in 1967 when paritarian administration was introduced, with employers' organisations and trade unions appointing half of the members of the boards; at the same

30 Paragraphs 29 and following of the *Sozialgesetzbuch*, Part IV (SGB IV); see also www.sozialwahl.de.

31 Last one was in 2023; in their actual form the "social elections" exist since 1953.

32 Robi Morder: Les élections à la sécurité sociale: une histoire ancienne, https://autogestion.asso.fr/les-elections-a-la-securite-sociale-une histoire-ancienne; see also: Comment le mode de gouvernement de la Sécurité sociale a-t-il évolué ? www.vie-publique.fr/decouverte-institutions/protetction-sociale/gouvernement-securite-sociale.

time, the professional management of the institutions became more powerful. Following an electoral promise of the left-wing government, social security elections were re-introduced in 1983. The mandate of the representatives of the socially insured in the social security institutions was to last six years, but was prolonged until the abolition again of elected representation in 1996; since then the representatives of the employers and the wage earners are nominated in equal numbers by their organisations, and they have been joined in the boards by a number of other independent members.

In a modern society, it is apparently difficult to separate the general policy from social policy. Even in a country like Germany with its "social parliaments", the main decisions in social security are taken by the politically responsible persons. Perhaps the "social parliaments" do have an impact on the political decision-making, but it remains to be examined whether this impact of the socially insured is bigger than in countries where the trade unions appoint representatives or even in countries where no formal co-decision has been established.

Individual Rights Against Democratic Social Policy Decisions?

As we mentioned already earlier, although democracy may be defined as the government of, by and for the people, a government is only genuinely democratic if it respects the fundamental rights of persons and minorities and the rule of law. Democracy is not the dictatorship of the majority!

This is not without consequences for the relationship between democracy and social security. Social security decisions taken by a duly elected majority may therefore be overturned also from a democratic perspective if they would violate the fundamental rights or the rule of law. Of course, we may expect that democratically elected parliaments and responsible governments will not act contrary to the fundamental rights, but this cannot be excluded; hence, the importance of the judiciary enforcement of the fundamental rights, also in social security matters. In the past decades, both national constitutional courts[33] and the European constitutional courts (Court of Justice of the EU and European Court of Human Rights)[34] have examined social security legislation and decisions in light of the fundamental rights their respective constitutional instruments protect. These decisions could be related to the protection of classical freedom rights, such as the freedom of religion[35]; more often though, they applied the equality and non-discrimination clauses of the constitutional instruments upon social security. In some cases, the

33 See our somewhat outdated: Danny Pieters, Bernhard Zaglmayer: *Social Security Cases in Europe: National Courts*. Intersentia, Antwerpen, Oxford 2006.

34 See Klaus Kapuy, Danny Pieters, Bernhard Zaglmayer: *Social Security Cases in Europe: The European Court of Human Rights*. Intersentia, Antwerpen, Oxford 2007.

35 See, e.g., Danny Pieters: Accommodating Social Security and Freedom of Religion, in: *European Journal of Social Security* 17 (2015) 3, pp. 316–337.

constitutional protection of property was even extended to social security entitlements or even expectations. The fundamental right to social security was sometimes opposed to the actual social security legislation. The question arises if the judiciary in challenging statutes does not take over part of the social policy responsibilities of parliament and government, which from a democratic perspective may be questionable. In so far as the conflicts are based on rather concrete fundamental freedoms (e.g., the religious freedom), the danger of a judiciary invasion of the legislative power is very limited. However, when on the basis of very broad and open fundamental rights, such as the right to social security, concrete statutory social security policy decisions are overturned, the problem is more apparent. Here the recent PhD thesis of Eleni De Becker concerning the right to social security in the European Union[36] may provide us with some interesting information as to how the national and European constitutional courts have in fact operated until now. In her rich doctoral thesis, she discerns three major trends:

- The right to social security is used by the courts in order to protect against change.
- A minimal protection, even a subjective right to social assistance may be derived from the right to social security.
- Courts often use the right to social security in combination with the prohibition of discrimination.

In a way, the second and third trend De Becker identifies are in line with what we could conclude 33 years earlier with relation to the fundamental social rights to benefits.[37] In my PhD thesis, I found that the social fundamental rights to benefits only got their real relevance for people who socially, economically or culturally are marginalised or in case of important societal changes jeopardising the very essence of these rights. Social fundamental rights to benefits only protect the essence of the benefits they guarantee, not the way they are being implemented: that is the task of the lawmakers. In cases where persons or groups are being marginalised, they may have been forgotten or excluded when implementing the social fundamental rights; in such cases, the social fundamental right may, sometimes in connection with the equality principle, make that the "gap" is closed in favour of the marginalised person. In my conclusions I considered it less a task of the social fundamental rights to protect against change, as I considered the preservation of the social nature of

36 Eleni de Becker: Het recht op sociale zekerheid in de Europese Unie. Een rechtsvergelijkende analyse op basis van het Europees Sociaal Handvest, het Europees Verdrag voor de Rechten van de Mens en de constitutionele tradities gemeen aan de EU-lidstaten. Doctoral dissertation at KU Leuven, defended on 7 September 2018, Die Keure, Brugge, 2019.

37 Danny Pieters: *Sociale grondrechten op prestaties in de grondwetten van de landen van de Europese Gemeenschap*. Kluwer Rechtswetenschappen, Antwerpen 1985.

the state, and thus of a good social security, primordially the task of the whole people and their representatives. The first trend De Becker identifies does not fundamentally contradict this, but points at a number of good practices political decision-makers should take into consideration.

What to think from a democratic perspective of the way constitutional courts examine social security legislations and governmental policy decisions in the light of the right to social security? It is important to first and foremost recognise the self-restraint of the courts: they are always stressing that in the first place, legislation and policy-making is the province of parliament and government, not of the courts. When they do intervene to guarantee a right to a minimal (social assistance) benefit in order to be able to live a decent human life or when they combine the non-discrimination clause with the right to social security, they are completely in line with what can be expected from courts invigilating fundamental rights in a democratic society.

The first tendency established by De Becker, i.e., the use by the courts of the fundamental right to social security to monitor legislative or executive changes and more specifically cuts in social security, calls for more attention from a democratic perspective. Certainly, also here courts will often stress the broad competence of parliament and politically responsible persons to make policy choices; courts claim merely the competence to marginally check the way these choices are being made. We can ask ourselves whether this is still in line with the separation of powers many constitutions proclaim. Of course, any policy decisions, and thus cuts in social security, need to be well motivated, but should the lack of motivation be sanctioned by a judge or by the electorate? Sometimes the courts also seem to defend somewhat older concepts of contributory social insurance: is this the task of the courts? Of course, one could argue that if social security is to provide security, the legislator of the day may not break commitments of its predecessors, but what if these commitments were unreasonable or turn out not to be tenable under present conditions? We are aware that the mainstream literature welcomes the proactive approach of courts to protect against social security regression, but we would like to call for more caution here. Most constitutional courts already stress the self-restraint they observe in this respect, and that is good. Let them continue to show this self-restraint, also in the name of a dynamic democracy. Let them stay away from judging the options taken by government or parliament, but let them merely remediate when hypotheses have not been considered by the politically responsible persons, when legislative gaps remained, etc. If the courts go further and become too much of an active player in the political debates concerning social security reforms, we believe they lack the democratic legitimation to do so and transgress the principle of separation of powers.

Allow me to highlight one more specific aspect of the democratic legitimation of judiciary intervention. When courts are called upon to test social security legislation, this is most often the result of a concrete complaint of one person or group of persons, i.e., on the basis of an individual complaint. The courts will then most often be bound to the issues raised in that case. If, e.g.,

the complaining persons or group consider the cuts too harsh upon them in comparison with other persons or groups, the court will indeed check whether the fundamental rights of that specific person or group were violated and provide redress to that person or group. It is, however, questionable whether social security (policy) decisions can be taken from such an individual perspective; social security decisions and policy require a collective vision, imply to take a much broader perspective. Democratic decision-making will indeed respect the fundamental rights of any person or group, but at the same time will need to consider the public interest, the general welfare, not only of the present generation, but also of those to come. A decision in an individual case may be *in se* justified from an individual fundamental right perspective, but what if it jeopardises the logics or structure of much broader arrangements, and hence, also fundamental rights of others? Let us also not forget that individual complaints will always be directed to pay less and/or to get more, never to obtain the opposite; the decision of a judge in the concrete case can as a consequence only result in a status quo or in more rights and less duties for the complaining parties. The fundamental right should of course not be set aside in such cases, but the judiciary should avoid undermining the broader democratically decided solutions. Courts cannot in social security issues merely look at the case before them, without considering the broader fallout of what they will be deciding. Moreover, when considering this broader perspective, they should not put themselves in the place of the political decision-makers, but rather align themselves on the vision of these political responsible persons in order to find an acceptable solution to the case.

Of course, the situation gets complicated when the democratic decision-making process is not functioning properly. When the political decision-makers fail to determine their position, and thus fail to make adequate legislation, the courts will have to step in more often . . . and this without proper guidance by the political level. This seems unfortunately to be more often the case for social security in a European Union context. The European Council, Commission and Parliament often seemed unable to develop adequate, innovative solutions in the area of social security, partly due to the heavy decision procedures and competence restrictions in the EU treaties, partly due to a lack of coherence and solidarity between the member states, partly due to a lack of ambition in the social (security) area. Whatever the reason may be, we could already establish in 2006[38] that far too often the Court of Justice of the EU is forced to take decisions in concrete cases, which have an important policy impact. It is, for instance, most striking that the European lawmakers are unable to change current coordination of social security regulations, except when it is to incorporate decisions of the Court of Justice. The result is a very complex, sometimes completely illogical regulation. Policy decisions are not made, at

38 See already Danny Pieters: Wie maakt het Europese socialezekerheidsrecht, het hof?, in: *Sociaal Maandblad Arbeid*, 2006, pp. 415–431.

least not by the political decision-makers; if policy decisions are made, it most often is by the Court of Justice of the EU, which in fact is not equipped to do so and is bound to a partial, case-bound vision on social security issues. It would obviously be wrong to blame the Court for this situation, but we cannot but find that at the European level there is a democratic problem with the European intervention in social security coordination matters. Unfortunately, the democratic problem with social security in the European Union is even more fundamental! If we leave the rather technical matter of European social security coordination law, we find that according to the EU treaties, the final competence in social security matters remains with the member states. However, in the context of the European Union, European law has precedence over national law. Consequently, in case national social security norms conflict with EU economic principles, such as free movement of goods or services, the EU principles prevail,[39] as was amongst other things shown in relation with the possibility to purchase health care services and goods abroad.[40] This democratically not justified precedence of the economic over the social concerns has become even more apparent since the EU developed recommendations for the member states' social security in the framework of the EU socio-economic monitoring process. In a brilliant analysis colleague Paul Schoukens demonstrated that the "European social model" that was "hidden" in these recommendations was predominantly of an economic-fiscal nature.[41] He concluded:

> The hidden model is of a socio-economic kind in the sense that national social security systems are primordially monitored on their economic and financial soundness. The social objectives and social security parameters are simply not concrete enough to speak of a true social model, leave aside the legal tools to make the social model sufficiently effective.[42]

That this is problematic also from a more comprehensive, democratic point of view is illustrated by Schoukens by the example of the EU approach to decentralisation and social security:

> The fact that, for example, the decentralised organisation of social security is only acceptable when it is organised in an economically efficient and/or effective manner is seriously limiting the justification scope that can serve as a basis for national or local devolution policies. What if decentralisation is leading to a qualitative better service provision? Or

39 See already Danny Pieters, Jason Nickless: *Pathways for social protection in Europe*. Ministry of Social Affairs and Health, Helsinki 1998.

40 Grega Strban: Patient mobility in the European Union: between social security coordination and free movement of services, in: *ERA Forum* 14 (2013) 3, p. 391.

41 Paul Schoukens: EU social security law: the hidden 'social' model. Inaugural address, Tilburg University, 2016.

42 Ibid., p. 44.

> what if it calms down the existing (political, cultural, etc.) tensions that may exist between the constituent groups in society? Should we limit the decentralisation options to the ones which hinder the economic objectives of efficiency, efficacy, sustainability the least?[43]

There is more to social security policy than only economic efficiency, efficacy or even sustainability; to deny so, drives us away from democracy into subjection to economics. To accept an EU involvement with social security only guided by economic-fiscal criteria is not only a negation of the member states' competence in social security and thus a negation of the democratic responsibility of these member states, but is also contrary to the need in a democracy to take into consideration all relevant elements and to develop a policy for the general well-being, not only (be it also) for the economic-fiscal stability.

A Commitment for Social Security and Democracy

We started our chapter by recalling the fundamental commitment both of the European Union and its member states to both democracy and social security. We share this commitment but got aware that promoting both may not always be easy and go hand in hand.

We have seen that a good social security may be very important, if not essential, to realise a truly democratic society for all; but at the same time, we found that you can have a good social security without having a democratic government.

We also learned that direct democracy tends to have a conservative impact upon the development of social security and that it is important to have well-institutionalised political parties to mediate the preferences of the population. Social security and democratic decision-making may concern other groups of the population and often have a fundamentally different time perspective.

Democracy is concretised in social security administrations of Bismarckian social security systems through the appointment by the trade unions and employers' organisations of representatives in their boards and exceptionally through the organisation of social security elections. At the end of the day, in all countries the political level is responsible for the decisions concerning social security. It is not established whether having representation of the social partners, social security elections or none of these has any influence upon the quality of the social security, nor even whether it has any impact upon the actual real democratic participation in the main social security decisions. It also appears difficult to separate decision-making concerning social security policy from that in other policy areas.

Finally, we examined the way the implementation by the courts of fundamental rights, especially of the right to social security, could lead to correcting policy decisions taken by parliament and government. From a democratic perspective, there is no problem with the courts filling out legislative gaps or

43 Ibid., p. 43.

providing redress for forgotten groups, but courts should refrain from becoming an active player in policy debates, including those related to cuts in social security. At the same time, it should be stressed that a lack of policy-making by the political authorities will sometimes compel the courts to take up a role which is fundamentally not theirs, as shows us the EU example.

Both a good social security and a well-functioning democracy are important to all of us. We should commit ourselves to both, and academics have a special responsibility in this respect. We should, however, not consider this to be a challenge to be taken up by each in our national corner. Through European collaboration, we can build a democratic Europe with good social security systems and at the same time strengthen both our democracies and social security systems at the national level.

17 Surrogate Mother, Co-mother, Biological or Genetic Mother, Legal or Social Mother

Which of These Is Real?

Dieter Henrich

The University of Ljubljana and its Faculty of Law are celebrating their 100th anniversary. At the conference the Faculty of Law held on that occasion, the lecture given by the Faculty's first dean, Leonid Pitamic, on 15 April 1920, on the subject of law and revolution, was recalled to memory. This concerns the development of law, which can occasionally take on revolutionary characteristics. In fact, laws guarantee legal certainty. Legal certainty and revolution are at odds. People tend to hold onto the tried and true, while revolution means an overthrow of the existing order. However, in an ever-changing world, it may occasionally be necessary to do away with decrepit structures in a single fell-swoop liberating act. This requires an instance whose greater authority can force a reluctant legislator to act. Pitamic bestows such authority on a constitutional court. Indeed, in Germany, the Federal Constitutional Court, which can declare applicable law to be unconstitutional, shows just how correct this claim was. Its interpretation of the constitution has on many occasions led to the overthrow of an established order. To cite just one example: according to the Basic Law, marriage and the family are subject to the special protection of the state order (Article 6(1) of the Basic Law (*Grundgesetz*)). In 1949, "marriage" was naturally considered to mean marriage between a man and a woman. The Federal Constitutional Court adhered to this understanding for a long time. From this, it has been inferred that apart from marriage, no other connection with conjugal or marriage-like effects would be possible. It was many years later that the Federal Constitutional Court decided, on the basis of a change in consideration that it had determined, that it would not violate the constitution if the legislator essentially equated same-sex partnerships with marriage. It thereby opened the way for the legislator to introduce marriage for all. It was indeed a revolutionary decision. In fact, much has also changed since the so-called revolutionary "change in values" of 1963–1975.

Family law, of all areas of civil law, has seen the most changes worldwide. Book IV of the German Civil Code (BGB), i.e., Family Law, originally consisted of 625 sections. Of these, only 79 remain in force unchanged. The new Slovenian Family Code is also unlikely to bear any semblance to the Austrian

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General Civil Law (ABGB) that was still in force in Slovenia in 1919. The family is no longer a natural community based on marriage – as it is still known in, for example, the Italian constitution (Article 29 (1), constitution). Families also exist without marriage. Marriage itself is no longer generally perceived as a union between man and woman. In addition to marriage, alternative types of lifestyle have emerged. The woman who gave birth to a child is no longer naturally perceived as being the child's mother alone.

A hundred years ago, there was only one answer to the question of which woman is the mother of a child in the Austrian General Civil Law (ABGB) or in the German Civil Code (BGB). It seemed self-evident to the legislator that a statutory definition was superfluous. Who else should be the mother of a child but the woman who gave birth to that child? *Mater semper certa est* can already be read in the Digests.[1] At that time, only the determination of a child born in wedlock or born out of wedlock was relevant for the legislator. It was only when advances in reproductive medicine made extracorporeal fertilisation possible, and with it the possibility of implanting a fertilised egg or an embryo begotten in this way into the uterus of another woman, that a competition could arise between two women over the motherhood of the born child. Who should be the mother of the child: the woman who carried it to full term and gave birth to it, or the woman from whom the egg came, i.e., the genetic mother? In the majority of countries, including Germany and Slovenia, the legislator opted for the former: the mother of the child is the woman who gave birth to it. Since the entry into force of the German law of 1997 on the reform of the law of parent and child, this has been stipulated in Sec. 1591 of the Civil Code (BGB), as well as in Art. 41 of the Slovenian Infertility Treatment and Procedures of Biomedically Assisted Procreation Act from 2000 (ZZNPOB) and now also in Art. 112 of the new Slovenian Family Law. The reason for this decision was, in addition to the wish to prevent gestational motherhood – a child should only have one mother[2] – the conviction that only the woman giving birth should have a physical and psychosocial relationship with the child during pregnancy and during and immediately after birth.[3] A secondary purpose, however, was to deter intended mothers from using a surrogate mother.[4] This expectation, however, has not been fulfilled. It is true that the transfer of an embryo to a surrogate mother is punishable in Germany and Slovenia

1 Dig. 2, 4, 5 (Paulus).

2 Andreas Spickhoff: Der Streit um die Abstammung – Brennpunkte der Diskussion, in: Andreas Spickhoff, Dieter Schwab, Dieter Henrich, Peter Gottwald: *Streit um die Abstammung – ein europäischer Vergleich. Verlag Ernst und Werner Gieseking*, Bielefeld 2007, pp. 13, 18; Winfried Bausback: Grußwort, in: Anatol Dutta, Dieter Schwab, Dieter Henrich, Peter Gottwald: *Künstliche Fortpflanzung und europäisches Familienrecht*. Verlag Ernst und Werner Gieseking, Bielefeld 2015, pp. 7, 9.

3 Michael Greßmann: *Neues Kindschaftsrecht*. Verlag Ernst und Werner Gieseking, Bielefeld 1998, p. 29.

4 Cf. BT-Drucks. 13/4899, p. 82: "also serves to prevent surrogate motherhood".

(item 7 of the Section 1 (1) of the Embryo Protection Act; Articles 43, 44 of the Infertility Treatment and Procedures of Biomedically Assisted Procreation Act (ZZNPOB)). However, intended parents are not prevented from seeking the fulfilment of their desire to have children abroad. This not only applies to heterosexual couples, but also to same-sex couples.[5] The problems begin when they demand the recognition of their parenthood acquired abroad via a child born by a surrogate mother in Germany, possibly even beforehand if the German diplomatic mission refuses to issue a child passport for the child because in the case of a married surrogate mother, her husband is presumed to be the father and the child, therefore, does not have a German parent.[6]

Herein lies the dispute. Some claim that the prohibition of surrogacy is part of public policy and thus opposes the recognition of parenthood acquired abroad. Others argue that the children's well-being outweighs the deterrent effect of prohibiting surrogacy. In detail, there are abundant cases of doubt and thus legal uncertainty. The call for the legislator is becoming more and more urgent.[7] However, the legislator – at least the German one – refrains from it. There is a draft law on the reform of *parentage*, but that draft law avoids mentioning surrogate mothers. Therefore, the sole motherhood of the woman who gave birth to the child should be retained. At the moment, the courts still have the final say in resolving disputes. Indeed, in a purely domestic case, they must adhere to the applicable law. However, surrogate mothers give birth to the child abroad. In a case with international jurisdiction, German law does not necessarily apply. The conflict-of-law rules regulate which law is applicable. In Germany, the parentage of a child is based on the law of the country in which the child has habitual residence (Article 19 (1) of the Introductory Law of the Civil Code (EGBGB)). For example, if the child is born in Ukraine, according to Ukrainian law, the mother of the child is not the surrogate mother, but the intended mother. We would have to acknowledge this if the child were also habitually resident in Ukraine. It would then only need to be checked whether the application of Ukrainian law is not contrary to the German public policy. As a rule, however, the child will not have habitual residence in its country of birth,[8] but will be immediately brought to the homeland by the intended parents, i.e., Germany in our case, and therefore

5 Cf. Federal Court of Justice (BGH), 10 December 2014, in: FamRZ 2015, p. 240.

6 Berlin Administrative Court, 5 September 2012, in: IPRax 2014, p. 80; Claudia Mayer: Sachwidrige Differenzierungen in internationalen Leihmutterschaftsfällen, in: *IPRax* 2014, p. 57; cf. also the case of which I reported, wherein the intended father had to wait two years in India until, after a long struggle, he was allowed to return to Germany with twins born of a surrogate mother: Dieter Henrich: Leihmütter-Kinder, in: *Zbornik v čast Karla Zupančiča*. Pravna fakulteta Univerze v Ljubljani, Ljubljana 2014, pp. 59, 62.

7 At its meeting in 2016, the German Juristentag admonished the legislator to regulate surrogacy.

8 For habitual residence of the child cf. Federal Court of Justice (BGH), 20 March 2019, in: *FamRZ* 2019, p. 892.

German law would apply, according to which the child's mother would be the surrogate mother. However, because according to Ukrainian law, it is not the surrogate mother who is regarded as the mother of the child, but the intended mother, the child would not have a mother in either Germany or Ukraine, which is an unacceptable situation. Currently, only one solution is available: the intended mother can adopt the child. The fact that the child was born with the help of surrogacy, which is forbidden in Germany, does not stand in the way of adoption according to prevailing opinion.[9] I assume that the possibility of adopting the child exists in Slovenia as well.

A special rule applies in Germany if a court abroad has adjudged the child as child of the intended mother, as is often the case in the United States. Here, we no longer raise the question of the applicable law, but only whether the foreign court decision has to be recognised. The German courts recognise the foreign decision: recognition, they say, is not contrary to German public policy. Here, the focus is not directed towards remedying the national public policy (conflict of laws), but towards the more liberal international public policy. The aim of recognition is to maintain consistency in international decisions. The refusal of recognition must therefore be limited to exceptional cases.[10] The fact that a foreign decision in the case of surrogacy assigns the parenting status to the intended parents does not in any case result in a violation of German public policy if one parent is genetically related to the child. A distinction is therefore made whether the recognition of parenthood abroad has been adjudged by a court or whether it results solely from the entry in a birth register. In the first case, we recognise the foreign court's decision in case of doubt. In the second case, the applicable law must be determined. The mere entry of the intended parents in the (e.g.) Ukrainian birth register is not a recognisable decision.[11] Here, the determination of the mother is a question of the applicable law. If the child has his or her habitual residence in Germany (because brought to Germany soon after birth), the German law applies: the mother is the woman who gave birth to the child, i.e., the surrogate mother. The only option left for the intended mother is adoption. That is currently the prevailing opinion in Germany.

In France, resistance to surrogacy was stronger than in Germany from the start. American birth certificates were not allowed to be entered into the French civil registry if they identified children born to a surrogate mother as children of the intended parents. Here, however, the European Court of Human Rights (ECtHR), called upon by the intended parents, ruled in two landmark decisions in 2014 that the refusal to register the intended father, who was also the biological father, is an infringement of Article 8 of the European Convention

9 Higher Regional Court (OLG) Frankfurt/M., 28 February 2019, in: *FamRZ* 2019, p. 899.
10 Federal Court of Justice (BGH), 10 December 2014, in: *FamRZ* 2015, p. 240, with registr. Helms; Federal Court of Justice (BGH), 5 September 2018, in: *FamRZ* 2018, p. 1846.
11 Federal Court of Justice (BGH), 20 March 2019, in: *FamRZ* 2019, p. 890.

on Human Rights (ECHR), although not against the right of the intended parents to respect for their private and family life, but against the child's right to identity.[12] Those were the decisions of Mennesson and Labassée versus France. With these decisions, nothing was said about motherhood. A few years later, the French Court of Cassation asked the ECtHR for an opinion. The answer provided by the Strasbourg Court on 10 April 2019 reads:[13]

> the right to private life of a child born to a surrogate mother who is only biologically related to the intended father but not to the intended mother, resulting from Article 8 of the ECHR, requires that national law also enables the establishment of a parent-child relationship between the child and the intended mother, who is legally specified as the "legal mother" in the foreign birth certificate. This does not have to be performed by transferring the foreign birth certificate to the national civil status certificate, it can be done in other ways, e.g., through the adoption of the child by the intended mother. The choice of the means to achieve the set goal falls within the margin of judgement of individual states. If the way of adoption is chosen, the state must ensure that this is carried out quickly.

For German intended parents, this means that in the case of a child born abroad to a surrogate mother, the parentage of the child must first be determined by the intended father. This can be done so that the child is recognised by the intended father. The intended mother can adopt the child if the parentage of the child is established by the intended father.

The path indicated by both the Federal Court of Justice (BGH) and the ECtHR is as follows: adoption of the child by the intended mother if the parentage of the intended father is determined usually leads to the result desired by everyone involved. Nevertheless, the result is peculiar. The parentage of the intended father is determined by his acknowledgement of his paternity. Recognition is effective, even if it is untrue, as long as it is not challenged. If, on the other hand, the intended mother is also the genetic mother (because she provided her egg), she cannot – at least under German law – recognise the child. The only option left is adoption. If she has separated from her partner before or after the birth of the child, it is conceivable that the intended father (as the legal father of the child) could refuse to consent to the adoption. Therefore, the genetic mother is in a worse position than the man who recognised the child without actually being related to the child. It is doubtful

12 ECtHR, 26 June 2014, *Mennesson v. France* and *Labassée v. France*, Dalloz 2014, p. 1797 = FamRZ 2014, p. 1525, with registr. Frank.

13 ECtHR, Grand Chamber, Expert Opinion, 10 April 2019, in: *FamRZ* 2019, p. 887, with registr. Ferrand.

whether this disadvantage of the genetic mother compared to the ostensible father is compatible with the constitutional principle of equality.[14]

The ECtHR and the German Federal Court of Justice agree on one essential statement: a child born to a surrogate mother should be assigned to the intended mother. This assignment alone corresponds to the children's well-being. However, both courts have one limitation: This rule should apply if at least one intended parent is related to the child, e.g., if it was conceived from the sperm of the intended father. It is open and controversial whether the intended parents can also become the parents of the child if no parent is related to the child, i.e., the egg of an egg donor has been fertilised *in vitro* with third-party sperm. In this case too, the children's well-being indeed speaks in favour of awarding the child to the intended parents, who wanted the child and who are willing to look after the child, to give the child good chances in life.[15] At the same time, there are weighty dissenting voices. A couple who were unable to have children of their own were previously (and still are) referred to the option of adoption. In the case of international adoption, the suitability of those willing to adopt must be checked and their living conditions and social environment must be determined. In this, their age can also play a role.[16] This is done in the best interests of the child. This check is not carried out when taking over a child born to a surrogate mother. There is also no probationary period as is provided for in the event of adoption. An adoption carried out abroad solely by agreement, without the involvement of a court, is not recognised in Germany as contrary to public policy.[17] Could it be otherwise if the intended parents "order" a child from a surrogate mother? In fact, internationally, surrogacy has increasingly replaced adoption. This is also connected with the fact that adoption by foreigners has become more difficult in many countries. One speaks of reproductive tourism. In order to prevent the circumvention of the legal requirements for adoption in such cases, the First Commission of the German Council for International Private Law recommended that the conflict of laws on parentage be supplemented with the sentence:[18] "A person's legal parentage coming from several people, none of whom is a biological parent, is subject to the regulations applicable to adoption." However, the German

14 Tobias Helms: *Rechtliche, biologische und soziale Elternschaft – Herausforderungen durch neue Familienformen. Expert opinion F for the 71st German Juristentag* (2016), F 53: "Conflict of values that is difficult to understand".

15 Claudia Mayer: Verfahrensrechtliche Anerkennung einer ausländischen Abstammungsentscheidung zugunsten eingetragener Lebenspartner im Falle der Leihmutterschaft, *StAZ* 2015, pp. 33, 40.

16 According to Greek law, the intended mother must not be older than 50 years, cf. Eleni Zervogianni: Künstliche Fortpflanzung im griechischen Recht, in: Dutta, Schwab, Henrich, Gottwald, 2015, pp. 205, 217.

17 Higher Regional Court (OLG) Frankfurt, 11 October 2018, in: *FamRZ* 2019, p. 1073; Staudinger, Henrich (2019): Art. 22 Introductory Law of the Civil Code (EGBGB), recital 98.

18 *IPRax* 2015, p. 185.

legislator has not yet reacted to this recommendation. In Italy, authorities took away a child born to a Russian surrogate mother and transferred it to foster parents after it was discovered that, contrary to what they claimed, none of the spouses were physically related to the child. The Italian courts upheld this measure. The ECtHR, invoked by the intended parents, initially saw (in a small set-up) the seizing as an infringement of Article 8 of the European Convention on Human Rights.[19] The Grand Chamber of the ECtHR, on the other hand, considered the seizing to be justified.[20] In its reasoning, the Grand Chamber relied in particular on the child's lack of genetic parentage from the intended parents, only an eight-month period of cohabitation and the uncertainty of the legal relationship between the child and the intended parents due to the infringements of Italian law. That is the famous (and also controversial) Paradiso and Campanelli decision vs. Italy.[21] What is essential in this decision is the statement that the recognition-friendly jurisdiction of the ECtHR (as well as the German Federal Court of Justice) should not apply if no intended parent is genetically related to the child. According to the ECtHR, an exception could at best apply if the child lives with the intended parents for a longer period (i.e., more than just eight months), which means that the intended parents have become the child's social parents.

An initial interim balance can be drawn from what has been said so far. The surrogate mother cases are a typical example of how fundamental and human rights increasingly influence the development of the law and also gain the upper hand over conventional international private law if the legislator does not react or does not react appropriately to a new situation. New questions arise with a change in social conditions, as well as with advances in medicine – as with our topic. The reformers – at least in Germany – have almost always invoked in their claims the basic rights, the Basic Law, the European Convention on Human Rights and, in the case of the law of parent and child, the UN Convention on the Rights of the Child. Occasionally, basic rights have also been used against one another. The discussion about the children of surrogate mothers is a case in point.

First of all, there were ethical concerns[22]: the instrumentalisation of the surrogate mother infringes human dignity (Article 1 of the Basic Law). The rule of surrogacy, namely taking over against remuneration, often leads to the exploitation of women, particularly in developing countries. The surrogate mother, as it were, rents out her uterus and is, therefore, strictly speaking, not a "surrogate

19 ECtHR, 27 January 2015, in: *FamRZ* 2015, p. 561, with registr. Henrich.

20 ECtHR (Grand Chamber) – Decision 24 January 2017 – *Paradiso and Campanelli v. Italy*, in: FamRZ 2017, p. 444.

21 For the status of the dispute, cf. the case note from Duden, in: *FamRZ* 2017, p. 445, as well as Stefanie Hösel: Verstärkte Rechtsunsicherheit bei grenzüberschreitenden Leihmutterschaften, in: *StAZ* 2017, p. 162; and Chris Chris Thomale: Das Kindeswohl ex ante – Straßburger zeitgemäße Betrachtungen zur Leihmutterschaft, in: *IPRax* 2017, p. 583.

22 Cf. Chris Thomale: Mietmutterschaft (2015), pp. 6ff.

mother, but a rent mother", i.e., a rented mother.[23] These concerns have resulted in a legal ban on surrogacy in many countries. The German Federal Court of Justice has relativised the allegation of an infringement of human dignity: If it is guaranteed that the agreement and implementation of surrogacy are subject to requirements that ensure the voluntary nature of the decision made by the surrogate mother to carry the child to term and leave it to the intended parents after the birth, the situation is comparable to an adoption. Even in the case of adoption, a mother voluntarily surrenders her child to the adoptive parents.[24] Only if the surrogacy is carried out under circumstances that call into question the voluntary participation of the surrogate mother can an infringement of human dignity be assumed.[25]

If the child has his or her first habitual residence in a country according to whose law the mother of the child is the intended mother, the conflict of law connection leads to the relevance of this law, provided that the application of this law is not contrary to the domestic public policy. The legal norms of another state do not apply if their application would lead to a result that is obviously incompatible with essential principles of one's own law. In our case, the question arises: is it not one of the fundamental principles of our law that the mother of a child is the woman who gave birth to it? In Germany, and not just in Germany, this would appear to be the case. The German legislator has taken an unequivocal stand in this matter. He has done everything possible to prevent the circumvention of the prohibition on surrogacy. According to the Embryo Protection Act, anyone who transfers an embryo to a surrogate mother shall be punished; according to the Adoption Placement Act, surrogate motherhood is prohibited, surrogate mother agreements are illegal and therefore void. The legislator wanted to prevent surrogacies and thus split motherhood. What he could not prevent, of course, were surrogacies that are established abroad. No infringement of public policy can be claimed against them from the outset if there is no domestic relation, especially if no nationals are involved. We are not entitled to judge whether Russian intended parents desire to have children with the help of a surrogate mother. However, this could be otherwise if a German (or Slovenian) couple travels abroad to circumvent the domestic ban. For a long time, referring to public policy, assigning the child to the intended mother was refused. From the outset, however, there was no shortage of critical voices who pointed out the consequences of this rigid stance. If neither the surrogate mother nor the intended mother is the legal mother of the child according to the law of the country of birth, due to the validity of her right of domicile, the child is without a legal mother. Here, the intended parents and their supporters have successfully invoked basic and human rights: according to the German Basic Law, every child has

23 Ibid., p. 8.
24 Federal Court of Justice (BGH), 10 December 2014, in: *FamRZ* 2015, p. 243.
25 Federal Court of Justice (BGH), in: *FamRZ* 2015, p. 244.

the right to enjoy parental care and upbringing (Section 1 of Article 2 in conjunction with the first sentence of the Section 2 of Article 6 of the Basic Law), which includes a guaranteed respect for private life in the Section 1 of Article 8 of the ECHR and the right of the child to be related to his or her parents. And finally, according to the Section 2 of Article 3 of the UN Convention on the Rights of the Child, the best interests of the child must be given priority in all measures affecting the child. These fundamental children's rights outweigh the alleged infringement of the human dignity of a woman who consents to be a surrogate mother.[26]

Now, the current question arising is: should not these fundamental rights of the child also lead to mere entries in a foreign birth register being recognised, so that the intended mother can obtain legal motherhood without adoption, as in the case of a court decision?

In its already mentioned expert opinion of 10 April 2019 at the request of the French Court of Cassation,[27] the Grand Chamber of the ECtHR stated in a comparative law overview that of the 19 signatories of the ECHR that recognise or tolerate surrogate mother agreements, 16 states register foreign birth certificates, and the 21 states where surrogacy is prohibited register at least 7 foreign birth certificates, at least if an intended parent is genetically related to the child. In Austria, the Constitutional Court ruled that in the case of an Ukrainian surrogate mother, surrogacy does not contradict public policy and, because of the priority of the child's best interests (Article 8 of the ECHR), the decision of the Ukrainian civil status authority, according to which children born by the surrogate mother are to be assigned to the genetic parents[28] should be recognised. In Italy, the view is upheld that the genetic mother has a *titolo naturale di maternità*, which becomes relevant when the surrogate mother renounces her priority or the child is "abandoned". In this case, the genetic mother can make use of her *titolo residuale* and recognise the child.[29] In general, foreign birth certificates should be recognised in Italy if the *status filiationis* acquired under the applicable law best corresponds[30] to the best interests of the child and

26 Dieter Henrich: Das Kind mit zwei Müttern (und zwei Vätern) im Internationalen Privatrecht, in: FS Schwab, 2005, pp. 1141, 1151; Nina Dethloff: Leihmütter, Wunscheltern und ihre Kinder, in: *JuristenZeitung* 69 (2014) 19, pp. 922, 927; Claudia Mayer: Ordre public und Anerkennung der rechtlichen Elternschaft in internationalen Leihmutterschaftsfällen, in: *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 78 (2014) 3, pp. 551, 574.

27 ECtHR, in: *FamRZ* 2019, p. 887, with registr. Ferrand.

28 Constitutional Court (VfGH), 11 October 2012, B 99/12, in: *IPRax* 2013, p. 271. See also Brigitta Lurger: Das österreichische IPR bei Leihmutterschaft im Ausland – das Kindeswohl zwischen Anerkennung, europäischen Grundrechten und inländischem Leihmutterschaftsverbot, in: *IPRax* 33 (2013) 3, p. 282.

29 Cesare Massimo Bianca: *Diritto civile*, vol. 2.1, 5th ed. Giuffre 2014, p. 408.

30 Amalia Diurni: Il nuovo paradigma della plurigenitorialità nel diritto interno, europeo e internazionale, in: *Rivista di diritto privato* 23 (2018) 1, pp. 23, 49.

the ascertained parentage is based on a *substrato biologico minimo*.[31] In the Paradiso and Campanelli case (see footnote 20), the Grand Chamber of the ECtHR would presumably not have approved the removal of the child born to a Russian surrogate mother by the Italian authorities if the intended parents had been the genetic parents of the child.

The trend is thus towards the recognition of foreign birth certificates that identify a child born to a surrogate mother as the child of the intended mother. The prevailing opinion in Germany, which only wants to allow such recognition if it has been confirmed by a court,[32] which is justified by the fact that international public policy is more generous than public policy (which is decisive in conflict of laws), is nowadays no longer convincing. If, in the opinion of the Federal Court of Justice, the assignment of the child to the intended mother in the case of a judicial confirmation does not in any case infringe public policy if one parent is genetically related to the child, it is incomprehensible why the recognition of a document through which the child born to the surrogate mother is assigned to the genetic mother is supposed to be incompatible with public policy. The decisive rejection of surrogacy by the legislator, not only in Germany but also in other countries, was based on ethical reasons, according to which renting a mother, i.e., carrying a child against remuneration, infringes human dignity. If these reasons do not prevent the recognition of a court-confirmed referral of the child to the intended mother, they can hardly be asserted against a legal regulation that identifies the genetic mother as the mother of the child.[33] In Ukraine, the Family Code provides that in the event of the transfer of an embryo created by spouses using reproductive technologies to another woman's body, the spouses are deemed to be the parents of the child born by the surrogate mother (Section 2 of Article 123 of the Family Code (FamGB)). In any case, the assignment of the child to the genetic parents in such a case corresponds better to the fundamentally protected interests of the child than assignment to the surrogate mother, who under her law is not (and does not want to be) considered to be the mother of the child. If Ukrainian law is applicable (because the child had their habitual residence in Ukraine), the application of Ukrainian law should therefore not conflict with German public policy.[34]

If German law is applicable (because the child has his or her first habitual residence in Germany), the legal situation is more complex. The regulation in German law that the mother of a child is the woman who gave birth can only be eliminated if the same process as the recognition of a court decision applies

31 Maurizion Di Masi: Maternità surrogata: dal contratto allo "status", in: *Rivista critica del diritto privato* 32 (2014) 4, p. 631.

32 Federal Court of Justice (BGH), 10 December 2014, in: *FamRZ* 2015, p. 243.

33 Mayer, 2014, p. 573; Dieter Henrich: Leihmütterkinder: Wessen Kinder?, in: *IPRax* 2015, p. 229.

34 Dethloff, 2014, pp. 922, 927.

to the recognition of a document. However, the Federal Court of Justice recently expressly rejected such equal treatment.[35] Although this corresponds to the applicable law, it clearly contradicts the fundamentally protected interests of the child. Constitutional concerns also arise from the aforementioned disadvantage of the genetic mother compared to the intended father (not necessarily genetically related to the child).[36] An appeal to the Federal Constitutional Court could therefore definitely promise success. Otherwise, the legislature is called upon to replace the current regulation with a regulation that takes the interests of the child into account, e.g., by allowing the child to be recognised by the intended mother as well as the intended father, following foreign models, if she is the genetic mother of the child and the surrogate mother gave the child to her voluntarily.[37]

Since the "opening of marriage for all", that is, the possibility of marriage for same-sex couples, which has taken place in a number of states for several years, another woman has become a mother in some states, namely the wife of the woman giving birth, i.e., the co-mother. According to the valid German law, the mother of a child is regarded as the woman who gave birth to it and the father of the child is regarded as the man who is married to the mother at the time of birth (sections 1591, 1592 BGB). Similarly, Articles 112 and 113 of Slovenian law provide as follows: mother of the child is the woman who gave birth to it and the father of a child born in wedlock is deemed the husband of the child's mother. There is no doubt that there is some presumption in favour of the assumption that the mother's husband is the father of the child. By definition, such a presumption cannot be considered for a same-sex couple. It is understandable that the mother's "wife" wants to be treated in the same way as a husband. However, this claim cannot be based on an analogy to the position of the husband, but presupposes action on the part of the legislator. The legislator has taken measures too: in England, Belgium and the Netherlands, Norway and Sweden, Spain and Portugal, the mother's wife can become the second parent of the child, i.e., parent mother. Germany intends to follow this example. According to the legal rules that the father of a child is the man who is married to the mother of the child at the time of their birth or who had acknowledged paternity, according to this draft law, a Section 2 is to follow: A co-mother of a child is the woman who is married to the mother of the child at the time of birth or who has acknowledged co-motherhood.

However, all of the above states adhere to the principle that a child can only have two parents. A child who has two mothers can no longer be recognised by its genetic father (the sperm donor). The only thing that remains unclear is the legal situation if the sperm donor, with the consent of the mother, has already recognised the child before it was born. Such prenatal recognition is

35 Federal Court of Justice (BGH), 20 March 2019, in: *FamRZ* 2019, p. 890.
36 Cf. Christiane von Bary, in: *FamRZ* 2019, p. 895.
37 Mayer, 2014, p. 589.

possible, though it is not effective until the child is born. By act of law, co-motherhood should, however, also arise with the birth of the child. It remains to be seen how the courts will decide in such a – certainly rare, but quite conceivable – case.

Incidentally, the principle that a child can only have two parents does not apply worldwide. For example, in British Columbia, it can be contractually agreed between a couple of two women, one of whom wants to give birth to a child, and the sperm donor that all three parties involved should legally become the parents of the child (Sec. 36 Family Law Act 2011). A court in Ontario has also ruled in a similar way.[38] A preliminary stage to triple parenthood could be that the sperm donor is granted the right of contact with the child of two mothers.[39] This could also be in the interests of the child, who would like to know who his or her father is in order to identify their identity. Cases have also become known in which a same-sex male couple maintained contact with the egg donor. New family forms are a challenge to the legislator.

The woman who is the mother of a child under the applicable law is the legal mother. As a rule, the legal mother will also be the biological and genetic mother. She gave birth to the child and from her came the fertilised egg. The intended mother can become the legal mother if the law recognises her as such, e.g., because she has adopted the intended child or her parenting status acquired abroad is recognised in Germany. If a child born abroad by a surrogate mother lives with his or her intended parents, the intended mother is, however, not the legal mother of the child but a social mother, as long as her parenting status is not yet recognised in Germany. This, too, is a legal position that enjoys legal protection similar to the legal position of a stepmother, the wife of the biological father who is not related to the child, or the partner of the biological mother, regardless of whether or not she is recognised as a co-mother by applicable law. She enjoys protection because, from the point of view of a small child in particular, it does not matter whether the woman who cares for the child as a mother is also its biological mother.[40] The German legislator takes this into account by granting a step-parent a limited right of joint custody and a power of co-decision in matters relating to the daily life of the child (Section 1687b BGB). In other countries, a step-parent can even be granted full custody, either through a court decision (e.g., in the Netherlands) or through an agreement between the person with the care and custody of the child and the step-parent (e.g., in England).

38 Court of Appeal, A.A. v. B.B., 2007 ONCA 2.

39 In two decisions, the English High Court promised the – known – sperm donor the prospect of issuing a contact order as an alternative to a failed residence order (i.e., a right to joint custody): Re G; Re Z, EWH13, p. 134; cf. also Natalie Gamble: Lesbian Parents and Sperm Donors, in: *Family Law* 2013, p. 1426.

40 Mayer, 2014, p. 565. See also ECtHR 28 June 2007, *Wagner v. Luxemburg*, in: *FamRZ* 2007, p. 1529.

When it comes to the question of which woman is the real mother of the child, the various interests of those involved must be weighed against each other. On the one hand, it is about the interests of the child – namely, both its interest in establishing its real, that is, its genetic mother, and its interest in growing up undisturbed in their family, even if the parents who take care of it are not its real (biological, genetic) parents. On the other hand, the mother of the child is also interested in her biological or genetic motherhood being recognised or that her social motherhood is not contested.

Years ago, the Federal Constitutional Court in Germany derived that a child has a right to know his or her own parentage from the general personal rights of the Section 1 of Article 1 in conjunction with the Section 1 of Article 2 of the Basic Law (GG).[41] The Federal Court of Justice followed suit in one case, concerning the knowledge of a sperm donor who was actually guaranteed anonymity.[42] The same must also apply if the child requests information about an egg donor (genetic mother) or the surrogate mother (biological mother).[43] Whether such a claim can be enforced is, of course, another question. The egg donor is almost always unknown and in many cases, the surrogate mother is also anonymous. It could be helpful here if the recognition of the surrogacy was made dependent on the submission of the surrogate mother's consent. In the United States, judicial confirmation is nothing more than the approval of the surrogacy agreement entered into by the parties involved. Therefore, the surrogate mother is known in any case.

The child's interest in growing up undisturbed in his or her family protects the mother's social motherhood and urges the legislator and the courts to acknowledge surrogacy.[44]

If the intended mother is also the genetic and social mother of the child, it is an urgent desideratum to allow her to recognise "her" child and thus become the legal mother of the child. Only the right of the surrogate mother to keep "her" child, that is, not to give it over to the intended parents, is more important. However, if she has voluntarily handed the child over to the intended parents, these should in any case become legal parents if one of the intended parents is genetically related to the child. If this is not the case, the intended parents can indeed become social parents, but the risk remains that the child will be taken away from them as long as the parent-child relationship has not been firmly established after a long period of time and is thus protected by Article 8 of the ECHR.

The weakest is the interest of a woman who, because she cannot have a child naturally (or does not want to have a child, which can also be the case),

41 Federal Constitutional Court (BVerfG), 18 January 1988, in: *NJW* 1988, p. 3010.

42 Federal Court of Justice (BGH), 28 January 2015, in: *FamRZ* 2015, p. 642.

43 Dethloff, 2014, p. 928.

44 Konrad Duden: *Leihmutterschaft im Internationalen Privat- und Verfahrensrecht.* Mohr Siebeck (2015), p. 61: The law that leads to legal parenting of the social parents should decide.

wants to fulfil her wish to have children with the help of a surrogate mother, but without somebody as her husband or partner to contribute to the conception of the child. She has no right to parenthood, only the hope that her social parenting of the child that the surrogate mother gave her will at some point be acknowledged.

The question asked at the beginning about the real mother of a child cannot, therefore, be answered unequivocally. As a rule, the mother of the child will still be the woman who gave birth to it. In individual cases, however, the interests of the genetic mother, especially if she is also the social mother of the child, can outweigh the interests of the woman in labour, i.e., the surrogate mother. The decisive factor should be which solution best suits the best interests of the child. In the case of same-sex female couples, co-motherhood is likely to increasingly replace the adoption of the child of the real mother or the help of a surrogate mother, especially since the co-mother can also be the genetic mother of the child through ovum donation.

Part V
Rethinking the Law

18 *De Minimis Non Curat Lex?*
Law and Little Things

William Ian Miller

We are all familiar with the maxim *de minimis non curat lex*. It is not true at all; a good portion of law is concerned with nothing if not little things. Yes, there are often jurisdictional amounts that purport to deny jurisdiction to disputes too trivial for the courts to get moving. But sometimes these amounts are so minimal that it falsifies the maxim, a maxim which is not classical, apparently being a late medieval modification of *de minimis non curat praeter*.[1]

Medieval Icelandic law gradated remedies by the amount in dispute (and jury size too). For instance, one had to take the value of at least six ells of woolen cloth (Ib 162)[2] for a taking to be actionable as a theft and not as a lesser offense, but if the taking is of food, there is no such thing as *de minimis*:[3] it is fully a theft, "no matter how much or little the theft the sanction is full

1 The phrase *de minimis non curat lex* does not appear in any Roman legal text. The earliest use in English texts is from the second half of the 16th century (see https://quod.lib.umich.edu/e/eebo2?ALLSELECTED=1;c=eebo;c=eebo2;didno=A12924.0001.001;g=eebogroup;rgn=full+text;singlegenre=All;size=25;sort=datea;start=1;subview=detail;type=simple;view=reslist;xc=1;q1=de+minimis+non+curat), but by the 18th century *de minimis* standing by itself was already current as a shorthand for what was already an easily identifiable full maxim; see also note 3.

2 The medieval Icelandic laws are known as *Grágás*. They are preserved in two large 13th-century manuscripts but contain laws that had been current as early as the late 10th and early 11th centuries. Citations are to *Grágás: Islændernes lovbog i fristatens tid*. 3 vols. Ed. Vilhjálmur Finsen, (Copenhagen, 1852 Konungsbók (Ia and Ib); 1879 Staðarhólsbók (II), 1883. Rpt. Odense, 1974. Translation: Andrew Dennis, Peter Foote, and Richard Perkins, *Laws of Early Iceland: Grágás. The Codex Regius of Grágás with Material from other Manuscripts*. 2 vols. (Manitoba, 1980, 2000).

3 Notice how proverbs or maxims have nicknames, or short titles; this is a standard linguistic feature of them. Thus, he who hesitates, the early bird, a rolling stone, a bird in the hand. Proverb scholarship notes this; see, e.g., "mention of one crucial recognizable phrase serves to call forth the entire proverb. Let us designate this minimal recognizable unit as the *kernel* of the proverb. . . . Proverbs bear much greater social, philosophical and psychological significance for speakers than do other idiomatic units. . . . Consequently a speaker can call forth a particular proverb for his hearer with a brief allusion to its kernel"; Neal R. Norrick, *How Proverbs Mean: Semantic Studies in English Proverbs. Trends in Linguistics, Studies and Monographs* 27 (Berlin 1985), p. 45.

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outlawry whenever a man steals anything edible or freshly slaughtered" (Ib 165). This should serve as a stunning reminder of the insistent anxiety hanging over premodern societies where people counted calories for much higher stakes than our present obsession with counting them. Perhaps the grandest of social changes in the history of the west is when anxiety about having enough to eat is displaced by anxieties regarding sexual identity and orgasm. Land, whose main value is as the necessary capital of food production, is as obsessively protected in Jewish law where a boundary stone must never be moved more than a finger's breadth. This is meant to indicate there is no such thing as *de minimis* in this terrain, for as Maimonides says "even a finger's breadth of land should be regarded as if it were filled with saffron".[4]

In the Anglo-American common law certain offenses in which the damages are minimal are still heard, but the winner is awarded nominal damages, in America, of six cents, now upped to a dollar in some jurisdictions, for the technical violation of his right, but which caused no measurable harm, at least as the law is inclined to measure harm, in dollars and cents. In England, a farthing or a shilling is the dismissive amount.[5]

In fact, there is not much need for an explicit rule about minimal jurisdictional amounts once the law becomes complex enough to require trained pleaders, or even the giving of a pledge as a condition of proceeding as in the Anglo-Saxon laws. What economists call transaction costs will close off private law for all but people of means or people so irrational that they will spend more to acquire what they stand to gain should they win. The problem all private law faces once we abandon debt slavery, or letting creditors carve their debts out of the body of the debtor as in the Twelve Tables, is that private law runs into the brick wall of the judgment-proof defendant, too poor to pay for the harms he causes (and if too rich, he can buy himself out of the harms he generates at a cost considerably lower than the cost of the harms; think of Trump's frequent recourse to bankruptcy). As an economic and social matter, if not as an adequate historical account, the criminal law is there to provide the poor with access to law as unwilling defendants. Private law is for people who can afford it.

But substantive law is deeply wedded to little things, to things *de minimis*, and not by accident; *lex* is felt and endured less in litigation than in regulations

4 Maimonides, *The Code of Maimonides, bk. 11, The Book of Torts*, trans. and ed. Hyman Klein, (New Haven, 1964), Treatise II 8.1.

5 I would guess that the six cents rather than five or ten in the US is the memory trace of the sixpence English coin from the colonial period. Well-known nominal awards in defamation cases saw Churchill getting a shilling for being called drunk at the White House, Whistler got a farthing in his suit against Ruskin for a bad review of his painting. In such cases the nominal award is meant to indicate not that the plaintiff had no reputation to lose but that his reputation was too good to be touched by the libelous statement. Yet there is something of a "diss" that the nominal award cannot avoid. It is in effect saying that the more "manly" thing to do would have been to ignore the insult, or else send your servant off to cane the insulter.

and petty fines for their violation, in the steps you must take, the calculations you must engage in, to comply or to evade these rules. It is how you *feel* lordship or the state on a daily basis – or so the libertarian right-winger complains in the US, but also so complained many a farmer in saga Iceland or Slovenian villager in the Middle Ages.[6] These regulations, though, generate a moral force field. For we could reasonably assert that they provide a grid in certain domains which help define and sustain some kind of order, keeping a certain kind of peace, even if at times that order is an exploitive one, it is probably more likely to be better than lawless and unregulated disorder.[7]

De minimis non curat lex is of course meant as a labor-saving principle for judges and jurors when the law is acting as an authoritative decision maker between private litigants who can afford to mobilize the law to press private claims. The maxim bears very little weight in the laws that regulate parking violations, fence heights, or crossing a street outside the crosswalk. Not the law prohibiting murder or arson when those very occasional urges arise, but the law that interferes with those desires that occur daily, over such little things as when you must wait until the sign at the crosswalk changes from DON'T WALK to WALK, or the attention you must pay to your speedometer to gauge how much you can exceed the posted speed limit, given the different levels of equity in their enforcement from state to state, even from county to county.[8] Though on the bright side, I do not have to worry one bit in my country that any of my numerous speeding tickets will get in the way of buying an AK-47 available at the local sporting goods shop, which I can walk out with in less than 10 minutes, if the shop is not too busy.

Nothing was felt more as the triumph of intrusive triviality by its victims up until quite recent times than the policing of religious observance or purity rules: the fines for not keeping a fast, for fornication, for violating holiday prohibitions on working, or eating certain foods. A host of hateful people

6 More than a few such regulations are perceived as nothing more than taxes, and thus inviting violation and evasion, with the game of evasion eliciting the nervousness of wondering if this time I am surely to be caught and have to pay the "tax". The author's willingness to pay the relatively modest fines for his speeding tickets was to find itself at last curbed a bit when he found that his annual premiums for his car insurance had been increased five fold, something like twenty times more than the cost of a ticket, and that is payable annually for the rest of his life, for having a "bad" driving record. Thus he found that his nation's speeding laws are mostly enforced not by the state, but by insurance companies.

7 Much of what Maitland deemed the "superiority" that hovered above land titles was exactly these little things, which totaled up were indeed a big thing for they added up to what it meant to be subject to lordship; F. W Maitland, *Domesday Book and Beyond* (Cambridge, 1897), 231–2, 241 passim.

8 In the US certain small towns through which people drive but do not stop are in fact stopped by the sheriff and his patrols and forced to pay a speeding fine, with court costs, that being the town government's chief source of income, and providing the funds to pay the salaries of the judge and the court clerk. No medievalist would be surprised to find that holding a court was a source of income to the lord.

cashed in on enforcing these rules: the informers, the busybodies, the officious types we all know so well.[9] In medieval Iceland there were a large number of regulations and laws that made the plaintiff "anyone who wishes to take up the action" (*sá á sök er vill*), in which as a normal matter no particular person could claim sufficient injury to have an action against the breaker of small rules. A few of these cases make their way into the sagas, where we see them employed to annoy enemies or purposely to provoke enmity: one example will do (*Valla-Ljóts saga* chs. 3–4).

The Archangel Michael

Three brothers wish to partition their inheritance, a farm and its stock. Ljot, the local chieftain, does the dividing to the brothers' satisfaction. This was a mere decade or so after Iceland had officially converted to Christianity. By chance the property division took place on Michaelmas. A certain Halli, intending to contest Ljot's dominance in the district, summons Ljot: "The law prohibits working on Michaelmas even if it doesn't fall on Sunday. I am summoning you for violating the holiday".[10] Answers Ljot: "But the faith is still new". Ljot knows he should set a good example, but claims that his transgression is a mere inadvertence and does not merit a summons. Nonetheless, he agrees to pay an amount he lets Halli set in the interest of peace and "because I do not wish to anger the angel".

Later, another chieftain admonishes Halli for taking money for such a "trivial (literally 'little') case" (*fyrir litla sök*). He warns Halli to expect retaliation, and it would be prudent, he says, for him to move out of the district. Halli

9 See Chaucer's wonderfully drawn pimply faced Summoner who compels people to appear before the Archdeacon's court while taking a cut from the whores who he thus unofficially licenses for a fee, and takes another cut from their customers for keeping the case from coming to the archdeacon; *The Canterbury Tales, General Prologue*, vv. 623ff.

10 The sagas, according to Andreas Heusler, *Das Strafrecht der Isländersagas* (Leipzig, 1911), 102, give us no instances of cases prosecuted by those taking it up pursuant to the general grant to "anyone who wishes to take up the action", but this violation in *Valla-Ljóts saga* is undoubtedly such a case; see *Grágás* Ia 28, II 33, where all Saturday and Sunday work rule violations are to be enforced by "anyone who wishes to". Most assuredly the same work prohibitions would obtain on holy days not falling on Saturday or Sunday, Michaelmas being one of the listed mandatory feast days in the church law (Ia 30–1) requiring a day and night of fast before it. The *Staðarhólsbók* version (*Grágás* II) of the church law assumes that walking boundaries is permitted on holy days, but boundary walking need not take place on the day of the main bargaining and warranting session upon the sale of land and presumably on partition; with *Grágás* II 33, see Ib 89, II 420–21, but then in another section specifically governing partition and evaluation of land such partitions and evaluations are to be valid "*though* [made on] a legal holiday or in Lent" with this proviso "wherever there are no district courts" (II 508). Of course, the laws we have are much later than the events depicted in the saga, but it seems that though such divisions should not take place on Sunday or holidays, exceptions were made, making it seem Halli would be acting no less officiously in the 13th century than he was in the early 11th.

ignores the advice and predictably Ljot ambushes him. Halli asked the reason for the attack, to which Ljot answers: "so that you won't give me any more lessons about holiday observance". And in an irony whose sophistication seems to fill the air of the sagas, Ljot tells Halli that we will let the "angel" decide whose motives, yours or mine, were most excusable. Ljot's wit is to make archangel Michael the only real party of interest, not some busybody like Halli, nor certainly Ljot himself; it is properly Michael's claim and he will decide this trial by battle, a bi-lateral ordeal. Michael sides with Ljot, who kills Halli, thus recognising the triviality of Ljot's inadvertent violation of his day.[11]

One sees here that *de-minimis* legal infractions, little things, are often really big things. Precisely because they are marked as trivial, they can purify a confrontation, making it a pure matter of honour, to show one can be irrational in the interest perhaps of a greater goal: Hamlet's "Rightly to be great is greatly to find quarrel in a straw". Hamlet though knows that to stake so much on so little also is a strategy to make one's threats down the road credible, precisely because you are willing to die or to kill over little things. So too not a few of these quarrels in a straw, struggles over trivial matters, are the form deeper power struggles take. More is on the line than the ostensible subject of the quarrel. When you sue someone because they stole your horse, or broke your arm, you would have the burden to explain why you did not sue if you chose not to because, of course, you want your horse back or compensation for your arm. It is the other way around when you make an issue of petty claims, except when it is your official job to enforce these kinds of little things, as it was lovely Rita's, the meter maid, if any of you are of an age that can still recall The Beatles' song in which Rita stars. But in Iceland the responsibility to enforce such regulatory violations fell usually, remember, to "anyone who wishes to take up the action", where an official title like meter maid did not offer the relatively benign explanation of "just doing my job" and instead made the enforcement of such minor matters offenses in themselves, either intentionally meant to offend as Halli does Ljot, or to offend in the way that officious people always do, those tattle tales you hated as a kid growing up.

Jacque v. Steenberg[12]

Now a more recent homely example of little things morphing into big things: The events took place in 1997 in the state I grew up in – Wisconsin, about 40 miles (68 km) south of my childhood home in Green Bay. Here are the facts:

11 One need not argue for ecclesiastical influence to account for the importance of Ljot's lack of intent to his liability. So-called early legal systems understood quite well the concept of accident and unintentional harm. Also, allowing Michael to be the judge in an issue in which he is a party of interest tracks the Icelandic procedure of self-judgment in which one of the parties to a dispute is granted the power by the other to give judgment.

12 *Jacque v. Steenberg* 209 Wis. 2d 605 (1997).

Jacque, the plaintiff, an elderly man, owns a farm outside the village of Schleswig (sounds like northern Europe got moved to Wisconsin). Steenberg, the defendant, sells mobile homes (trailers) and wished to make a delivery to a purchaser.[13] The road to the purchaser took a sharp right at the end of Jacque's farm. There were two-meter-high snow banks that would make it a time-consuming operation to make the turn, but fairly easy if Steenberg could just cut across a corner of Jacque's land, making a path with a snowplow. Steenberg's workers asked Jacque if they could cross his property. Jacque refused; they asked Jacque to name a price. Jacque was adamant; he just did not want them crossing his land. He was perhaps overly sensitive about anyone stepping foot on his land because he had lost property valued at over $10,000 to the neighbouring farmer by adverse possession some eight years earlier. Good neighbours it seems are always a threat to add to their estate by carving out bits of yours.

Never mind that no possible prescriptive claim could be made against Jacque by such a small permissive use, but his unfortunate introduction to the hazards of adverse possession ended any urges to be neighbourly he might once have had. The case is a minor comedy which I would love to regale you with, but suffice it to say that when Steenberg's employees called their manager to tell him of the situation, he answered, and I quote: "I don't give a fuck what [Jacque] said, just get the home in there any way you can". So, they blocked the old farmer's view with a truck and got a snowplow and cut a path through the snow on his property.

A neighbour told Jacque what Steenberg had done (here a good neighbor is a tattle tale or a talebearer); Jacque called the sheriff, who issued the proper $30 citation, that being the fine for such a trespass. That was not enough to satisfy Jacque, so he sued for trespass, one of the oldest common law forms of action. He won a nominal award of $1 in compensatory damages, since there was no damage to the field, but the jury awarded $100,000 in punitive damages nonetheless. I think the most damning evidence in the trial transcript that prompted this rather incredible award was this: One of Steenberg's employees testified that when he got back to the office and told the manager that they had gotten across the field despite Jacque's refusal, the manager "giggled". Though the court will not quite admit it, it was such a "little thing" that prompted the outsized punitive damages for a trespass in which no cognizable damage was done. A smile, even a modest laugh, would not have cost as much as that giggle. The trial judge set aside the punitive award, there being

13 Mobile homes are also called trailers from being able to be attached to trucks. Some readers might be familiar enough with American idiom to know that the people who make these dwellings their home are often called "trailer trash", which largely is a synonym for "white trash", so deep runs the sense that full personhood depends on owning a fixed home on one's own land.

authoritative precedent that nominal damages could not support an award of punitive damages.[14]

But, somewhat incredibly, the Wisconsin Supreme Court reinstated the punitives. Farmer Jacque got $100,000. Steenberg must still be wondering how such a little thing as cutting across the land of someone else with even a good reason to do so, doing no damage whatsoever, could justify that award. Indeed, legal commentators and even ordinary people still wonder. But you see, these damages are not really punitive damages so much as purely compensatory in the saga way. I am not sure if it is always possible to distinguish punition from compensation. Each uses mercantile metaphors of paying back, paying for; each means you got caught when you were trying to get away with something.[15] So often what we consider punishment in the civil law is computed as a multiple of compensatory damages anyway, so that the linkage between the two is seldom denied, as indeed it was already the case in biblical law (e.g., Ex. 22).

The Wisconsin Court took the position that the most important incident of property in land is the right to exclude. It means the owner has sole dominion to deny entry if he chooses, at least on these facts, where permission was bargained for and denied and there were no significant equities in the defendant's favour. Steenberg was not, for instance, delivering a mobile home to flood victims. Though calling the damages punitive, the court says in so many words that they are to *compensate* for Jacque having been treated with utter contempt *as an owner of property*, for with regard to that status, he is to be accorded respect. But I still do not believe that the price for the right to exclude would have been set this high without that giggle.[16]

The price the court confirms as the cost of Jacque's permission is more than just the value of the stolen permission. Would farmer Jacque have refused

14 The cases enunciating the principle that nominal damages could not support an award of punitives were largely defamation cases; here the court went on to distinguish the precedents on just those grounds: that intentional trespass was more serious than maliciously false statements that had no effect on their object's reputation, but see further discussion for how the court ends by making this case a defamation case of sorts.

15 See generally my *Eye for an Eye* (Cambridge UK, 2006). It should be noted that whether the award was six cents or a $100,000 denominated punitive damages, that both awards are in fact compensatory, as should become clear in what follows.

16 Thus note the almost hysterical diction of the Wisconsin court regarding Steenberg's behavior:

> The most important indicium of the reasonableness of a punitive damage award is the degree of reprehensibility of the defendant's conduct. Punitive damages should reflect the egregiousness of the offense (628). In this case, the "crime" was Steenberg's brazen, intentional trespass on the Jacques' land. Steenberg's intentional trespass reveals an indifference and a reckless disregard for the law, and for the rights of others. At trial, Steenberg took an arrogant stance, arguing essentially that yes, we intentionally trespassed on the Jacques' land, but we cannot be punished for that trespass because the law protects us. . . . We are further troubled by Steenberg's utter disregard for the rights of the Jacques. Furthermore, . . . Steenberg Homes acted deviously. . . . We conclude that the degree of reprehensibility of Steenberg's conduct supports the imposition of a substantial punitive award (629).

$100,000 had Steenberg offered that amount? Couldn't Jacque have reasonably taken an offer that high as a joke and as a refusal to take his NO seriously? And should Steenberg actually have offered a cashier's check could Jacque accept it without feeling like a fool? Or feeling like he was selling his soul to the devil should he accept? The case seems really to be about honour, pure and simple.

Trespass in fact is a ground of action in the common law which gives no heed to *de minimis non curat lex*. If the trespass is intentional, liability follows, whether it be one dollar or more. Trespass is simply a strict liability tort; the wrong is one thing, the damages another. Normally the transaction costs of vindicating a right like Jacque's would prevent him from going to law, but he was madder than hell. And thanks to the Wisconsin Supreme Court, not irrationally so.

What starts out *de minimis* might grow to very large proportions indeed if you treat someone as if they were *de minimis* when they stand before you as an owner of land, his entire human dignity bound up in his right to exclude. The landowner has been insulted, dissed qua landowner.

There is a small irony in this case. The Wisconsin case previous to this one that disallowed punitives if there were no compensatory damages to sustain the punitives was a defamation case, and though the court makes much of that rule's unsuitability for intentional trespass and limits the rule of that earlier case to defamation, it then, as we have seen, turns this case into something of a defamation case. The harm was to Jacque's honour qua owner of land, but the whole case is one of insult.

But there is more dishonouring going on in the court's mind than in farmer Jacque's. The problem is the honour of the law itself: remember that $30 fine? As a matter of public law the state sets a $30 price on the trespass. And the court is worried that Steenberg will just look on it as a small licensing fee and not be deterred from behaving the same way next time. The law is not respecting itself when it licenses what it admits are violations of the right to exclude for a trivial $30.[17]

By defending Jacque's honour, the court finds a good part of the wrong to be a kind of *lèse majestie*, not by Steenberg, but by the $30 fine meant to sanction drunken teenagers from spinning their tires in someone's garden.[18]

How much better to show you are serious about the right to exclude, about the law of trespass, about the law itself when you decide to find your quarrel

17 "The $30 forfeiture was certainly not an appropriate punishment for Steenberg's egregious trespass in the eyes of the Jacques. . . . If punitive damages are not allowed in a situation like this, what punishment will prohibit the intentional trespass to land? . . . A $30 forfeiture and a $1 nominal damage award are unlikely to restrain Steenberg Homes from similar conduct in the future. An appropriate punitive damage award probably will" (620–621).

18 In the three statements of the talion in Exodus, Leviticus and Deuteronomy, the first two are compensatory, setting the price on wrongful takings, and the third is exemplary for bearing false witness, where the talion is more about poetic justice. See my *Eye for an Eye* 63–68.

in a straw, where there was no "real" damage at all? The straw you found your quarrel in turns out to have been one a magic wand made worth $100,000.

One more matter: punitive damages are also known as exemplary damages; they are meant to make an example of Steenberg, to use him for utilitarian purposes, which raises a whole new set of moral problems of the Kantian variety, for Steenberg is under this view being used as a means, not as an end; he is being used as a cautionary tale. Does that undo the compensatory quality that I have argued is really the proper way to think about the $100,000? Does not this way of making Steenberg pay let farmer Jacque laugh at him? As such it is a perfect revenge for his having been giggled at. And if farmer Jacque is too dour to giggle, the court nonetheless has made Steenberg a laughingstock, a byword. Farmer Jacque gets paid, Steenberg gets paid back.

Moreover, the court knows it is creating an incentive to being unneighbourly in the hope of winning a lottery like Jacques just did. It claims as an advantage to their ruling that it will encourage plaintiffs to sue where given the small compensatories they might not otherwise think it worthwhile to go to law. They mean to make a case that would be *de minimis* by transaction costs alone, into a worthwhile gamble. By allowing punitive damages, the self-interest of the plaintiff might lead him to pursue a claim that he might not otherwise have bothered with. A $100,000 punitive damage award will not only give potential trespassers reason to pause before trespassing, but it will also give aggrieved landowners reason to pursue a trespass action. So next time what do you advise Steenberg to do? Just cross the land without asking, and pay the $30, that is enter as the Lord himself will come, as a thief in the night (1 Thess. 5.2)? Above all, do not giggle at the old farmer.

If the law must systematically violate the *de minimis* maxim, which, as we have seen, is simply false for the law for the law is mostly recognised in its dealing with little things. Suppose we were to generate a contrary maxim of *de maximis non curat lex*. Wouldn't that capture a big truth? For if wrongs get too big, too costly, the law backs off and declares the subject too big to handle and punts the ball to truth and reconciliation commissions, or else declares it is a "political question" and hence not justiciable.

One perhaps contentious conclusion we might draw from Steenberg seen through the eyes of Ljot's case is that honour culture is not quite dead among us, in the streets and in the workplace to be sure as we jockey for esteem and precedence, but also, it seems, in the law, where Ljot would have understood quite well why punitives were necessary if Jacque's honour as a property owner was to mean anything. Steenberg can be seen as a modern instance of *Ljot v. Halli*, where little things can have big consequences, as folk wisdom well knows: not only do mighty oaks from acorns grow, or Cleopatra's nose decide the course of history, or more darkly: just one bite of an apple, but is it not the defining trait of Yahweh that he could not even remotely understand the principle of *de minimis non curat lex*? Just ask Aaron's sons (Lev. 10.1–2).

19 Legal Monism and the Challenge of Legal Pluralism(s)

Roberto Toniatti

The Western legal tradition – both the common law of England and the continental codified law – has elaborated a theoretical conception of the law as the product of one exclusive source of authority, to be identified with the ultimate holder of legitimate public power, the state. State-centric legal monism has been able to assert itself, leaving out of the official legal sphere all other competing non-state sources of law (religious law, customary law) that nevertheless continue having an impact on some sectors in society.

However, since World War II, two sets of processes have started challenging such well-established state-centred legal monism: on the one hand, the expansion of international and supranational law in the field of protection of fundamental rights and, on the other, also as a consequence of a dynamic that has transformed Western societies into multicultural and multireligious social aggregations, a new season of awareness and claims by those groups that advocate some public space for their own (religious or customary) non-state law. Legal monism is still a distinctive feature of the Western legal tradition and, nevertheless, it does not play the same exclusive unquestioned dominant role and is clearly under challenge. The dynamic phenomena indicated have significantly expanded the role of the judiciary in dealing with such crucial developments.

Introduction

A lucid attention to history, a sophisticated legal culture and a keen sensitivity for the comparative method are relevant intellectual resources whose balanced synthesis is most needed for law scholars analysing a constitutional transition. This appears to be the perceptive message to be read in Leonid Pitamic's Opening Lecture at Ljubljana University in 1920. The same message deserves to be kept in mind today, when the constitutional transition one has to deal with in the first two decades in the 21st century does show clear connections with the innovative dynamics already experienced 100 years ago, a transition that is, obviously, framed according to the original challenging features of the contemporary scenario. Leonid Pitamic's message, thus, is by all means to be taken seriously today.

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History first: a transition entails leaving established visions and practices and sailing towards unexplored and yet promising horizons. Keeping in mind the past is required when the future suddenly becomes the present to be shaped, built and supported.

The authentic alternative in a constitutional transition is between making a thoroughly radical *tabula rasa* of all that connects the present with the previous legal system – as the French and the Bolshevik revolutions did in 1789 and 1917 – on the one hand, and on the other, elaborating new paradigms in law yet consistent with some basic features inherited from the past. The latter seems to be the case with regard to the new legal scenario brought about by the American revolution that essentially engrafted a written binding constitution qualified as "the supreme law of the land" in a context that basically conformed to the common law of England. Achieving political independence through war was indeed revolutionary, but adopting a written interstate compact and establishing the federal polity and the republican form of government was, in fact, innovative and not properly revolutionary, as the challenge did actually show substantial elements of continuity.

Provided that – against the temptations of anarchy – a legal order is always needed by any society, the awareness of time is then essential because of the difference between revolution and evolution – as Pitamic sharply notices – between the *pars destruens* and the *pars construens*, between the old and the new legal order. It is therefore crucial to distinguish between what belongs to the past only and is consequently to be discarded and what is essential in any legal order and is to survive in the new reality. Very clearly, Pitamic says that "the concept of society is a *normative* problem" and that "a freedom that knows of no boundaries, no norms, is incompatible with society", adding that "social reformers and revolutionary statesmen have often striven to avoid a complete dismantling of the legal order in spite of the revolution they have led or contributed to". The distinction between the two phenomena and consequent qualification – between what is revolutionary and what, on the contrary, is evolutionary – is likely to be one of perspective, to depend more on the criteria for evaluation used than on ontological and intrinsic features. A transition may thus be at the same time revolutionary – for instance, politically – and evolutionary, when some continuity and consistency with features of the previous legal setting is sought for and maintained.

History helps also in looking at phenomena in a longer perspective, projecting the attention beyond what merely happens here and now. In reasoning on a constitutional transition, the priority – logical and historical – becomes to define the justification for overthrowing the old system and founding a new one: again, quoting Pitamic, "in order to understand and classify a revolution logically, to satisfy a scientific mode of thought, one must always identify the norm which justifies that revolution, and which can be used to comprehend the upheaval caused to society". The example provided is "the destruction of the Austrian legal system" that "was justified according to the principle of national self-determination": such destruction, in fact – by far more a fairly long process

than a punctual event – may be classified as a revolution from the point of view of the fall of its legal order, but at the same time also as an evolution inasmuch as it was somehow contradictorily facilitated by the very multinational, multilinguistic and multireligious features of the Habsburg monarchy.

Attention to history is crucial both in responding to the *Zeitgeist* and adapting to the compelling circumstances of the day as well as in perceiving the inevitably relative reach of innovations and of their impact on the future.

The new states born out of the collapse of the Austrian monarchy did gain their national sovereignty as deeply and widely longed for by generations and yet, over time, they had – and some of them still have – to deal with national, linguistic and religious minorities within their borders in ways that have not always been liberal and tolerant, and in fact some dangerous peaks of nationalism have been often reached in recent times as well. A consequent development has produced a new stage of recognition, protection and promotion of the rights of national minorities in Europe, that is to be regarded as an achievement of constitutionalism and regional international law. Revolution and evolution may coexist and do, in fact, coexist within a proper historical framework. The dynamics of the post-national state and the interaction with a new season of nationalism is also part of the constitutional transition that we are experiencing now.

Legal culture allows dealing with revolutions and evolutions – (r)evolutions – in constitutional transitions within a framework that reduces uncertainties and enhances the ability of setting a new polity and its legal system even though its due to the previous one must be paid. This was indeed the case in the transition between the Austrian collapse and the constitutional origin of the new Kingdom participated in by Slovenia, when – according to Pitamic – former sources of law were to be regarded as still in force (for example, the 1811 Austrian civil code and its reference to natural law to be used by a judge if no other rules appear to be appropriately applicable); or in relation to the continuity of international treaties and obligations. It is legal culture that controls the dynamics of the legal system – the new as well as the old one – and allows us to conclude, as Pitamic does, that "changing laws in a lawful fashion no longer presents a problem for us" and that "today, surely, no one would consider adopting 'eternally' valid laws, as the Austrian Pragmatic Sanction purported to do"; an achievement of modernity, indeed, although in a different setting, constitutional eternity clauses in entrenched constitutions do play a relevant role in contemporary constitutionalism (for instance, when under the challenge of a wave of illiberal democracy).

Legal culture is the key to understanding the "miracle" of making it "possible to reconcile revolution and law, two principles which are . . . logically exclusive" through reference to the "antinomy which dominates the world of law" and is represented by the distinction between material and formal law. In fact, "the law is only what those who are authorised by the legal order to rule on law, determine it to be. Their interpretation of the law is the only valid one". Pitamic's comments on interpretation are especially interesting: on the

one hand, he praises continental legal culture ("a refined legal culture can be created only by those capable of abstract thought, and of making inferences from general ideas to concrete cases"); on the other, he acknowledges that "the empirical approach has its practical uses".

Dealing with interpretation opens the way to a noteworthy reference, in particular, to the common law system, to legal education in the context of England and North America and to the empirical method in learning and practicing the law ("if a particular approach proved effective in a long line of decided cases, it is bound to be effective in the case at hand as well"). In other words, to the use of the comparative method.

The crucial issue considered in such a perspective is the traditional approach in the European continental civil law system, according to which "the judge is debarred from inquiring whether given laws conform to material provisions of the constitution": this means that the judge "is precluded from *constitutional interpretation*" and that "the immense power granted to authorities by interpretation stops with the constitution". A further step in such a line of reasoning leads Pitamic to deal with the issue of judicial constitutional review, following the example derived from the United States. His comments are all the more interesting – and even fascinating – when we consider the 1920 regional context when the Constitutions of Austria and of Czechoslovakia were adopted and the European model of constitutional review was formalised in both, thanks to not only the theoretical elaboration by Hans Kelsen but also to his personal involvement with the drafting of the former (a specific circumstance of constitutional innovation that Pitamic does not take into consideration).

The focus of the comments is once again provided by interpretation of the law classified as a power: "the constitution grants the power of interpretation in order to protect itself". And this very setting is classified dramatically:

> this is nothing other than revolution proper, legalised in advance. Legalised, because according to the constitution the judge has full freedom of interpretation, and revolution because the judge may invest the constitution with a meaning different to the one commonly understood by people who are not officials; different even from that which emanates from previous rulings.

The comparison between civil law and common law systems is further taken to a powerful synthesis: "the European judge possesses *something*; the American *everything*", as "the former is below the constitution, the latter is not".

The qualification attributed by Pitamic to the United States' model and historical experience of judicial review of constitutionality is twofold: that the constitution may have more than one meaning is "logically inconceivable", and yet one has to consider that

> by entrusting judges with revolutionary powers, the American constitution has probably prevented many other revolutions by *others*. By

> legalising revolution in an orderly way, even one that goes against the very nature of the legal order, the American Constitution has prevented revolution taking place against *society*.

The further step undertaken by Pitamic's comparative reasoning (which includes also the English common law and its unique constitutional setting) leads to an unequivocal support in favour of the establishment of a constitutional court "to exercise control over parliament". There is a vision of high moral intensity here:

> it seems to me an expression of great culture of mind, heart and will if a people entrusts a judge – as a symbol of justice from time immemorial – with this great power [of constitutional interpretation]; and a sign of an equally great culture if the judge indeed honours that trust.

A careful reading of Leonid Pitamic's Opening Lecture is intellectually most rewarding, in particular when one's mind goes sympathetically to the stimulating and creative cultural climate of the post-1918 period and its effects on national state-building and constitution-making in the post-Habsburg era. As anticipated earlier, some of the comments are somehow appropriate also in our present context, with regard to the complexity of the issues that a new generation of scholars of law are expected to face and cope with. In particular, problems caused by the challenge of legal pluralism(s) are considered here.

Although no absolute form of strong legal pluralism is obviously to be assessed as compatible with the identification of law with the state and its exclusive ultimate normative and judicial powers – that is, legal monism – and vice versa, that identification is not any longer as solid and undisputed as Western traditional legal theory continues to be still inclined to believe. In fact, we have been and are witnessing two phenomena that, although quite different the one from the another, do prospect a challenge to the endurance of legal monism.

Reference is, on the one hand, to developments in international law – and especially from international law into supranational law – that might endorse the view of state law-making as a sort of decentralised agency of a higher legal system, and, on the other hand, to the claims for forms of recognition of non-state law, such as religious law or customary law, raised either by (fundamentalist) religious groups or by communities of immigrants who are accustomed to practices of personal laws in important fields of their daily experience (such as family law), or as chthonic law by indigenous communities in countries where they are traditionally established.

Two distinct forms of legal pluralism – *non-state only law* because of interaction with international and supranational law and *non-state law tout court* because of the pressure from religious, customary or chthonic law – and yet bearing similarities as they both converge in prospecting a (r)evolution to and in legal theory and mainstream constitutionalism as well as in emphasising that, political responses being mostly absent, solutions on how to shape the interaction and the pressure mentioned appear to be mainly entrusted to the

judiciary. And such twofold circumstance makes Pitamic's analysis particularly relevant in our own time.

The following paragraphs will deal with each one of the two forms of legal pluralism indicated above. The main part of the reasoning will be centred on Europe, often to the larger Euro-Atlantic legal community and occasionally to a wider world scenario. The thematic focus selected for dealing with both fields of legal pluralism is the protection of fundamental rights, because of its intrinsic importance in constitutionalism and constitutional law and because it has received a powerful impact by physiological forms of judicial activism producing some relevant (r)evolutionary developments in our era.

Legal Pluralism and the Interaction of Domestic Constitutional Law With International and Supranational Jurisdictions

Continental Europe has a rather impressive record in its nation-states' constitutional transitions during the 20th century, especially since the end of World War II: in a relatively short period of time, in fact, European polities – in their great majority – have been experiencing a structural transition to new constitutional paradigms bearing a (r)evolutionary impact on traditional constitutional theory and practice.

In the first place and as a starting point, traditional basic principles such as "parliamentary supremacy" and unquestioned subordination of the judiciary to parliamentary legislation have been set aside by the introduction of judicial review of constitutionality: one of the main implications is that judges are not any longer *la bouche de la loi* but have been attributed the power of interpretation of rules (let's recall Pitamic here!) and are therefore allowed – when not solicited – to legitimately doubt the conformity of legislation (and other public acts) with rules having a higher law status. In other words, the entrenched constitution coupled with judicial review has generated a system of plurality of sources of law and, at the same time, has introduced a hierarchical structure as the way to organise the system and manage a conflict of rules within it.[1]

A second challenging new paradigm concerns the overcoming of states' exclusive competence – by those very states' agreement and will, of course – as to the definition and protection of fundamental rights as the core values of the national community. One lesson learnt from the World War II is that the status of human rights in a given jurisdiction is also an indicator concerning regional security. Consequently, an international mechanism – substantive and procedural – to that purpose would serve, undoubtedly, the interests of individuals whose fundamental rights have been violated and, just as undoubtedly, would support a process of harmonisation of European states' political regimes and

1 The doctrinal reference in the civil law system is Hans Kelsen's *Stufenbaulehre*. For the common law, see Edward S. Corwin: The Higher Law Background of American Constitutional Law, in: *Harvard Law Review* 42 (1929), p. 365.

be eventually instrumental – in the long run – to the preservation of peace on the continent. Such a mechanism is grounded on the willing compliance by states' domestic judiciaries as well as on the credibility of a newly established international judicial body, and it does clearly represent how substantial a reliance political institutions have invested in its functioning.

Third, for their own economic benefit, some European states (six at the origins, that became 28 and are now 27) have agreed to set aside their discretionary decision-making power for the *ad hoc* ratification and execution of the obligations arising in international law within a given context in favour of a new type of centralised rule-making institution that automatically produces immediate binding normative effects in the sphere of domestic law of sovereign states participating to such a mechanism.

Such effects are meant to directly affect individuals as well as corporate bodies, and at some stage, the issue of protection of their fundamental rights was unexpectedly raised in the practice of regulating the economy. This peculiar and innovative setting – less than a federal state and more than an international organisation – has well deserved to receive a peculiar and innovative qualification as supranational. Such supranational rules, as long as they need being the same within all the states' jurisdictions involved, require a supranational court for their enforcement and must enjoy a hierarchical primacy over national rules, also in the field of protection of fundamental rights. Nevertheless, while states' political institutions feel uneasy at stipulating such effects in the text of the establishing treaties, the issue of primacy of supranational rules receives an affirmative solution by the supranational judiciary and a negative one by states' highest supreme and/or constitutional courts, while the two sets of judicial bodies manage as much as feasible to avoid final clashes, more often than not acknowledging the supranational normative primacy.

This last focus describes the third challenging (r)evolutionary paradigm of our age: one more instance of legal pluralism, without the support of a formal supremacy clause, and yet letting such an implicit and judicially elaborated clause produce its effects thanks to the mainly cooperative attitude shown by both the supranational and national judiciaries.

All three incisive innovations are here to give evidence to the process of paradigmatic transitions that European legal systems have been experiencing in only about 70 years. Such innovations do affect the well-established system of international and national sources of law rooted in traditional concepts of nation-states' sovereignty and (more recently) constitutional identity and do confirm possibly being qualified in either a revolutionary or an evolutionary perspective, although the expectations are likely to be left to a combination of a (r)evolutionary slow development.[2]

2 See Roberto Toniatti: Sovereignty Lost, Constitutional Identity Regained, in: Alejandro Saiz Arnaiz, Carina Alcoberro Llivina (eds.): *National Constitutional Identity and European Integration*. Intersentia 2013.

Furthermore, especially in the area of definition and judicial protection of fundamental rights, the condition of having to make reference to three distinct – and yet in some cases overlapping – sets of rules and three separate and yet interactive sets of judicial bodies has given origin to a scenario of constitutional pluralism.[3]

No wonder that, more recently, symptoms of a reaction against the hypothesis of a post-sovereign European nation-state are clearly detectable and that a conservative turn from the current stage of such development may occur.[4] But what mostly matters here and now is that the three paradigmatic challenges involve a process of attributing to the judiciary a pivotal role in managing – *de jure* or *de facto* – the new framework of institutional checks and balances implied by the transitions, and such judicial role might be regarded by itself as a shift beyond the traditional constitutional paradigm of separation of powers and as a significant enhancement of a more complex system of checks and balances.

The Era of Constitutional Courts

The first transition to deal with concerns the appearance, circulation and firm rooting of constitutional adjudication entrusted to *ad hoc* courts on the stage of European mainstream constitutionalism[5]: whether since the 1940s – as, for obvious reasons, in Germany and Italy after the end of the war – or in the 1970s (Greece, Portugal and Spain's emancipation from authoritarian rule), and again since the 1990s (about two dozen countries – now all members of the Council of Europe – including those states resulting from the collapse of former federal unions, exiting from communist *régimes*), the constitutional scenario in continental Europe has dramatically changed in favour of the adoption of liberal and democratic systems. In particular, such changes involved the option of having the higher law status of their constitutional source guaranteed

3 See Neil Walker: The Idea of Constitutional Pluralism, in: *The Modern Law Review* 65 (2002) 3, p. 317. A constitutional pluralist framework has been described "as a community constituted by partly separate but interdependent legal orders, whose foundational norms are not hierarchically ordered", in: Aida Torres Pérez: *Conflict of Rights in the European Union. A Theory of Supranational Adjudication*. Oxford University Press, Oxford 2009, p. 67.

4 See Neil MacCormick: Beyond the Sovereign State, in: *Modern Law Review* 56 (1993) 1, pp. 1–18; Neil MacCormick: *Questioning Sovereignty: Law, State and Nation in the European Commonwealth*. Oxford University Press, Oxford 2002; see also Michael Wilkinson: The Reconstitution of Postwar Europe: Liberal Excesses, Democratic Deficiencies, in: Michael W. Dowdle, Michael Wilkinson (eds.): *Constitutionalism Beyond Liberalism*. Cambridge University Press, Cambridge 2017; Michael Wilkinson: Beyond the Post-Sovereign State?: The Past, Present, and Future of Constitutional Pluralism, in: *Cambridge Yearbook of European Legal Studies*, Cambridge 2019.

5 Earlier rare symptoms of the phenomenon, as well known, took place in the post-Habsburg transition in Austria (1920) and Czechoslovakia (1921), as well as in the Constitution of the second Republic in Spain (1931). In the common law world, the 1936 Constitution of Ireland is to be mentioned.

by a newly established specialised court, having the exclusive competence of judicial review of parliamentary legislation and other public acts.[6]

An institution bearing judicial characters and being lawfully able to declare acts of the political branches of government contrary to the Constitution and therefore repealed – a Constitutional Court – was and is charged, therefore, with the crucial function of overseeing and protecting the fundamental normative source of the *régime* transition that all those countries had to go through. It is to be stressed that, after the initial political impulse, ensuring the defence of such radical transitions apparently relied more on that *sui generis* type of court than on democratic, elected and politically liable institutions.

The exception is represented by those few states – such as Belgium, the Netherlands, the Scandinavian countries and, of course, Switzerland – that had not developed from within any form of authoritarian or totalitarian rule and did not need to go through any significant transition. In fact, almost none of them has introduced judicial review.[7] On the contrary, the other states mentioned did experience a fairly relevant reform of their constitutional paradigm, moving from formerly being (more or less stable and for shorter or longer periods of their history) "rule of law states" to becoming "rule of constitutional law states", thus moving from the 19th century model of the *Rechtstaat* to the model of the *Verfassungsrechtstaat* in the 20th century.[8]

The change of constitutional paradigm – echoing the earlier anathema of being described as *le gouvernement des juges*[9] – has gone through heavy criticism, mainly related to the well-known accusation related to the "counter-majoritarian difficulty".[10] While frequent tensions between supreme and constitutional courts and democratically elected lawmakers over single judgements are physiological, such specific criticism has its roots in the very jurisdiction in which judicial review had its origins (*Marbury v. Madison*, 1803).

6 Estonia and Greece, while adopting judicial review of constitutionality, have introduced some features of their own into the system. In France, the *Conseil Constitutionnel* is not, *per se*, a judicial institution, although its mandate and proceedings are consistent with the judicial method.

7 In Belgium and Switzerland, judicial review is strictly connected to the federal structure of the polity (in Belgium the original name of the *Cour Constitutionnelle* was *Cour d'Arbitrage*). In the Netherlands, art. 120 of the Constitution goes as far as stating that "the constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts".

8 Parliamentary supremacy is still in force in the United Kingdom, paradoxically confirmed by the innovative judicial power of issuing a declaration of incompatibility of national legislation with regard to "Convention rights" since the incorporation of the ECHR into the system. Although the principle knows many contradicting *nuances*, parliamentary supremacy is still claimed to be the rule in Israel, because of its non-fully-entrenched constitution and in spite of a fairly flourishing judicial review.

9 Édouard Lambert: *Le gouvernement des juges et la lutte contre la législation sociale aux Etats-Unis.* Dalloz 1921, significantly reprinted in 2005.

10 John Hart H. Ely: *Democracy and Distrust: A Theory of Judicial Review*. Harvard University Press, Boston 1980; Michel Rosenfeld: US Constitutional Review: Antimajoritarian But Democratic?, in: *Journal of Constitutional Justice* (2018), and in: Cardozo Legal Studies Research Paper, No. 561.

But in continental Europe such judicial guarantee has been rationalised in constitutional texts – whose original democratic legitimacy is not questioned – within a framework of "constitutional democracy" that is founded also on non-majoritarian mechanisms (for instance, the requirements of special majorities and *ad hoc* entrenched procedures for constitutional amendments, or for the ratification of certain categories of treaties as well as the constitutional regulation of some competences attributed to qualified parliamentary minorities, thus protecting the systemic function of the opposition).

The Constitution as "the supreme law of the land" is then not only written, not only entrenched as to its formal as well as substantive revision, but it is also judicially protected, to the extent that the very constitution-amending power – as a *pouvoir constitué* standing below the *pouvoir constituant* – is susceptible, at least theoretically, to being subject to control by a Constitutional Court.[11]

Furthermore, the shift in paradigmatic constitutional features affects also the methods of judicial interpretation of the constitution: traditional criteria of hermeneutics – closer to formal(istic) parameters and to an abstract, value-free syllogistic approach as in periods of prevailing legal positivism – tend to be replaced by a systematic, purposeful and evolutive interpretation, inspired by the judicial function of ensuring the implementation of constitutional values.

When we analyse the methods of judicial interpretation – most notably (but not necessarily only) by the highest jurisdictions – what appears to matter more than references to legal theories are the practices widely known as "judicial self-restraint" or "judicial activism". The conceptual origin of such qualifications is most likely due to common law jurisprudence, along with the "political question doctrine". In civil law jurisdictions, the dogmatic presumption of completeness of the legal order (properly and inevitably transferred to the constitution as long as the latter is genuinely part of the system of sources of law and not merely a political document) and the principle of *non liquet*[12] – the obligation for the judge to decide a case – display a different theoretical background and nevertheless reference to judicial activism or self-restraint

11 See Yaniv Roznai: *Unconstitutional Constitutional Amendments. The Limits of Amending Powers.* Oxford University Press, Oxford 2017; Richard Albert: *Constitutional Amendments: Making, Breaking, and Changing Constitutions.* Oxford University Press, Oxford 2019. Historically, the issue is still very seldom rationalised in constitutional provisions that expressly regulate judicial review of constitutional amendments (for instance limiting it to formal criteria only, as in Turkey, or framing it as a prior consultative function, as in Ukraine); more often it is constitutional case law that acknowledges such further area of judicial intervention (as in Italy, where the Constitutional Court asserted its power to guarantee "the fundamental principles of the constitutional order", decision no. 1146, 1988).

12 In civil law countries, the closest theoretical justification for the application of a functional equivalent to the political question doctrine takes the form of a decision in which a Court acknowledges that the Constitution leaves open margins of political discretion in selecting a normative solution, such selection being reserved to the political law-maker and exceeding, therefore, judicial competence. In the field of administrative law and adjudication, reference is to be made to the *act de gouvernement* doctrine.

in evaluating a judgement is both academically and politically frequent and widespread.

The field of interpretation, in fact, has gradually become the main battlefield where supporters and critics exchange their arguments assessing the *revolutionary impact* that judicial review of constitutionality has produced on former undisputed 19th-century paradigmatic conceptions.[13]

Furthermore, it is to be stressed that, in spite of the formal centralised model of control of constitutionality present in Europe, an important development in the field of implementation of the constitution concerns the role increasingly played by the judiciary at large. All courts, in fact, show a commitment to supporting interpretations of statutes in conformity to the higher source as an alternative – if and when feasible – to directing the decision over the issue to the Constitutional Court.[14]

Such a proactive role of the judiciary is also a consequence of those constitutional texts that support the direct enforcement of their provisions on fundamental rights even without any previous *interpositio legislatoris* and establish a preferential relation between judges and citizens, a *constitutional duetto* that once again somehow leaves parliaments at the margins of the game.[15]

13 It is noteworthy that two former Presidents of a Constitutional Court (Spain) and of a Supreme Court (Israel) have referred to the *revolutionary* nature of judicial review: see "the introduction of constitutional jurisdiction in Europe has not been the product of an evolution, but rather of a revolution"; consequently, we need "a theory of jurisdiction more descriptive of its true nature than the theory of the automaton judge, a theory that would accentuate the creative moment", Francisco Rubio Llorente, in: Alessandro Pizzorusso (ed.): *Law in the Making. A Comparative Survey*. Springer Verlag, 1988, p. 165; and "Indeed, the *revolution* is not one of content so much as of force. With the enactment of the Basic Laws, these fundamental rights have become "inscribed in the book". From now on, they bind not only the citizens and residents, and not only the administrative authorities, such as the government and local authorities. From now on, they bind the Knesset itself. Above the Knesset as the legislative branch stands the Knesset as constitutive branch, and above the ordinary law of the Knesset stand the two Basic Laws. The people are sovereign, and the Basic Laws are supreme. A Knesset law may no longer infringe the basic rights mentioned, unless it is enacted for a worthy purpose, even then only to the extent necessary, and it fits the values of the state of Israel as a Jewish, democratic state", in Aharon Barak: *A Constitutional Revolution: Israel's Basic Laws*, 1993, in: Faculty Scholarship Series, 3697, https://digitalcommons.law.yale.edu/fss_papers/3697 (accessed 17 January 2020) (italics added).

14 One reason for supporting an interpretation of an ordinary provision in conformity with the Constitution is often due also to the preference for not creating a normative vacuum in the legislative order.

15 The German *Grundgesetz* is very clear in this regard ("Art. 1.(3): "The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law"). The Constitution of Slovenia (Art. 15. Exercise and Limitation of Rights) is emblematically very accurate in such regard:

> Human rights and fundamental freedoms shall be exercised directly on the basis of the Constitution. The manner in which human rights and fundamental freedoms are exercised may be regulated by law whenever the Constitution so provides or where this is necessary due to the particular nature of an individual right or freedom. Human rights and fundamental

In fact, the (r)evolutionary impact on 19th-century original constitutionalism in Europe consists in affecting the dogmatic and rigid understanding of separation of powers and in reinforcing the system of checks and balances: rather than criticising the "juristocracy",[16] or the excessive expansion of the role of the judiciary, it may be more constructive to acknowledge that the parliamentary lawmaker is always in charge of the normative function, inclusive of the power to amend the constitution, and that a lack of reaction on its side against a given interpretation by the constitutional court or by the judiciary may be qualified as an implicit act of normative will or simply as acquiescence in front of that specific interpretation of the constitution.

The normative function thus would be more the result of a dynamic and interactive cooperation between legislation and adjudication within a framework of checks and balances, subject to a parliamentary corrective intervention, than the result of a rigid separation of functions in an ever more complex context.

A New International Legitimacy for the Definition and Protection of Fundamental Rights

Thus far, only national law and jurisdictions have been dealt with, although continental circulation of models as well as the shared impact of (r)evolutionary reforms on established constitutional paradigms have been duly emphasised also as factors of some legal interaction beyond and above national borders. Furthermore, growing relevance of the use of the comparative method by judges – deciding controversies by adding to national sources further normative ground from law and case law of other states – is also a circumstance that contributes to highlighting the phenomena under consideration.[17] The image of a gradual progress towards achieving awareness of entirely not-self-sufficient, not-self-referential and non-monadic states' legal orders is likely to be appropriately conveyed at this stage.

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freedoms shall be limited only by the rights of others and in such cases as are provided by this Constitution. Judicial protection of human rights and fundamental freedoms, and the right to obtain redress for the violation of such rights and freedoms, shall be guaranteed. No human right or fundamental freedom regulated by legal acts in force in Slovenia may be restricted on the grounds that this Constitution does not recognise that right or freedom or recognises it to a lesser extent.

16 See Ran Hirschl: *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism*. Harvard University Press, Boston 2007.

17 See Basil Markesinis, Jörg Fedtke: *Judicial Recourse to Foreign Law. A New Source of Inspiration?* Routledge-Cavendish, 2007; Tania Groppi, Marie-Claire Ponthoreau (eds.): T*he Use of Foreign Precedents by Constitutional Judges.* Hart, 2013; Giuseppe Franco Ferrari (ed.): *Judicial Cosmopolitanism: The Use of Foreign Law in Contemporary Constitutional Systems.* Brill Nijhoff, 2019.

In a landmark judgement,[18] the German *Bundesverfassungsgericht* (hopefully lending its voice to all supreme and constitutional courts in Europe) wrote that

> sovereign statehood stands for a pacified area and the order guaranteed therein on the basis of individual freedom and collective self-determination. The state is neither a myth nor an end in itself but the historically grown and globally recognised form of organisation of a viable political community.[19]

The Court also stressed "the Basic Law's mandate of peace and integration and the constitutional principle of the openness towards international law (*Völkerrechtsfreundlichkeit*)"[20] and further expanded the statement specifying how the GG includes "not only the principle of openness towards international law, but also the principle of openness towards European law (*Europarechtsfreundlichkeit*)".[21]

The symbolic and substantive dynamic expressed by such statements inspired by the recent historical process of leaving behind the traditional Westphalian conception of states' sovereignty is self-evident. In particular, the innovative impact has progressively led to shaping the international human rights *régime*.[22]

Since World War II and following a first step represented by the adoption of the Charter of the United Nations (1945) and then of the Universal Declaration of Human Rights (1948), the international community has started an impressive rule-making itinerary leading to the adoption of sources of international law – sometimes, in fact, sources of soft law – displaying the international concern for human rights in a wide range of realities, often negatively affecting the most disadvantaged and discriminated segments in society.

Such a huge normative body, in spite of a diplomatic lip-service tribute to their respect by each one of the UN member states, cannot help, nevertheless,

18 The *Lissabon Urteil* decided the consistency of the Lisbon EU treaty with the German Constitution. See BVerfG, *Judgment of the Second Senate of 30 June 2009*–2 BvE 2/08 -, paras. (1–421), www.bverfg.de/e/es20090630_2bve000208en.html.

19 Ibid., para. 224. It further added that "[t]he Basic Law abandons a high-handed concept of sovereign statehood that is sufficient unto itself and returns to a view of the state authority of the individual state which regards sovereignty as "freedom that is organised by international law and committed to it. . . . It breaks with all forms of political Machiavellianism and with a rigid concept of sovereignty which until the beginning of the 20th century regarded the right to wage a war – even a war of aggression – as a right that is due to a sovereign state as a matter of course", ibid., para. 223.

20 Ibid., para. 219.

21 Ibid., para. 225.

22 See Manfred Nowak: *Introduction to the International Human Rights Regime*. Brill Nijhoff, 2003; Andreas Føllesdal, Johan Karlsson Schaffer, Geir Ulfstein (eds.): *The Legitimacy of International Human Rights Regimes. Legal, Political and Philosophical Perspective*. Cambridge University Press, Cambridge 2013.

being unable to go beyond a mere assumption that those documents represent "a common understanding of these rights and freedoms".[23] Furthermore, the UN system does not provide reliable instruments of authentic protection of victims of human rights violations, apart from the establishment of committees of experts charged with the task of monitoring the (non)implementation of each text adopted, in addition to a Human Rights Council (reformed in 2006) having a general field of competence.[24]

In Europe, the need for a more determined and stronger response to the vulnerability of human rights was urgently felt: it was therefore decided to proceed (1) to a regional definition of human rights and fundamental freedoms on the assumption of member states of the Council of Europe being "like-minded" ("*animés d'un même esprit*") and having "a common heritage of political traditions, ideals, freedom and the rule of law" – the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, 1950), and (2) "to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration", such collective enforcement entailing setting up its own judicial institution, the European Court of Human Rights (ECtHR).[25]

The ECHR and the ECtHR together aptly and more than symbolically exemplify and give evidence to the new regional scenario of international law in the field of human rights. While in planetary international law the principle according to which protection of fundamental rights is a matter of legitimate international concern must be balanced with the opposing principle of non-intervention in domestic affairs – the latter supported by a provision of the

23 From the Preamble of the Universal Declaration (that qualifies such common understanding as being "of the greatest importance for the full realization" of the "pledge" to the promotion of universal respect for and observance of human rights and fundamental freedoms"). The Preamble further proclaims the Universal Declaration "as a common standard of achievement for all peoples and all nations". The Resolution adopted by the General Assembly (15 March 2006) reforming the Human Rights Council more realistically acknowledges that "*while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind*, all States, regardless of their political, economic and cultural systems, have the duty to promote and protect all human rights and fundamental freedoms" (emphasis added). Reference to regional and national own distinct understanding of human rights is found also in the ASEAN Human Rights Declaration (2012): "the realisation of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds" (Art. 7).

24 See the same Resolution, which restrictively specifies that "the Council shall be responsible for promoting universal respect for the protection of all human rights and fundamental freedoms" and that it "should address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon".

25 See Art. 19: "To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights. . . . It shall function on a permanent basis".

UN Charter[26] – in Europe, national sovereignty may no longer be regarded as a shield that can be opposed for supporting the claim that human rights questions are reserved to states' sovereignty.[27]

Such innovative development – that in the regional scenario was able to achieve results that went well beyond those conceivable within the UN system – could be explained as a phenomenon of expansion of some features of states' constitutionalism to the international dimension.

In fact, on the one hand, the ECHR establishes functions and obligations of international law onto the states as parties to the treaty[28] and allows states to file suits against other states for infringement of those obligations. Furthermore, it sets the rule of equal participation by all member states to the composition of the EctHR,[29] although there is no national mandate binding its members, as specifically stated.[30] Judges of the ECtHR are required to be as neutral, independent and professionally qualified as any member of a national high court.

On the other hand, the Convention also allows individuals (not necessarily citizens of any of the member states) to raise a controversy against a state for the violation of their Convention rights and obtain a motivated remedy when the state is found guilty of a violation of the Convention.[31] Individual complaints – that have become by far the core of the Court's activities – are subject to the rule of judicial subsidiarity and are admissible only when all domestic remedies have been exhausted, thus providing a profitable circuit

26 See Art. 2.7 of the UN Charter: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter".

27 The principle is expressly stated in the Moscow Document (Office for Democratic Institutions and Human Rights of the Organisation for Security Cooperation in Europe, OSCE, 1991) that reads: "A fundamental aspect of the human dimension is that human rights and pluralistic democracy are not considered an internal affair of a State. The participating States have stressed that issues relating to human rights, fundamental freedoms, democracy and the rule of law are of international concern, as respect for these rights and freedoms constitutes one of the foundations of the international order". In fact, the participating States "categorically and irrevocably" declared that the "commitments undertaken in the field of the human dimension of the OSCE are matters of direct and legitimate concern to all participating States and do not belong exclusively to the internal affairs of the State concerned".

28 Most notably, "the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention" (Art. 1); and "The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties" (Art. 46).

29 See: "The Court shall consist of a number of judges equal to that of the High Contracting Parties" (Art. 20) and "the judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party" ["*au titre de chaque Haute Partie contractante*"] (Art. 22).

30 See: "The judges shall sit on the Court in their individual capacity" (Art. 21.1).

31 See: "Reasons shall be given for judgments as well as for decisions declaring applications admissible or inadmissible" (Art. 32.2).

of interaction between the ECtHR and domestic courts and tribunals. Such interaction contributes to shaping and, in the long run, giving evidence to a consensus – or a common ground or shared trends – among member states that ultimately plays a crucial role in the justification for a judicial ruling by the Strasbourg judge, whether a member state is found guilty of violation of the ECHR or whether margins of political discretion are acknowledged that allow for different interpretations of the provisions of the Convention. Consensus is therefore a factor displaying its effects not only in multilateral diplomatic conferences but also within the international jurisdiction where the ECtHR and national courts interact.

The ECHR set a model that so far has proved to be able to inspire further regional normative and judicial experiences, both adopting international bills of rights and establishing international courts, as happened through the American Convention on Human Rights and the Interamerican Court of Human Rights (in force since 1978) and, later, through the African Charter of Human and Peoples' Rights (in force since 1986) and the African Court on Human and Peoples' Rights (in force since 2004). Although the interest for a detailed analysis of both sets of substantive rules and judicial organisation and functions of such courts is indeed doubtless, it is sufficient at this stage of our reasoning to emphasise, first, the historical reality of such developments, that give evidence to sharing a very innovative worldview over previous conceptions of sovereign states' exclusive role and powers and, second, the combination of common basic features – relying on an international judiciary and acknowledging the need to protect the dignity of all human beings regardless of their nationality[32] – and recognition of respective distinct cultural identities.[33]

The new European framework in force for the protection of human rights relies on the interaction between national and international sources of law and courts, a common understanding being that individuals would profit from the support by a concerned and "like-minded" international community, providing for further judicial remedies against human rights violations beyond domestic law and national judicial systems.

The ECtHR has a record of adjudication that combines instances of judicial activism and judicial self-restraint, the latter being evidenced in particular by its own judge-made doctrine of the *national margin of appreciation*: according to the doctrine, some conflictual issues are best left up to a national decision-making process as they are simply not fit for being settled by an international court, that nevertheless keeps for itself an ultimate supervisory role over the respects of those margins by the member states. The doctrine, originally a

32 As expressly stated in the preamble of the American Convention ("recognizing that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality").

33 This is particularly applicable to the African Charter for its special emphasis on duties and on peoples' rights.

result of judicial self-restraint only, has recently been formalised into the text of the preamble to the ECHR by Protocol n. 15 (2013),[34] in line with a drive that may be seen as supporting a process of "re-nationalisation" in the implementation of the Convention and ultimately in the field of protection of fundamental rights.[35]

There appears to be, in fact, a new emphasis on the principle of judicial subsidiarity and the requirement that national judiciaries – and, in fact, all states' legislative and administrative authorities – commit themselves to sharing the responsibility of ensuring the implementation of the ECHR.[36] In fact, national courts are also, at the same time, Convention courts, and questions of "conventionality" are now physiologically to be added to questions of constitutionality in encouraging judicial interpretation with reference to more than one set of rules and precedents.

The ECHR mechanism is meant to work without a hard impact on the national systems of sources of law: as an international treaty, the Convention enjoys the force of the domestic instrument that made it executive internally.[37] The ECHR does not (claim to) have any supremacy over national constitutions, although its important contribution to the interpretation of their provisions, in conformity with the interpretation given the ECHR by the European Court, is widely acknowledged.[38]

34 The recital added to the preamble reads: "Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention".

35 On the phenomenon named *principled resistance* – motivated refusal to give implementation to specific EctHR's rulings – see Colm O'Cinneide: Saying 'no' to Strasbourg: when are national Parliaments justified in refusing to give effect to judgments of International Human Rights Courts?, in: Matthew Saul, Andreas Follesdal, Geir Ulfstein (eds.): *The International Human Rights Judiciary and National Parliaments: Europe and Beyond*. Cambridge University Press, Cambridge 2017, p. 304.

36 On the principle of *shared responsibility*, see in particular the recent Copenhagen Declaration (2018) adopted by the contracting states. In this context – specified as directed towards enhancing "the interaction between the Court and national authorities and thereby reinforce implementation of the Convention, in accordance with the principle of subsidiarity" (from the preamble) – the new 16th Protocol (2013) must also be mentioned, which has introduced a mechanism of voluntarily requesting a preliminary non-binding advisory opinion by highest national courts to the ECtHR.

37 Austria and the United Kingdom have incorporated the ECHR into their own legal system: the former by employing the parliamentary procedure required for adopting a constitutional amendment in 1964, and the latter through the Human Rights Act, 1998, which has also introduced the power of courts of declaring the incompatibility of national sources with respect to the Convention, leaving it up to Parliament if and how to cope with such incompatibility.

38 See the 2004 decision of the *Bundesverfassungsgericht* (2 BvR 1481/04), at 30: "In the German legal system, the European Convention on Human Rights has the status of a federal statute, and it must be taken into account in the interpretation of domestic law, including

The synthetic overview of the impact of both the ECHR and the case law of the ECtHR on domestic jurisdictions indicates how the gradual profiling of an original and provocative notion of "constitutional pluralism" has been put in motion without a clear hierarchical system of sources of law foundation and how European and national judges alike have been given the function of ensuring its enforcement. Here we have an important feature of a (r)evolutionary innovative phenomenon strongly favouring and conditioning a new role of the judiciary.

Fundamental Rights as a Further Set of Rules Limiting the New Supranational Governmental Power

Constitutional pluralism has found a new ground for its development in the field of protection of fundamental rights within the (not federal, and not international) supranational system of sources of law aimed at pursuing the process of European integration. In fact, the four fundamental freedoms that were present and dealt with by the treaties since the very origin of the process – free circulation of capitals, goods, services and people – did not reproduce the catalogue of fundamental rights already protected by national constitutions and by the ECHR, as the economy and the common and single market – not protection of fundamental rights – was in the agenda of the Communities first and the European Union later and now.

The issue of fundamental rights just appeared in court when it was clear that the supranational institutions could not exercise governmental powers in the economic field without at some stage having an impact on such rights and on the consequent litigation.

The Court of Justice was unable to refuse to hear the early cases in the field (an application of the principle of *non liquet*?) and, not finding a textual ground, was forced to make up a category of sources of supranational law, namely "fundamental human rights enshrined in the general principles of

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fundamental rights and constitutional guarantees"; and at 32; "The text of the Convention and the case-law of the European Court of Human Rights serve, on the level of constitutional law, as guides to interpretation in determining the content and scope of fundamental rights and constitutional principles of the Basic Law, provided that this does not lead to a restriction or reduction of protection of the individual's fundamental rights under the Basic Law". See also the judgement by the Italian Constitutional Court no. 348 (2007) at: "Since legal norms live through the interpretation which is give to them by legal practitioners, and in the first place the courts, the natural consequence of Article 32(1) of the Convention is that the international law obligations undertaken by Italy in signing and ratifying the ECHR include the duty to bring its own legislation into line with the 38 Convention, in line with the meaning attributed by the court specifically charged with its interpretation and application. It is therefore not possible to speak of the jurisdiction of a court overlapping with that of the Italian courts, but of a pre-eminent interpretative role which the signatory states have recognised in the European Court, thereby contributing to clarifying their international law obligations in that particular area" (Conclusions on points of law, at 4.6).

community law and protected by the Court".[39] Soon after, the Court declared that "the protection of such rights [is] inspired by the constitutional traditions common to the member states"[40] and that

> the Court *is bound* to draw inspiration from constitutional traditions common to the member states, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the constitutions of those states. Similarly, international treaties for the protection of human rights on which the member states have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of community law.[41]

Since its first steps, the process of European integration relied on an assertive attitude by the Court of Justice in supporting the primacy of EU law over the law of member states "however framed", inclusive, therefore, of their constitutional sources. The Italian and the German Constitutional Courts – the only constitutional courts existing in the early stage of the process – did try to resist and oppose the veil of constitutional sovereignty, but eventually they accepted that the supranational legal system needed to have rules on fundamental rights and that the supranational judiciary had a role in enforcing them.

Eventually, the treaty of Lisbon gave the Charter of Fundamental Rights (2009) the same legal value of the founding treaties as a primary source and, although implicitly, the framework of constitutional pluralism goes one step further and, on the one hand, it seems to support the hierarchical order defended by the Court of Justice, and yet, on the other, by making the access of the European Union to the ECHR mandatory, the subordination of the primacy of supranational law vis-à-vis the member states would become subject to the ECHR and to the more accommodating jurisdiction of the ECtHR.[42]

The framework of constitutional pluralism in the EU is particularly challenging because of the claim to primacy of supranational law that, although *de facto* substantively acknowledged by the member states, does not have the support of a textual foundation. Occasional clashes did and do occur, but so far they have been, in fact, more or less occasional, and a way out of the conflict has been found pragmatically by the courts themselves – supranational

39 Judgment of the Court of 12 November 1969, *Erich Stauder v City of Ulm – Sozialamt*, Case 29–69.

40 Judgment of the Court of 17 December 1970, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case 11–70.

41 Judgment of the Court of 14 May 1974. – *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, Case 4–73 (italics added).

42 As well known, the negative opinion by the Court of Justice after the first round of negotiations has led to a standstill, and at the moment the EU's access does not seem to be in the agenda.

and national – through the adoption of a cooperative attitude which has been named "judicial dialogue".[43]

Once again, the emphasis of the (r)evolutionary transition towards constitutional pluralism appears to be on the role of the judiciaries: the issue is quite relevant, among other reasons, for a double difficulty, consisting, on the one hand, in the wide margins of interpretative discretion given to courts – in any effort of theirs towards accommodating their respective understanding of the law – contrary to the preference for the political method of law-making, which is still the established paradigm in a rule of law state (*Rechtsstaat* or *État de droit*) based on separation of powers, and, on the other hand, on national sovereignty and identity, which is still (is it?) an essential component of nation-statehood in Europe.

A compromise between EU law's supremacy and member states' normative sovereignty and identity settles the potential conflict by making the Charter binding (and supreme) for the states "only when they are implementing Union law" (which is, by itself, a condition subject to a wide or narrow interpretation).[44] The rule indirectly acknowledges and gives formal status to the existence – for the member states of the EU – of two sets of rules regulating fundamental rights, one in the field of application of EU law and the other applicable within the matters reserved to national normative powers. Not a very rational setting and yet the only one available in a transition of constitutional paradigms.

Legal Pluralism and the Interaction of Legal Monism With Non-State Law and Non-State Judicial Systems

There is yet another and quite distinct understanding of "legal pluralism" as a phenomenon that is in good health and, indeed, quite vital around the

43 Reliance on the virtue of judicial dialogue has been expressed also by the member states in their constituent capacity through the InterGovernmental Conference that prepared the text of the Lisbon treaty: in fact, in the Declaration No. 2 annexed to the treaty, it is stated that: "The Conference agrees that the Union's accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms should be arranged in such a way as to preserve the specific features of Union law. In this connection, the Conference notes the existence of a regular *dialogue* between the Court of Justice of the European Union and the European Court of Human Rights; such *dialogue* could be reinforced when the Union accedes to that Convention" (emphasis added).

44 See Art. 51 of the Charter. In federal systems the tension between federal law and member states' law in the field of protection of fundamental rights is physiological, due in particular to the equality clause. In the US the supremacy of federal law in the field is the rule, to the extent of interpreting the Bill of Rights – originally written to limit the federal government – as binding also the states (incorporation theory elaborated by the Supreme Court). In Canada, a compromise between the supremacy of federal rules and the constitutional autonomy of the Provinces has been found in the so-called notwithstanding clause (according to Art. 33 of the Canadian Charter of Rights and Freedoms, a provincial law-maker has the authority to suspend the binding effect of a provision of the Charter within its own territory for a period of five years, renewable only once).

world, to the extent that – as a consequence of human mobility[45] – it has developed a process causing another challenging (r)evolutionary transition affecting, with distinct force and in more or less discrete ways, the European legal community.

So far, legal pluralism has been dealt with in the previous section in accordance with events, perspectives, theories and practices that belong entirely to the core of the Western legal tradition: both the English common law and the continental civil law, as firmly rooted in their original horizon of national legal cultures as they are, have further projected their own typical features on the international as well as, eventually, on the supranational regional sphere.

A varying combination of judge-made case law and statutory legislation – each made more robust and, at the same time, more flexible by their mutual coexistence within the ECHR and the EU – has managed to duplicate beyond national borders a legal worldview whose basic ground is the nation-state and its typical legal monism: there is no law other than state's law, and the general normative power of the state is exclusive and incompatible with any alternative system of sources of law that is determined to maintain its own original legitimacy irrespective of any state's recognition.

Paradoxically, even the constitutional pluralism developed in the last 70 years or so in the field of fundamental rights is consistent with the basic recognition of state law – even in its representation beyond borders in the form of international law and supranational law – as the only source of law admissible. Legal pluralism, as we have been considering it so far – that is, *legal pluralism of state law and state-like law* – is indeed a challenge to legal monism, and yet it is clear that both of them mainly speak the same language of exclusivity. Constitutional pluralism in the field of fundamental rights is the product of the absence of a supremacy clause unanimously recognised by each of the competing sources of law, determined to hold (at least the image of) their respective exclusivity as immune from change. In this sense, legal pluralism entails a pluralisation of legal monism, of its methods of law-making and of its typical characters. The conflict – whether virtual or actual – takes place between and among entities that share the same genetic code.

The alternative concept of legal pluralism to be considered now – that is, *legal pluralism of state law and non-state law* – is related to the coexistence within a same state's legal setting of sources of law that belong to distinct and different legal traditions[46] (or families)[47] as it happens in mixed (or hybrid)

45 That human mobility brings along legal mobility through a more or less mechanic cause-effect relationship has been witnessed throughout history: colonialists carried their laws with them in the past just as immigrants do it now, the dominant position having remained the same.

46 See H. Patrick Glenn: *Legal Traditions of the World. Sustainable Diversity in Law*, 5th ed. Cambridge University Press, Cambridge 2014.

47 See René David, Camille Jauffret-Spinosi, Marie Goré: *Les Grands systèmes de droit contemporains*, 12th ed. Dalloz 2016.

jurisdictions where more than one legal tradition is physiologically and lawfully in force.[48]

Pluralism of legal traditions within the same state legal order mainly involves a contextual and distinct force of state law, chthonic (or indigenous, or tribal, or customary) law and religious law; consequently – although not necessarily – even the presence of a plural setting of differentiated judicial bodies is involved, each enforcing their respective legal tradition (nevertheless, a state court is often given the supreme role of ensuring some level of uniformity to the distinctiveness of their rulings).

This is, in fact, a permanent institutional feature of those jurisdictions – in Africa, in Asia, in Latin America – where, since before colonial times and still nowadays, primary bonds of identity of individuals with their community of origin have not disappeared and, what is most relevant, have not been replaced by the introduction of a uniform and unitary notion of equal citizenship (one of the crucial factors of modernisation in the West). Furthermore, in those extra-European areas of the world, governmental functions are not structured in a way that regards equal state citizenship as the basic and even exclusive foundation of individuals' identity, allegiance, and entitlements to rights and benefits.

In spite of this interesting state of the world, in our present context the focus is not on legal pluralism *per se* but on the emergence of growing fragments of legal pluralism in the West. The theoretical and historical background is that state-centric legal monism has been able to assert itself leaving out of the official legal sphere all other competing non-state sources of law (religious law, customary law) that nevertheless have continued having an impact on some sectors in society. At the present stage, the phenomenon has increased its articulation and relevance.

Needless to say, in fact, such a dynamic has an origin in the wide and deep transformation of the social and cultural fabric of Western societies, due to human mobility, to (old and new) immigration, to a relevant number of asylum seekers, to an increase in the number of countries hosting waves of men and women and children from abroad (many countries of emigration having become, more recently, host to immigrants).

Due to several reasons – such as objective cultural differences, scared perceptions of the impact of the high numbers of foreigners on security as well as the uncontrolled unveiling of some concealed traces of racism – the implementation of reasonable policies of integration to a large extent failed.

48 On the constant dynamic evolution of mixed legal systems, see Sue Farran, Esin Örücü, Sean Patrick Donlan (eds.): *A Study of Mixed Legal Systems: Endangered, Entrenched or Blended*. Routledge 2014. For a (partial) list and a world map of mixed systems (combining civil law and common law; civil law and customary law; common law and customary law; civil law and Muslim law; common law and Muslim law; civil law, Muslim law and customary law; civil law, common law and customary law; common law, civil law, Muslim law and customary law; civil law, common law, Jewish law and Muslim law; Muslim law and customary law), see www.juriglobe.ca/eng/sys-juri/class-poli/sys-mixtes.php (accessed 3 February 2020).

Multiculturalism, as the peaceful and separated coexistence of several culturally identified communities, never developed (if not in lip-service official rhetoric) into a coherent intercultural approach directed to finding ways of accommodation of diversities consistent with a determination to avoid (more or less forced) assimilation or marginalisation. At the same time, once again, reference is to be made to the impact of numbers on social behaviour, in the sense that the larger the foreign cultural or ethnic community, the stronger their inclination to live as if they were in their home country, whose system of legal pluralism is consistent with the enforcement of their own community's customary or religious rules.

It is such inclination to choose one's own rules as an alternative to the host country's laws that has put in motion the drive towards (forms of) legal pluralism in Western societies. The phenomenon is not structured as a homogenous political movement inspired by a unitary ideological manifesto and by putting forward rationalised claims requiring the elaboration of policies and the enactment of legislation. Its manifestation is, rather, at a grassroots level, and takes form through punctual requests to single branches of the administration, or to institutions of local government and, more often, through litigation in court (when those requests are not met).[49]

It is important at this stage to recall a vision of legal pluralism elaborated through the contribution of an anthropological standpoint[50] and, within it, a main distinction between legal pluralism in a strong sense and in a weak sense: the former has its own intrinsic and independent source of validity while the latter's applicability depends on some recognition by a state authority.[51]

Any further reasoning in the present context will assume the interaction between a plurality of legal traditions and state legal monism to take place within the framework of a legal pluralism in the weak sense – in spite of what appears to be an irremediable theoretical contradiction[52] – because, realistically,

49 See Cinzia Piciocchi: *Courts, Pluralism and Law in the Everyday. Food, Clothing and Days of Rest*. Routledge 2024.

50 See John Griffith: What is Legal Pluralism?, in: *The Journal of Legal Pluralism and Unofficial Law* 1986, for the definition of "the ideology of legal centralism", according to which "law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions. To the extent that other, less normative legal orderings, such as the church, the family, the voluntary association and the economic organization exist, they ought to be and in fact are hierarchically subordinate to the law and institutions of the state", 3. And "legal pluralism is the fact. Legal centralism is a myth, a claim, an ideal, an illusion", ibid., 4.

51 In this ("weak") sense, a legal system is "pluralistic" when the sovereign (implicitly) commands (or the *grundnorm* validates, and so on) different bodies of law for different groups in the population. In general the groups concerned are defined in terms of features such as ethnicity, religion, nationality or geography, and legal pluralism is justified as a technique of governance on pragmatic grounds", ibid., 5.

52 See John Griffiths: "It would be a complete confusion to think of 'legal pluralism' in the weak sense as fundamentally inconsistent with the ideology of legal centralism. It is merely a

it is within such a framework that the challenge of legal pluralism is developing in our time as a consequence of the indicated social and cultural transformations. A consistent manifestation of this approach is the policy of accommodation and its operational tools that ultimately finds in judicial adjudication its most sophisticated expression.

Case Law Indicating Attempts at Indirect Accommodation of Claims to Weak Legal Pluralism Through Adaptation and Interpretation of State Law

The focus, consequently, must concentrate on ways, tools and limits employed by a state's legal monism in order to accommodate – or not – a larger set of claims requesting an equal and non-discriminatory regulation of cultural diversities and consequently adapt hosting the legal setting. An international or supranational framework, inasmuch as they faithfully reflect the typical state legal monist approach and may be regarded as fairly representative, is often and properly to be referred to.

In the field of ethnic customary law, a case started in Spain and then moved to the ECtHR provides a good example of a negative attitude concerning a direct recognition of any legal effects to this specific source of non-state law: the facts concern a couple, both members of the Roma community, living in Spain with their six children, registered in the family record book and since 1986 granted first-category large-family status by the Spanish civil registration authorities. They were married in 1971,

> according to their community's own rites. The marriage was solemnised in accordance with Roma customs and cultural traditions and was recognised by that community. For the Roma community, a marriage solemnised according to its customs gives rise to the usual social effects, to public recognition, to an obligation to live together and to all other rights and duties that are inherent in the institution of marriage.[53]

When, in 2000, the husband passed the way – after paying social security contributions for 19 years – authorities communicated to the widow that the survivor's pension could not be paid because she had never properly been the wife of the deceased prior to the date of his death.[54]

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particular arrangement in a system whose basic ideology is centralist. . . . The very notion of 'recognition' and all the doctrinal paraphernalia which it brings with it are typical reflections of the ides that 'law' must ultimately depend from a single validating source. 'Legal pluralism' is thus but one of the forms in which the ideology of legal centralism can manifest itself", 8.

53 See *Muñoz Díaz v. Spain*, Application no. 49151/07, 8 December 2009, at 8–10.

54 The first Spanish Labour Court that heard the case did acknowledge that "in our country the Roma minority (*etnia gitana*) has been present since time immemorial and it is known that this minority solemnises marriage according to rites and traditions that are legally binding on

The case reached the ECtHR: the Strasbourg Court did somehow acknowledge the relevance of the historical and cultural factor, coupled with the minority status of the Roma community: "while the fact of belonging to a minority does not create an exemption from complying with marriage laws, it may have an effect on the manner in which those laws are applied".[55]

And yet, the ground for the ruling in favour of Mrs. Muñoz Díaz is well rooted in principles of state law: the cultural and customary rule offers the factual background for deciding that

> the applicant's good faith as to the validity of her marriage, being confirmed by the authorities' official recognition of her situation, gave her a legitimate expectation of being regarded as the spouse of M.D. and of forming a recognised married couple with him [and] consequently, the refusal to recognise the applicant as a spouse for the purposes of the survivor's pension was at odds with the authorities' previous recognition of such status. Moreover, the applicant's particular social and cultural

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the parties. These marriages are not regarded as being contrary to morality or public order and are recognised socially". Nevertheless, "Article 61 of the Civil Code provides that marriage has civil effects from the time it is solemnised but that it must be registered in the Civil Register if those effects are to be recognised. Roma marriages are not registered in the Civil Register because they have not been regarded by the State as a feature of the ethnic culture which has existed in our country for centuries", ibid. at 14. The case was eventually decided by the Labour Court in favour of the woman on a normative ground based on several sources: the Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, the United Nations International Convention on the Elimination of All Forms of Racial Discrimination (1966) ratified by Spain, the Spanish Constitution (Art. 14, principle of equality), with reference as well to analogy to comparable situations in accordance to art. 4 of the civil code (the Court wrote: "Roma marriage is not covered by Spanish legislation, in spite of that ethnic minority's social and cultural roots in our country. However, as noted above, marriages solemnised according to certain religious rites and customs that were, until quite recently, foreign to our society, [do] have a legal framework. These are therefore similar cases, albeit that it is not a religion that is concerned here. They have a similar object (community of cultures and customs present within the Spanish State"). In other words, ethnic customs did indirectly matter, but ultimately sources of state law only are allowed to decide the case. Further courts – including the Constitutional Court (judgment on *amparo* of 16 April 2007), with an interesting dissenting opinion – did not even go that far.

55 See *Muñoz Díaz v. Spain*: "she belongs to a community within which the validity of the marriage, according to its own rites and traditions, has never been disputed or regarded as being contrary to public order by the Government or the domestic authorities, which even recognised in certain respects the applicant's status as spouse. The Court takes the view that the force of the collective beliefs of a community that is well-defined culturally cannot be ignored", ibid. at 59; and "there is an emerging international consensus among the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle . . . not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity that is of value to the whole community", ibid. at 59); "the vulnerable position of Roma means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases", ibid. at 62.

> situation were not taken into account in order to assess her good faith [and, finally,] in the circumstances of the present case, the applicant's situation reveals a disproportionate difference in treatment in relation to the treatment of marriages that are believed in good faith to exist.[56]

In another perspective, religious law and its cultural context are indirectly relevant in shaping state law, although without having legal effects of their own. An example comes from a case decided by the ECtHR concerning the incompatibility between European adoption and Islamic *kafalah* – or "legal care", protecting a minor child in the same manner as a father would care for his son – and is a consequence of the prohibition of adoption by Islamic law and by the law of most Islamic states.[57]

The facts: Ms. Harroudj, an Algerian lady living in France, requested to have a formal adoption of a girl with whom she had a relationship of *kafalah* granted by an Algerian court. As the ECtHR recalls in its judgement, under Islamic law adoption is prohibited and is replaced by *kafala*, as in Algeria, whose Family Code reads that "adoption (tabanni) is prohibited by the Sharia and by legislation" (Art. 46). In France, Art. 370–3 of the Civil Code (inserted by the Law of 6 February 2001) rules that "adoption of a foreign minor may not be ordered where his or her personal law prohibits that institution". In other words, French legislation has been adapted in order to give priority to its own consistency with Algerian state law and, indirectly, to sharia law rather than to the individual concern of an adopting mother and of a girl to be adopted. In doing so, France has not violated the right to respect for private and family life of the applicant (art. 8 of the ECHR) and, quite to the contrary, has recognised the relevance of the child's legal and religious original context.[58]

Religious precepts – not religious law – nevertheless, play quite a different role with regard to the recognition of conscientious objection, as the way that allows individual exemption from public duties and (seldom) private obligations on religious, philosophical or ideological ground.

The recognition of freedom of conscience, often jointly normatively framed with freedom of religion and opinion, includes the right not to act contrary to one's conscience and convictions.[59] An important endorsement of conscien-

56 See *Muñoz Díaz v. Spain*, at 63–65.

57 See *Harroudj v. France*, Application no. 43631/09, 4 October 2012.

58 It is important to stress that Art. 20.3 of the United Nations' Convention on the Rights of the Child (1990), ratified by France, makes reference to alternative instruments for the guardianship of minors ("Such care could include, inter alia, foster placement, *kafalah* of Islamic law, adoption or if necessary placement in suitable institutions for the care of children") and emphasises that "When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background".

59 See ECHR, Art. 9 (freedom of thought, conscience and religion) and CFREU, Art. 10 (freedom of thought, conscience and religion). The latter explicitly recognises "the right to conscientious objection . . . in accordance with the national laws governing the exercise of this

tious objection to armed military service has been provided by the case law of the ECtHR, which ruled that

> opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person's conscience or his deeply and genuinely held religious or other beliefs, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9.[60]

Case Law Indicating That No Accommodation May Be Achieved Between State Law and Claims to Weak Legal Pluralism

A firm indifference is applied to religious law as a possibly valid source producing legal effects in the recognition of what is regarded as a "private divorce":[61] the case concerns a couple, both with German and Syrian nationality, married in 1999 within the jurisdiction of the Islamic Court in Syria. In 2013, Mr Mamisch declared his intention to dissolve his marriage by having his representative pronounce the divorce formula before the religious sharia court in Syria, and that court declared the couple divorced. Ms Sahyouni consequently signed a declaration that she was to receive from Mr Mamisch, under religious law, an established amount of money on the basis of the unilateral divorce. The stage of recognition of the effects of such divorce raised litigation in front of German courts and, in response to a request for a preliminary ruling, the Court of Justice declared that the relevant EU Regulations covers "solely divorces pronounced either by a national court or by, or under the supervision of, a public authority" and, therefore, "a divorce resulting from a unilateral declaration made by one of the spouses before a religious court, such as that

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right". No further reference to material areas of protection is provided, leaving it up to case law to specify the scope of protection. An example is provided by a decision where "the Court notes that in the instant case the applicants, who are the joint owners of a pharmacy, submitted that their religious beliefs justified their refusal to sell contraceptive pills in their dispensary. It considers that, as long as the sale of contraceptives is legal and occurs on medical prescription nowhere other than in a pharmacy, the applicants cannot give precedence to their religious beliefs and impose them on others as justification for their refusal to sell such products, since they can manifest those beliefs in many ways outside the professional sphere", *Pichon and Sajous v. France*, Application No. 49853/99, 2 October 2001.

60 ECtHR, *Bayatyan v. Armenia*, Application no. 23459/03, 7 July 2011, at 110. The Court further declared that "almost all the member States of the Council of Europe which ever had or still have compulsory military service have introduced alternatives to such service in order to reconcile the possible conflict between individual conscience and military obligations. Accordingly, a State which has not done so enjoys only a limited margin of appreciation and must advance convincing and compelling reasons to justify any interference. In particular, it must demonstrate that the interference corresponds to a pressing social need", ibid., at 123.

61 See *Soha Sahyouni v. Raja Mamisch*, Case C-372/16, 20 December 2017. The preliminary ruling affects the area of freedom, security and justice, in view of the enhanced cooperation in the area of the law applicable to divorce and legal separation.

at issue in the main proceedings, does not come within the substantive scope of that regulation".[62]

The case law of the ECtHR is consistent in its interpretation of the ECHR according to which "freedom of religion does not require the Contracting States to create a particular legal framework in order to grant religious communities a special status entailing specific privileges". And, if a state has introduced such a privilege in its own legal setting, its application must be non-discriminatory and, therefore, strictly voluntary.[63]

Another emblematic decision by ECtHR rules in support of state law concerning a religious and cultural background and, within it, the individual right to one's own cultural and religious identity in favour of upholding the primacy of collective goods such as the value of "living together" qualified as an element of the "protection of the rights and freedoms of others". In its decision the ECtHR upheld the French ban on wearing, in public places, clothing designed to conceal the face over arguments that it would have given the priority to the right to respect for private life of women who wish to wear the full-face veil for reasons related to their beliefs as well as to the freedom to manifest those beliefs (articles 8 and 9 of the Convention).[64]

Freedom of religion presents a wide area of interaction between state law and claims for exemptions from enforcement of general rules or requests of special rules for residents (in fact, not only foreigners) who are members of religious communities. Rather than reaching the conclusion – somehow oversimplified – that religious freedom is not evenly and adequately protected, it would be fair to admit that principles and rules regulating it were generated in a historical period when the horizon of religions actually practiced within European borders was by far less plural and exotic than the one experienced in our times, and secularism had already achieved a first settlement of conflicts.

62 See *Soha Sahyouni v. Raja Mamisch*, at 48, 49. Further interesting reasoning, dealing in particular with issues of private international law and inconsistency of the specific private divorce – among others, on ground of discriminatory treatment of the wife – with the public policy of the forum see the Opinion of the Advocate General Henrik Saugmandsgaard Øe.

63 See ECtHR (Grand Chamber) Case of *Molla Sali v. Greece*, Application no. 20452/14, 19 December 2018, at 155. The Court further states that "Refusing members of a religious minority the right to voluntarily opt for and benefit from ordinary law amounts not only to discriminatory treatment but also to a breach of a right of cardinal importance in the field of protection of minorities, that is to say the right to free self-identification", at 157. With reference to the facts under scrutiny, the Court emphasises "that Greece is the only country in Europe which, up until the material time, applied Sharia law to a section of its citizens against their wishes. This is particularly problematic in the present case because the application of Sharia law caused a situation that was detrimental to the individual rights of a widow who had inherited her husband's estate in accordance with the rules of civil law but who then found herself in a legal situation which neither she nor her husband had intended", ibid. at 158.

64 See *S.A.S. v France (Grand Chamber)*, Application no. 43835/11, 1 July 2014 with two interesting dissenting opinions.

Whether the present settlement is going to be permanent or provisional – under the pressure of the current *militantisme religieux* – may be an open question.[65] At present, it is fair to emphasise, once again, the crucial role played by the judiciary in keeping the balance between religion in the public sphere and within individual conscience as well as between freedom of religion and its limits.[66]

An Attitude Favourable to Some Accommodation Between State Law and Claims to Weak Legal Pluralism Through New and Innovative Instruments

Careful attention needs to be paid also to some *ad hoc* original instruments that appear to have been recently put in place to deal with the new multicultural scenario.

One of them is the twofold process – scientific and judicial – of consolidation of a new specific category of crime known as "cultural offence" (or "culturally motivated crime"), which owes its scientific elaboration to the contribution of legal anthropology focusing on clashes of cultural norms in court[67] and its judicial acceptance to the practice of "cultural defence".[68]

65 See András Sajo: Introduction à une conception laïque du constitutionnalisme. Prélude à un concept de laïcité constitutionnelle, in: Hélène Ruiz Fabri, Michel Rosenfeld (dir): *Repenser le constitutionnalisme à l'âge de la mondialisation et de la privatisation*. Societeé de Législation Comparée 2011. In the perspective here taken into consideration, an interesting concluding comment states that "the challenge of organizing religious pluralism and of regulating it in and by means of the law is the same everywhere, because the trouble spots are transnational. In other words, Europe does not seem to be divided between religious or convictional currents, but rather between those who place religious norms in the realm of the individual conscience and those (conservatives of all types, whether Catholic, Protestant, evangelical or Muslim) who invite them into the core of the political debate and decision-making process", Caroline Sägesser, Jan Nelis, Jean-Philippe Schreiber, Cécile Vanderpelen-Diagre: *Religion and secularism in the European Union*. Observatory of Religions and Secularism (ORELA), Université libre de Bruxelles, September 2018, p. 122.

66 It has been stated that "even when limitations are expressly spelled out, much still depends on the intellectual construct that judiciaries develop (e.g., balancing, proportionality, compelling state-interest tests, narrow tailoring, etc.) in applying constitutional limitation provisions in specific cases", W. Cole Durham, Jr., Carolyn Evans: Freedom of Religion and Religion-State Relations, in: Mark Tushnet, Thomas Fleiner, Cheryl Saunders (eds.): *Routledge Handbook of Constitutional Law*. Routledge 2013.

67 See Marie-Claire Foblets: Cultural Delicts: The Repercussion of Cultural Conflicts on Delinquent Behaviour. Reflections on the Contribution of Legal Anthropology to a Contemporary Debate, in: *European Journal of Crime, Criminal Law and Criminal Justice* (1998); Marie-Claire Foblets: Les délits culturels: de la répercussion des conflits de culture sur la conduite délinquante. Réflexions sur l'apport de l'anthropologie du droit à un débat contemporain, in: *Droit et Cultures* (1998); Marie-Claire Foblets, Alison Dundes Renteln (eds.): *Multicultural Jurisprudence. Comparative Perspectives on the Cultural Defense*. Hart 2009.

68 See Alison Dundes Renteln: The Use and Abuse of the Cultural Defense, in: *Canadian Journal of Law and Society/Revue Canadienne Droit et Société* 20 (2005), pp. 47–67; Alison Dundes Renteln: In Defense of Culture in the Courtroom, in: Rick Shweder, Martha Minow,

The purpose of cultural defence is to achieve mitigating effects on the actual punishment of an individual because of the strong influence that culture exerts on his or her behaviour in violation of criminal rules. In other words, the thesis holds that an individual, while in a foreign environment, would still instinctively think and behave in a way that is consistent with patterns of his or her own culture of origin rather that with criteria – legal, social or otherwise – of the host country.[69]

In fact, a cultural offence has been defined as

> an act by a member of a minority culture, which is considered an offence by the legal system of the dominant culture. That same act is nevertheless, within the cultural group of the offender, condoned, accepted as normal behaviour and approved or even endorsed and promoted in the given situation.[70]

It is necessary to avoid that cultural diversity, *per se* and in all circumstances, be used and abused as a blanket justification annulling any criminal liability, and a specific procedure has been suggested in order to restrict it to those cases that most need it.[71]

Strictly connected to the notion of culturally motivated crimes is yet another "instrument of accommodation" of a conflict between cultures: the concept of "cultural expertise" is a resource available in legislative, administrative and, in particular, in judicial contexts. The judge – as well as the public prosecutor and the counsel – could very seldom have a personal expertise of their own

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Hazel Rose-Markus (eds.): *Engaging Cultural Differences: The Multicultural Challenge in Liberal Democracies.* Russell Sage 2002.

69 Well-known examples of this kind of behaviour normally held in some parts of the world and practiced also by immigrants in the host European country are female circumcision (excision), violence and sexual violence against women, murder or violence motivated by the protection of one's honour, witchcraft and the burning of alleged witches (on this last phenomenon, see UN High Commissioner for Refugees (UNHCR): *Witchcraft allegations, refugee protection and human rights: a review of the evidence*, Research Paper No. 169, 2006). In fact, the phenomenon is not restricted to criminal behaviour, but is present in other areas as well, as in the framework of family relationships where the influence of cultural factors is very strong.

70 Jeroen Van Broeck: Cultural Defence and Culturally Motivated Crimes (Cultural Offences), in: *European Journal of Crime, Criminal Law and Criminal Justice* 9 (2001) 1.

71 The procedure is described as follows: "In order to identify a cultural offence in practice, a three-step reasoning is proposed. In a first step, one needs to look for the subjective motivation or justification as used by the offender himself. Once this person claims to have acted according to certain cultural norms, one needs to control whether or not other members of the cultural group of the offender agree with that view, whether or not they estimate his actions appropriate in the given situation. This way, this subjective reasoning is objectified and one can control if there is a cultural basis and background for the actions of the offender and if he conformed to this background. In a third step, which can already be deduced from the second one, the culture of the offender is compared with the norms of the dominant culture and the decision is thus made", in Van Broeck, 2001, p. 23.

in assessing if and to what extent the cultural factor is to be admitted to the determination of the criminal liability of an offender whose background is far away from the values and criteria of conduct of the system; in such a case, the need is being able to rely on the professional abilities of experts in both law and cultures who would supplement the judicial actors with an appropriate qualification of facts and acts of the criminal case.[72]

Another recent emblematic trend – following an approach that clearly privileges assimilation rather than accommodation – may be described as the establishment of instruments that frame immigrants' integration within the host environment more as an individual obligation to integrate than as a policy to be enforced by the authorities. In several countries (the Netherlands, Austria, Belgium, United Kingdom, and others), since the 1980s, immigrants are required to sign formal "contracts of integration" listing a number of duties (respecting laws and customs of the host countries, learning the language, achieving a sufficient knowledge of the country, paying taxes regularly, participating to mandatory courses of civics, in general doing their best for making integration effective). The contractual tool is employed in order to give visibility to the commitment by immigrants and qualify expulsion (if that is the case) as a sanction for the violation of a contractual obligation.[73]

Another way that is instrumental towards accommodation in a context of legal pluralism is a state's tolerant attitude concerning the activities of arbitration in family matters (marriage, divorce, mediation),[74] as is the case of *Shariah Councils* (and of a *Muslim Arbitration Tribunal*, registered under the *Arbitration Act*) operating in the United Kingdom.[75] Although their decisions

72 See Livia Holden (ed.): *Cultural Expertise and Litigation. Patterns, Conflicts, Narratives.* Routledge, GlassHouse Book, 2011; Austin Sarat (ed.), Livia Holden (spec. ed.): Cultural Expertise and Socio-Legal Studies: special issue, *Studies in Law, Politics, and Society*, 2019; Ilenia Ruggiu: *Culture and the Judiciary. The Anthropologist Judge.* Routledge 2019.

73 For a critical assessment, holding that while integration "is now framed as a 'two way' process or a contractual agreement between migrants and the host society . . . despite the deployment of the notion of a contract, integration is, in reality, a one way process aimed at procuring conformity, discipline and migration control", see Dora Kostakopoulou: Anatomy of Civic Integration, in: *The Modern Law Review* 73 (2010) 6, p. 932. See also Sara Wallace Goodman: Integration Requirements for Integration's Sake? Identifying, Categorising and Comparing Civic Integration Policies, in: *Journal of Ethnic and Migration Studies* 36 (2010) 5, p. 753, where a civic integration index (CIVIX) to measure language, country knowledge and value-commitment requirements is suggested.

74 The perspective of a vague recognition of Islamic Shariah Law in England was mentioned and somehow supported by a public lecture of Rowan Douglas Williams, Archbishop of Canterbury, in 2008 that significantly contributed to raising the awareness of the problem.

75 For a full account of the services provided by the Muslim Law Shariah Council, see www.shariahcouncil.org. In particular, under "Our Vision and Policy", one can read the following statements: "1. The Council provides assistance, guidance and resolution to married Muslim men and women seeking reconciliation or an Islamic divorce (talaaq). 2. The Council does not provide a parallel judiciary service and only aims to offer a mechanism for obtaining an Islamic divorce, a religious obligation in Islam, which is not currently obtainable through the

do not have any official recognition by state authorities and do not produce legally binding effects in the state's legal order,[76] the functions performed by such private institutions are highly appreciated by individuals belonging to the Islamic community as long as they are able to achieve the results desired within the sphere of religious law.[77]

Final Remarks

History, legal culture and the comparative method ought to inspire and assist the jurist in rationalising (r)evolutionary constitutional transitions: evolutionary in the sense that such transitions are not the outcome of a punctual event that at a given time in history radically breaks away from the past and establishes a legal *tabula rasa* for a brand new self-legitimising system of sources of law, and yet revolutionary in so far as the transition does affect – although without replacing them – vital paradigms of the old system, so that (and the dynamic of the transition appears to be evolutionary once again) current

English courts and legal system. 3. The Council does not adjudicate on any other matters or disputes and advises its clients to refer to the English courts in all such other cases. 4. The Council maintains a policy of avoiding conflict between the law of the land and Islamic law in its deliberation".

76 In ECtHR, *Molla Sali v. Greece (Grand Chamber)*, Application no. 20452/14), 19 December 2018, the Court, after a comparative survey of member states' jurisdictions, declares that: "It appears from the documents available to the Court concerning the legislation of Council of Europe member States that Sharia law can be applied in all those States as a source of foreign law in the event of a conflict of laws in the context of private international law. In such cases, however, Islamic law is not applied as such but as the law of a (non-European) sovereign State, subject to the requirements of public-policy", at 82. And that "In another State (the United Kingdom), in May 2016 the government commissioned an independent review into the application of Sharia law (in England and Wales) in order to consider whether Sharia law is being misused or applied in a way that is incompatible with the domestic law in England and Wales, and in particular whether there were discriminatory practices against women who use sharia councils". In its report of February 2018, that independent review explained that "Sharia councils have no legal status and no legal binding authority under civil law. Whilst sharia is a source of guidance for many Muslims, sharia councils have no legal jurisdiction in England and Wales. Thus if any decisions or recommendations are made by a sharia council that are inconsistent with domestic law (including equality policies such as the Equality Act 2010) domestic law will prevail. Sharia councils will be acting illegally should they seek to exclude domestic law. Although they claim no binding legal authority, they do in fact act in a decision-making capacity when dealing with Islamic divorce", at 83.

77 A thoroughly opposite attitude, consistent with a view of integration policies quite closer to assimilation, is expressed by the movement named "Save Our State" that sponsored a people's initiative for amending the Constitution of Oklahoma by adding a provision according to which "The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia Law". The amendment was approved by the voters but was eventually invalidated by e federal court. On the issue, see John T. Parry: Oklahoma's Save Our State Amendment and the Conflict of Laws, in: *Oklahoma Law Review* 65 (2012) 1. See also Aaron Fellmeth: U.S. State Legislation to Limit Use of International and Foreign Law, in: *American Journal of International Law* 106 (2012) 1, pp. 107–117.

developments may be regarded, as it were, as transitional, not final and fairly – if not fully – consistent with the previous arrangements.

The analysis has dealt with our contemporary experience in the field of normative definition and judicial protection of fundamental rights, which is a very sensitive and crucial material area of public concern, for states and citizens alike. Both kinds of legal pluralism entail a challenge to the ability of the legal system to manage unwanted consequences in this area.

The way we look at such issues is directly influenced by the two dynamics of legal pluralism, although they are distinct from one another.[78] Globalisation of the law – whatever it exactly implies – contributes to the dynamic transformation of the context and of the constitutional phenomenon in particular.[79]

In the first case – that we might name "normative pluralism" – international and supranational sources of law share the same rational structure that reflects typical features of states' systems of law, including the virtual primacy of the political method of law-making as well as the judicial power of "finding" the law (both in common law and codified law) through interpretation.

In the second case – that we have classified as "legal pluralism in the weak sense", founded on recognition by the state of competing and alternative legal traditions – the original distinctiveness of the law, whether it depends on a religious revelation or on communitarian customs, must ultimately rely on an assessment of its consistency with state law as long as state law so declares.

The nation-state is still there, in charge of regulating the transition from one to another set of paradigms, hence the qualification of the current transition not as evolutionary or revolutionary but as (r)evolutionary.

This main feature is evident when, in the framework of normative pluralism, we think of the state-centred reactions to the primacy of EU law at least as far as fundamental rights are concerned, as indicated, among other symptoms, by the amendments to the Charter of Fundamental Rights introduced between the adoption of the Charter (Nice, 2000) and the attribution to it of "the same legal force as the treaties" (Lisbon, 2007), or by the Explanations attached to it.[80] The same kind of evidence that is disclosed by the recent emphasis on the

78 On such distinction, see William Twining: Normative and Legal Pluralism: A Global Perspective, in: *Duke Journal of Comparative and International Law* 20 (2010), p. 473.

79 See Roberto Toniatti: Comparing Constitutions in the Global Era: Opportunities, Purpose, Challenges, in: *Kansas Law Review* 67 (2019), p. 693; Alec Stone Sweet: Constitutionalism, Legal Pluralism, and International Regimes, in: *Indiana Journal of Global Legal Studies* 16 (2009), p. 622; Paul Schiff Berman: Global Legal Pluralism, in: *Southern California Law Review* 80 (2007), p. 1155.

80 See the introduction to the Explanations relating to the Charter of Fundamental Rights ("These explanations were originally prepared under the authority of the Praesidium of the Convention which drafted the Charter of Fundamental Rights of the European Union. They have been updated under the responsibility of the Praesidium of the European Convention, in the light of the drafting adjustments made to the text of the Charter by that Convention (notably to Articles 51 and 52) and of further developments of Union law. *Although they do*

principle of judicial subsidiarity and the newly emphasised relevance of the national judge in the enforcement of the ECHR in a context of formalisation of the "national margin of appreciation doctrine" that was originally elaborated by the Court as a voluntary manifestation of judicial deference and has developed now into a structural warning on judicial independence.

The persistence of states' centrality is even more strongly confirmed when it has to deal with weak legal pluralism: the final word – whether in adapting state law or recognising the distinct cultural background or introducing new instruments of accommodation – belongs always to states' authorities and their assessment.[81] Comparative research in this area is ever more crucial to the purpose of detecting any even small development that may turn out to be important, not only as a source of information on relevant practices but also as hints of intuition and suggestions that might lead to wider theoretical speculations on the very notion of law that is particularly relevant in our era of globalisation.[82]

Developments are expected to affect the social perception of legal phenomena before they reach the stage either of formal rule-making or, more likely, of judicial interpretation of the law as (they say) it is.[83] In many circumstances, courts play the role of "cultural sensors" able to understand the degree of social acceptance of diversities and their cautious inclusion in the

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not as such have the status of law, they are a valuable tool of interpretation intended to clarify the provisions of the Charter"), emphasis added.

81 See Ralph Grillo, Roger Ballard, Alessandro Ferrari, André J. Hoekema, Marcel Maussen, Prakash Shah (eds.): *Legal Practice and Cultural Diversity*. Ashgate 2009; Marie-Claire Foblets, Jean-François Gaudreault-DesBiens, Alison Dundes Renteln (eds.): *Cultural Diversity and the Law. State Responses from Around the World*. Bruylant, Éditions Yvon Blais 2010; Giselle Corradi, Eva Brems, Mark Goodale (eds.): *Human Rights Encounter Legal Pluralism. Normative and Empirical Approaches*. Hart, Bloomsbury 2017; Ralph Grillo: *Interculturalism and the Politics of Dialogue*. B and RG Books of Lewes 2018.

82 A proposal of an adequate specific theoretical framework depends very much on the scientific authority of scholars, as is the case of William Twining: *General Jurisprudence. Understanding Law from a Global Perspective*. Cambridge University Press, Cambridge 2009, when it is specified that "the primary objective of the institutionalised discipline of law is understanding law (i.e., the main subject matters of the discipline). The scope and nature of these subject matters has long been contested with differing views falling into two internally varied camps: a narrow view that treats law as doctrine – rules, principles, concepts, and rule systems – and a more expansive view, which extends beyond doctrine to include social practices, institutions, processes, and personnel, as well as rules", at p. 443. See also H. Patrick Glenn: *The Cosmopolitan State*. Oxford University Press, Oxford 2013.

83 For a detailed treatment of "signs of a qualitative transformation of the interpretative practice can indeed be found in different areas of transnational rules application. In particular, the independent and creative use of comparative legal inquiry seems unprecedented. This method is nowadays directly used for the construction of transnational norms pf both public and private origin and occasionally (as in the *lex mercatoria* cases) also for the discovery and expression of the rules themselves", Joanna Jemielniak, Przemisław Mikłaszewicz (eds.): *Interpretation of Law in the Global World: From Particularism to a Universal Approach*. Springer 2010, p. 16.

legal system within the framework of the existing mainstream paradigm. In other words, the challenge of legal pluralisms on legal monism is mediated and filtered by the judiciary, and the relevance of their interpretative function is greatly enhanced. Leonid Pitamic's understanding of "law and revolution", perhaps an intuition in his own time, is now confirmed as sound contemporary scholarship.

20 Shall the Justice of the Whole Earth Not Do Justice?[1]

The Revolutionary Copernican Moment in the Relationship of God's Law, Humanity and Justice

Joseph H. H. Weiler

Preface

Western culture, of which the Judeo-Christian tradition is one fundamental pillar, has, in times recent and past, grappled with an enduring tension in the relationship between divine normativity and human moral sensibility. In a way this tension is but a reflection between Jerusalem and Athens, with Athens and its more modern iteration in the Enlightenment as the other principal pillar of Western civilization.

In theory, such a tension should not exist, at least not in the Abrahamic monotheistic tradition. The transcendental God of the Old and New Testaments is the God of Justice. Following in His path (Imitatio Dei) is not only the path to Sanctification (Jewish tradition) and Salvation (Christian tradition) but is the path of righteousness for the individual and society as a whole. The enduring tension is, and has been, evident from time immemorial, not least in the Biblical texts themselves: What if the divine command, the divine law, conflicts with our human, evolving sensibility of right and wrong? Which is one to follow?

1 I have used throughout the text the New King James Version (NKJV) of the Bible, but I have taken the liberty of "correcting" the NKJV in this one key passage (Gen. 18:25). The NKJV renders the original Hebrew – Hashofet Kol Haaretz Lo Yaaseh Mishpat – as "Shall not the judge of all the earth do right?", but I have rendered it as "Shall the Justice [in the sense of Judge – as in several legal systems] of the whole earth not do Justice?". The reason for the change is that the NKJV rendition loses the poetic beauty and allusive phonetic connection in the original Hebrew of the word Judge and that which the judge should do. *Shft and mshpt*. Additionally, in this context the translation of Mishpat as "right", which works well in some languages, e.g., German, is clumsy. In the context of v. 25, "do justice", as is used in other translations, is to be preferred. In this, I follow the rightly praised Alter Translation. And see, e.g., CEI, "Forse il giudice di tutta la terra non praticherà la giustizia?"; Louis Segund, "Celui qui juge toute la terre n'exercera-t-il pas la justice?"; Biblia Gdanska, "Izali Sędzia wszystkiej ziemi nie uczyni sprawiedliwości?"

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The so-called Old Testament is replete with such examples. Think, to pick just one of many, of the Binding of Isaac, where Kierkegaard famously crowned Abraham as the Knight of Faith. Knight of faith he might be:

> But the Angel of the LORD called to him from heaven and said, "Abraham, Abraham!" So he said, "Here I am." And He said, "Do not lay your hand on the lad, or do anything to him; for now I know that you fear God, since you have not withheld your son, your only son, from Me."
> (Gen. 22:11–12)

But the silence of Abraham when ordered to murder his son cannot but raise serious questions from a moral and ethical perspective and highlights the aforementioned tension. Are we really to take this story, as Kierkegaard famously does,[2] as normative?

The tension extends beyond such specific instances. It goes to the very foundations of human normativity and practical reason. Autonomy versus heteronomy is a useful shortcut to explain this. In the Kantian (Athens) tradition, true moral sensibility and consequent normativity must be the result of an autonomous human reflection coming from within, not the result of external authority, and must be guided by the Categorical Imperative. Abraham would have seemed to fail both tests. The Judeo-Christian tradition insists on the supremacy of heteronomous transcendental truths residing in the sacred word of God. Indeed, obedience to such is at the ontological core of *Homo Religiosus*. If I follow my human conscience in all cases of conflict, am I not subordinating God to mankind? Is my professed God worship not just a camouflage to Man worship replacing a theocentric world view with an anthropocentric one? The Law – Nomos – is part of the ontology of this dilemma, since the divine commands are conceived as part of Divine Law.

So even outside specific conflicts with one another, there is a tension regarding the very basis of normative human conduct. There is no easy (or perhaps even any) solution to this fundamental dilemma.

The Bible is replete with "contradictions". It is one such contradiction which informs this essay, and it relates to another incident in the life of the Patriarch Abraham which stands in stark contrast with the narrative of the Binding. In the story of the Binding, when ordered to take his son, his only son, the son he loved, walk three days through the desert and sacrifice him to God, Abraham remains silent and simply obeys. By contrast, when God informs Abraham of his decision to destroy Sodom and Gomora, the same Abraham not only dissents but proceeds to give the Almighty a lesson in ethics.

2 In his *Fear and Trembling*, see Søren Kierkegaard, *Kierkegaard's Writings*, VI. (edited and translated by Edna H. Hong and Howard V Hong), Princeton University Press: Princeton 2013.

I will argue that it is the second narrative, that of Sodom and Gomora, which represents a revolutionary, Copernican moment in the understanding of Justice and Divine Law, and should be taken as normative. But before doing so, we must take an excursus and explain – or justify – that choice.

Excursus: The Modern Reader in the Face of Morally Troubling Biblical Narratives

How, then, should the modern reader, especially a person of faith who believes in the sacred nature of Biblical scripture, deal with those parts of the scripture which clearly conflict with modern moral sensibilities?

The clearest example concerns gender. Our point of departure is, and must be, that the Bible as a whole and the Pentateuch in particular are texts based on, and infused with, a patriarchal *Weltanschauung*. It is in many ways an anti-feminist text. No apologetics can or should obscure this reality. Given the huge influence of the Bible on Western civilization, it accounts for many of the attitudes which prevailed and still prevail in our societies, including secular societies (which is most of Europe). Since the Pentateuch is in large part nomistic, this Weltanschauung has also permeated into language and into law. The most striking and disconcerting example of this Biblical prejudice is that Revelation at Sinai and the ensuing Covenant were addressed to men.[3]

For the secular and scientific readership, this is not a particularly troubling or at least not an unexpected issue. The Bible, as great a literature as it might be, is in the eyes of the secular and scientific reader the product of human minds and human hands. Human minds and human hands are located in specific historical, social and cultural contexts, just as, say, we find in *The Iliad* and *The Odyssey*. As such, it reflects the cultural habits and moral sensibilities of these contexts. And since these contexts, across time and across space, have been predominantly patriarchal, it is hardly surprising that they are reflected in these humanly created Biblical narratives.

The religious reader, however, is faced with a dilemma. In its most classical form it presents itself when contemporary moral sensibilities find themselves at odds with Biblical normativity. It is a dilemma which, as is well known and endlessly explored, does not lend itself to easy solutions. If we are to automatically prefer our contemporary sensibilities and displace Biblical normativity when such a conflict presents itself, we are, willy-nilly, giving proof to the Lockean and Freudian proposition: It was not God who created men and women, but it is men and women who created God, both as a means of giving meaning to one's life and to use the alleged divine authority as legitimating human-made norms and moral propositions.

One of the classical attempts in religious thinking to resolve this classical dilemma is the notion that the Almighty endowed His (his? her?) human

3 Ex. 19:15.

creations with the faculty to discern between good and evil, and as such these determinations are part of the Revealed creative design. But grant me that this is far from a perfect solution and is persuasive mostly to those already convinced. It may work well when there is no explicit Revealed Biblical norm. The non-religious might just shrug and say, often condescendingly: "If you wish to imbue, say, Kantian autonomous ethics with a transcendental divine aura, may your god bless you". But we know the limitations to this solution, two in particular. Firstly, when religious authorities grapple with finely balanced moral dilemmas, they often resort to the authority of the decision-maker, who is sometimes said to be guided by divine inspiration. And, secondly, what does one do when our God-given faculty of moral discernment conflicts with *explicit* Biblical normativity? Are we really meant to admire Abraham's tacit acceptance of the murder, by his own hands, of his son?

The dilemma is perhaps more acute for observant and pious Jews than it is for Christians, because a great many of the conflicts between explicit Biblical norms and contemporary moral sensibilities derive from the Law of Moses (Nomos), which in Christian faith was fulfilled through Jesus and became obsolete under the New Covenant. But when it comes to patriarchy and gender equality, the New Testament can be, as is well known, as challenging as the Old Testament. When we read in Gen. 1:27 "So God created man in his own image, in the image of God created he him; male and female created he them" (a radical statement of equality), almost immediately afterwards we find: "[Y]our desire shall be for your husband and he shall rule over you".[4]

Or when St Paul teaches in Galatians 3:28 that "[t]here is neither Jew nor Greek, there is neither bond nor free, there is neither male nor female: for ye are all one in Christ Jesus" (another radical statement of equality), we find, by the same Paul: "As in all congregations of the Lord's people, Women should remain silent in the churches, They are not allowed to speak, but must be in submission, as the Law says".[5]

The fundamental statements of equality thus become exceptions which prove the rule – statements which were subsumed, forgotten, twisted, but with little impact on the ensuing civilization, including within religious civilization.

How, then, does – or should – the religious reader understand *Imitatio Dei* – the wish (and command) to walk in the ways of the Lord – when these ways seem to clash with contemporary moral sensibilities? Do I follow my divinely endowed faculties of moral discernment, or the logos of the Biblical narrative? Or, put differently, how should one read these morally challenging texts?

Let me reassure any reader who has endured my text so far: I am not about to offer some ingenious original solution to this dilemma. Indeed, I would suggest that like similar challenging dilemmas (such as the tension between the religious belief in an omniscient God which suggests determinism, and

4 Gen. 3:16.
5 Cor. 14:33–35.

another foundational religious belief in free choice and moral agency), the very need of grappling with these issues is the lot of *homo religiosus* and is part of the phenomenology and experience of the life of the faithful.

Instead, I want to suggest an additional way (and of course, here too, I make no claim to originality) of framing the dilemma and suggest that in this very framing there is a seed, perhaps not of a solution but at least of a different way of thinking about the issue. In order not to transgress on interreligious sensibilities, my analysis henceforth will be limited to my reading and understanding of the so-called Old Testament.

Whether through the living and inerrant word of God or through human creation divinely inspired, the Biblical narrative emerged as a normative text given at a specific historical moment and addressed to a human community existing at that moment. In many ways, not least in the understanding of the very notions of the Divine, of Holiness and the Sacred, it was a revolutionary message eventually reduced to scripture. The very ontology of Abrahamic monotheism – *One God*, *Transcendent* (yet immanent in His creation and at moments of revelation) and *Covenantal* – was new, antithetical to previous experiences (consider the experience of religion of the Israelites in Egypt) and extremely challenging (consider the speed and ease with which, when Moses disappeared up the mountain, a Golden Calf was created). Abrahamic monotheism is revolutionary. Abrahamic monotheism is hard. Abrahamic monotheism often goes against human natural desires and instincts. Go too fast and the Covenant is destined to failure, as 40 years in the desert demonstrated.

So, for example, we find in Exodus an elaborate Nomos on the right way to handle slaves in full contradiction with the very message of Exodus – from slavery to liberty – in the very same text. The slavery rules may be enlightened, perhaps, compared to contemporary practices, but they nonetheless sanction slavery. It might have been too much to expect a slave mentality to change overnight or even over 40 years.[6] Animal sacrifice, a fairly primitive manner of relating to the Almighty, might fall into the same category.[7] In some ways, the clash between the grand statements of principle and the subsequent retreat from them in the detail, such as seen in Genesis and Paul, is but an example of the clash between the eternal ideal and the art of the possible. This should not be a recipe for an easy dismissal of any nomistic norm which does not appeal to us by regarding it as historically contextual. But the fact that both types of norm

6 Indeed, pious churchgoing slaveholders in the American Southern states and in South Africa relied explicitly on such texts to legitimate (and perhaps in so doing assuage their consciences) the practice as divinely permitted, disregarding in the process the endless authoritative interpretations which indicated that the Exodus law was not relevant to contemporary conditions.

7 It should be noted that the Levitical law of sacrifice represents a significant limitation of the practice of sacrifice, limiting the manner, time and place it could take place, and was not excluded until the fall of the Temple. And see Maimonides, *Guide to the Perplexed*, Pines Translation (Chicago 1974), at iii. 32 (pp. 525–531).

are scripturally valid imposes a constant hermeneutic imperative towards reconciliation. Religious authorities over the millennia have recognized as much and acted, explicitly or *sub silentio*, in this manner. The claims made on both sides of this divide (orthodoxy versus progress) to be more authentically "scriptural" are hard to justify. As long as both positions are taken in good faith, including the good faith of honoring the Almighty and walking in his way, and not as a camouflage for pre-religious commitments, both may be considered the "living word of God".

This very hermeneutic tension between the grand principle and its specific actuation in time and place – both of which have significant normative weight – almost cries for, even mandates re-exploration, re-interpretation, re-harmonization. One can do so in a more "conservative" manner or in a more "liberal" manner, but no one can escape it if the Biblical narrative is not to descend into an archeological artifact. I will not explore here the non-patriarchal ways of reading scripture, but in choosing between the narrative of the binding and the narrative of Sodom and Gomora, I feel fully justified in privileging the latter over the former as a normative text.

In addition, the Sodom and Gomora narrative, yields, with a careful and close reading, profound and broader implications for general ethical discourse and the relationship between divine law and human sensibilities that are not evident from the mere story line.

God, Abraham and the Tale of Sodom and Gomora – Five Lessons

Here is the relevant test from Chapter 18 in the Book of Genesis:

> 16 Then the men rose from there and looked toward Sodom, and Abraham went with them to send them on the way. 17 And the LORD said, "Shall I hide from Abraham what I am doing, 18 since Abraham shall surely become a great and mighty nation, and all the nations of the earth shall be blessed in him? 19 For I have known him, in order that he may command his children and his household after him, that they keep the way of the LORD, to do righteousness and justice, that the LORD may bring to Abraham what He has spoken to him." 20 And the LORD said, "Because the outcry against Sodom and Gomorra is great, and because their sin is very grave, 21 I will go down now and see whether they have done altogether according to the outcry against it that has come to Me; and if not, I will know." 22 Then the men turned away from there and went toward Sodom, but Abraham still stood before the LORD. 23 And Abraham came near and said, "Would You also destroy the righteous with the wicked? 24 Suppose there were fifty righteous within the city; would You also destroy the place and not spare it for the fifty righteous that were in it? 25 Far be it from You to do such a thing as this, to slay the righteous with the wicked, so that the righteous should be as the wicked; far be it from You! Shall the Justice of

> the whole earth not do justice?"[8] [26] So the LORD said, "If I find in Sodom fifty righteous within the city, then I will spare all the place for their sakes." [27] Then Abraham answered and said, "Indeed now, I who am but dust and ashes have taken it upon myself to speak to the Lord: [28] Suppose there were five less than the fifty righteous; would You destroy all of the city for lack of five?" So He said, "If I find there forty-five, I will not destroy it." [29] And he spoke to Him yet again and said, "Suppose there should be forty found there?" So He said, "I will not do it for the sake of forty." [30] Then he said, "Let not the Lord be angry, and I will speak: Suppose thirty should be found there?" So He said, "I will not do it if I find thirty there." [31] And he said, "Indeed now, I have taken it upon myself to speak to the Lord: Suppose twenty should be found there?" So He said, "I will not destroy it for the sake of twenty." [32] Then he said, "Let not the Lord be angry, and I will speak but once more: Suppose ten should be found there?" And He said, "I will not destroy it for the sake of ten." [33] So the LORD went His way as soon as He had finished speaking with Abraham; and Abraham returned to his place.

There are at least five lessons on ethics, law and Divine command which may be extrapolated from this text, with the last of which representing what I have termed the revolutionary or Copernican moment in the relationship of *Homo Religiosus* and God.

The first lesson about justice is simple and obvious: We recoil against collective punishment. You do not punish the innocent as if they were guilty, or, in the words of Abraham, you do not destroy the righteous with the wicked.

Precisely because this is so obvious, allow me to digress with a word of discernment. It is often not so simple to distinguish the innocent from the guilty in a collective context. Is a society which allows the wicked to flourish not complicit in their wickedness? Their complicity can be explicit – think of the millions who, in free elections, vote into power a regime the iniquity of which is part of its manifest program. Sometimes this collective guilt (or at least responsibility) is implicit – turning a blind eye to the surrounding injustice. Do the Dutch soldiers who stood by when, in front of their eyes, mass murder took place in Srebrenica, not share responsibility or even guilt in the atrocity? I raise this point simply as a word of caution not to take the Abrahamic lesson as reducing guilt to the person who pulls the trigger. Be that as it may, the principle against collective punishment, mixing the truly innocent with the guilty, stands.

The second lesson emerges from a careful reading of the first passage in the tale of Sodom and Gomora:

> Shall I hide from Abraham what I am doing, [18] since Abraham shall surely become a great and mighty nation, and all the nations of the earth

8 See note 1 *supra*.

> shall be blessed in him? [19] For I have known him, in order that he may command his children and his household after him, that they keep the way of the LORD, to do righteousness and justice.

In this simple statement, the concept of natural law and moral agency is born. The Lord at that point in the Biblical narrative had not yet given the Law. The Ten Commandments, or the ethical commands found in Leviticus 19, to give but a couple of examples, are revealed centuries later. And yet, Abraham and his descendants are expected to be able to discern that which is right and wrong, that which is just and unjust. It is a capacity that is created within them as human beings. It is the foundation for our concept of natural law and part of their ontology as moral agents.

We already have that lesson implicit in the narrative of Cain and Abel. When Cain murders Abel and is confronted by the Lord, he does not say in his defense, "you never told me that it was forbidden to murder". It is understood by him and the reader of the Biblical text that such a norm is inherent in our human condition.

Now let us pay attention to one word in this passage for therein lies **the third lesson**:

> that they keep the way of the LORD, to **do** righteousness and justice [. . .]

In our classes on moral philosophy, we spend most of our attention on the ability to discern right from wrong. We tax our students with classical dilemmas, such as the railway man at the junction whereby shunting the train to the right will lead to the death of 15 innocents and shunting it to the left will result in the death of one's own children (in one version of the dilemma).

Yet, in the so-called real world, the problem of injustice is often not the result of an epistemic dilemma, the inability to discern injustice and distinguish it from justice, or an error in such discernment.

In most cases, injustice occurs by an act or by a failure to act where the perpetrators, active or passive, are in full cognition of the injustice they are about to commit or allow to occur, and yet simply do not act on that knowledge. *To do justice* often comes with a cost, and one is simply too weak, or too evil, to bear this cost. If we are interested in justice, this lesson is no less than fundamental: knowing is not enough; doing is ultimately what counts.

The transition from knowing to doing is also not simple at the philosophical level. Although it seems axiomatic, it is easier to articulate the process of reasoning which will lead us to a cognitive ability to distinguish between right or wrong. It is actually more difficult to explain the imperative to follow a path of justice, of righteousness, in our personal conduct. Understanding what is right and wrong is not in and of itself a reason for me to follow justice. In world literature, this existential dilemma is at its sharpest in Albert Camus' *L'etranger*.

The Biblical text is aware of this challenge and resolves it in the first part of the verse: You pursue justice because that is "the way of the Lord" to whom you are bound. It is a lesson directly relevant, of course, only to *Homo Religiosus* – but of course that is the premise of all Biblical narrative. The solution of Camus, given in his wonderful *La Peste*, is alluring but just as arbitrary as the rejection found in *L'etranger*.

Lesson four does not result from textual exegesis but from a consideration of the very conduct of Abraham.

As I mentioned earlier, most injustice in the world is not the result of cognitive failure. Rather, it is the result of the failure of those who witness it and understand that what they are witnessing is unjust, the failure to speak up, to protest. They do not care, or they are afraid, or they think it is not their problem.

Doing justice thus requires courage. Courage often means speaking Truth to Power. And the story of Abraham and God discussing the fate of Sodom and Gomora is *the* paradigmatic example of speaking Truth to Power, for the Power whom Abraham is confronting with Truth is the Almighty God himself.

Abraham is petrified and speaks in a most reverential and respectful manner when he "negotiates" with God. Fifty, forty, thirty, etc. But he speaks up! There is something spectacular in the structure of the text. It is not simply a theoretical lesson: You know justice and you need to do justice. The theoretical concept is followed by the most striking of examples.

One cannot but notice the literary brilliance of the text in this context. As we read, the Lord says:

> Shall I hide from Abraham what I am doing, [18] since Abraham shall surely become a great and mighty nation, and all the nations of the earth shall be blessed in him? [19] For I have known him, in order that he may command his children and his household after him, that they keep the way of the LORD, to do righteousness and justice.

And immediately, we the readers receive an unexpected example of just that: Abraham keeping the way of the Lord, even if it means confronting the Lord.

And this in turn brings us to the **fifth lesson**, which is concerned with just that – the tension between Divine law and human justice.

The reaction of Abraham to the plan of God to destroy Sodom and Gomora represents one of the most important moments in the evolution of our sense of justice, and our understanding of Justice in Western civilization.

> [23] And Abraham came near and said, "Would You also destroy the righteous with the wicked? [24] Suppose there were fifty righteous within the city; would You also destroy the place and not spare it for the fifty righteous that were in it?

This, of course, is a rhetorical question but Abraham does not stop there and lectures the Lord – reversing the role of Father and Son.

> 25 Far be it from You to do such a thing as this, to slay the righteous with the wicked, so that the righteous should be as the wicked; far be it from You! Shall the Justice of the whole earth not do justice?"[9]

It is not simply the question of collective punishment *in abstracto*. The number game which Abraham plays (fifty, forty, etc.) embodies another important stricture. Justice must be administered with care, with discernment and not with a rough brush. This is now written into our collective consciousness and reflected in the most primordial of our legal precepts. It is taken for granted.

There is an additional subtle point which is often lost in translation. *Shall the Justice (in the sense of Judge) of the whole earth not do justice* is a translation of the Hebrew: HaShofet Kol Haaretz lo Yaase Mishpat. It is a plausible translation. But the literal translation would be, will the judge of the whole earth not hold a trial? I like this interpretation because it goes beyond discernment. It embodies what has become part of the principles of natural justice both in the Roman Law and the Common Law tradition: *Audi Alteram Partem*. You do not punish without trial in which the parties may be heard. I believe this interpretation is not only textually plausible but contextually required.

Recall in the text the following:

> 20 And the LORD said, Because the outcry against Sodom and Gomorra is great, and because their sin is very grave, 21 I will go down now and see whether they have done altogether according to the outcry against it that has come to Me; and if not, I will know.

Surely if the Almighty himself "took the trouble" to go and check the allegation, it should have sufficed. But to Abraham this is not enough. Even in this circumstance a trial is required if only so justice will not only be done but will be seen to be done.

But there is more: the rhetorical nature of Abraham's question has profound epistemic consequences. The rhetorical nature points to a postulate: even God himself is bound by the strictures of Justice. He is not God if He is not just. If it is not just, it cannot be from God. Note the audacious ontological move, for this is the Copernican moment in our understanding of the relationship between theology and morality. The typical theological proposition – if it is a divine design, it must mean, per force, that it is just – is reversed: If it is not just, it cannot be divine. If that were not so, Abraham would have no basis to challenge God.

9 See note 1 *supra*.

There is, as a result, an extraordinary delicate play on the relationship between heteronomous and autonomous normativity – the subtle religious challenge to the pure anthropocentric Kantian vision of the human condition, a vision which, as the last century proved so painfully, can yield the sour, and bloody, grapes of human hubris. *Homo Religiosus* is said to accept a heteronomous source of normativity, which he does. But when it comes to the realm of the ethical, it is accepted on the premise of a just God, which humans with their capacity to understand the ways of the Lord, even without specific instructions, are in a position to discern and judge.

21 Epilogue

Law and Justice in a Time of the Pandemic

Matej Accetto

Introduction: Understanding the Covid-19 Pandemic as a Disruptive Reality

After the first scares in 2019 and early 2020, by March 2020 the world finally had to confront the Covid-19 pandemic.[1] All around the globe, the pandemic rattled the established legislative frameworks, institutional setup and expertise on dealing with communicable diseases. The states scrambled to adopt effective measures to contain it, the expert community to understand it and hopefully to produce a vaccine against it. Some states introduced a state of emergency, in some cases lasting for a prolonged period of time. The world was under siege by a global disruptive reality.

It has largely been accepted that Covid-19 was an extraordinary event posing "novel challenges" in "unique ways".[2] When Romania introduced a state of emergency by way of a presidential decree, for instance, its preamble referred to the circumstances of the pandemic as an "unforeseeable exceptional context, which concerns the general public interest and constitutes an extraordinary situation, requiring exceptional measures".[3] In *Terheș v. Romania*, referring to this preamble, the European Court agreed, stating that[4]

> [i]n the Court's view, there is no doubt that the Covid-19 pandemic may have very serious effects not only on health, but also on society, the

1 The World Health Organization first declared it a public health emergency of international concern in January 2020 and then a pandemic in March 2020 – see the WHO Director-General's opening remarks at the media briefing on COVID-19 on 11 March 2020, available at <www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>, referring to more than 118 000 reported cases from 114 countries by that day.

2 See, e.g., Stephanie Palmer and Stevie Martin, Public Health Emergencies and Human Rights: Problematic Jurisprudence Arising from the Covid-19 Pandemic, *European Human Rights Law Review* 5 (2020), pp. 488–498, at 488.

3 Preamble to the Decree No. 195/2020, reproduced in the ECtHR judgment in the case *Terheș v. Romania*, decision of 13 April 2021, App. No. 49933/20, para. 23.

4 *Ibid*., para. 39.

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> economy, the functioning of the State and life in general, and that the situation must therefore be described as an "unforeseeable exceptional context" . . .

And yet, it may hardly be said that the very notion of a novel communicable disease was unforeseeable. Plagues have been known to humankind at least since the shift to the agrarian societies.[5] One may note the several references to the plagues found in the Old Testament[6] or contemplate their present-day health care implications.[7] Factual historical antecedents notably include the three major bubonic plague pandemics over the past 15 centuries, with the first, the Plague of Justinian, erupting in 541 and spanning 18 waves over the next 200 years.[8] In the even longer period of the second one, originating in the 1330s and lasting some 500 years,[9] the first organised strategies of public health measures adopted to combat the disease have also been introduced, including special health magistracies with vast legislative, judicial and executive powers.[10] More recently, there have been seven cholera pandemics since the early 19th century, and at least since the late 19th century a number of influenza pandemics, including the lethal 1918 influenza pandemic that ravaged the world in three waves after World War I, in the period addressed by Pitamic, infecting some 500 million people and killing 50 million worldwide.[11]

Perhaps of an even more immediate relevance, there have been a number of infectious diseases' outbreaks in the last 20 years alone, including notably the SARS coronavirus (first identified in China) in 2003, the swine flu (the H1N1 virus, first spreading in Mexico and the United States) in 2009, the MERS coronavirus (originating in Saudi Arabia) in 2012, the Ebola virus (first detected in West Africa) in 2014 and then again in 2018, and the Zika virus (spreading mostly in Brazil) in 2015. These outbreaks often resulted in (common) initiatives and commitments to prepare for likely future outbreaks.[12] The

5 Jocelyne Piret and Guy Boivin, Pandemics Throughout History, *Frontiers in Microbiology*, Vol. 11, Article 631736 (2021), pp. 1–16, at 1.

6 In particular, the ten plagues visited on Egypt in Exodus 7–12.

7 See N. Joel Ehrenkranz and Deborah A. Sampson, Origin of the Old Testament Plagues: Explications and Implications, *Yale Journal of Biology and Medicine* 81 (2008), pp. 31–42.

8 See Frank M. Snowden, *Epidemics and Society: From the Black Death to the Present*, Yale University Press: New Haven and London 2020, at 34–35.

9 Some refer to the entire period of the several waves as the Black Death, a name often used to depict the first wave in Europe between 1347 and 1353, on its own killing as much as one half of the continent's population – see *ibid*., at 36–38.

10 See the account in *ibid*., at 58–82.

11 See Piret and Boivin, *Pandemics Throughout History*, n. 5 above, at 4–6.

12 See, e.g., the WHO global influenza preparedness plan: *The role of WHO and recommendations for national measures before and during pandemics*, World Health Organization 2005, at 4, lauding the experience with the SARS virus and the value of a coordinated response in order to contain a pandemic or at least delay its emergence so as to put in place the prepared common response.

states have adopted legislation on infectious diseases, and special expert bodies or institutions have been set up.

However, the outbreaks have also been followed by what one author termed a "recurring pattern of societal amnesia".[13] Unfortunately, as the Covid-19 pandemic spread, it thus turned out that most states, along with their institutional and legislative frameworks, were still caught unprepared. The pre-existing legislation on infectious diseases was found to be wanting, the provisions regulating the possibility of adopting restrictive measures in order to combat the pandemic too vague and imprecise. The institutional structures and processes were found to be ill-equipped for an effective coordinated response to the pandemic, both nationally and internationally. The expert community itself was not fully aware of the nature and the severity of the disease or the effectiveness of the various possible measures to contain it.

As the states sought to contain the pandemic, a number of specific issues were raised. Who should manage the regulatory response to the pandemic, the legislative or the executive branch of government? Should a state of emergency be declared? How should restrictive measures be introduced, implemented and monitored? How often should they be reevaluated? What should be the substantive standards governing the regulatory response?

Many of these issues were ultimately determined or evaluated through the process of judicial review, deciding on applications challenging the measures taken (or not taken) by the authorities before ordinary or constitutional courts. These applications raised a number of further challenges for the courts, on both procedural and substantive grounds, such as the issues of standing when challenging the acts of general application or the criteria governing judicial review.

With some hindsight, with the first wave of the Covid-19 decisions behind us, this jurisprudence may now be evaluated to see not only how the courts coped with the Covid-19 litigation but also to what extent the challenges posed by the pandemic were novel challenges for the courts requiring new standards and mechanisms of constitutional review to be developed. While reference will be made to other jurisdictions,[14] the following analysis will mostly be illustrated by reference to the jurisprudence of the court I know best – the Slovenian Constitutional Court, a busy judicial actor having received over 200 distinct applications (not counting all the like cases raising identical issues) and very much confronted with a number of problematic challenges posed by the pandemic.

13 Snowden, *Epidemics and Society*, n. 8 above, at x.

14 Relying in part on the excellent Covid-19 Litigation Database coordinated by the University of Trento and available at <www.Covid-19litigation.org/case-index>. On the database, see Paola Iamiceli and Fabrizio Cafaggi, The Courts and Effective Judicial Protection during the Covid-19 Pandemic: A Comparative Analysis, *BioLaw Journal/Rivista di Biodiritto* 1 (2023), 1–47, online version available at <www.biodiritto.org/Online-First-BLJ/Online-First-BLJ-1-23-The-Courts-and-Effective-Judicial-Protection-during-the-Covid-19-Pandemic.-A-Comparative-Analysis>.

The Regulatory Response to the Pandemic: Choices and Dilemmas

The rapid spread of the pandemic required an urgency of the states in deciding on the appropriate regulatory response, and in several ways so.

Firstly, was this an event that could be handled under the normal operation of the legal order? Some states formally declared a state of emergency: in Italy, one of the countries outside China first confronted with the pandemic, a state of emergency was introduced as early as 31 January 2020 (and extended until 31 March 2022);[15] in Israel, it was declared on 19 March 2020.[16] Some made use of other types or emergency powers, not always without controversy: in Vietnam, for instance, while a state of emergency has not formally been declared since 1979, a de facto approach allowing the executive to temporarily assume special powers was used.[17] This group of states may also be said to include China, with the particular characteristic of its "rule of emergency law" regime, where the response to Covid-19 was summarised as a "coordinate management programme".[18] Finally, some states adopted the policy of operating under ordinary constitutional rules, notwithstanding the fact that an epidemic was declared as an exceptional public health emergency.[19] One report analysing the data for 106 states concluded that, through early 2022, some 40% of these states declared a state of emergency due to Covid-19.[20]

Secondly, many states were confronted with the reality that their existing legislative frameworks were inadequate to deal with such a widespread pandemic. Accordingly, a number of states had moved swiftly to amend the legislation on communicable diseases. In Austria, with the legislation dating back at least to 1950 and largely even to 1913, a new set of bills was adopted as early

15 See Decreto Legge 24 marzo 2022, n. 24, Disposizioni urgenti per il superamento delle misure di contrasto alla diffusione dell'epidemia da COVID-19, in conseguenza della cessazione dello stato di emergenza (GU Serie Generale n.70 del 24. 3. 2022). For early response, see Michelle Falkenbach and Manuela Caiani, Italy's Response to Covid-19, in Scott L. Greer and others (eds.), *Coronavirus Politics: The Comparative Politics and Policy of Covid-19*, University of Michigan Press: Ann Arbor 2020, pp. 320–338, at 322–324.

16 See Raphael Cohen-Almagor, Israel Facing Covid-19, *Public Governance, Administration and Finances Law Review* 6 (2021) 1, pp. 7–17, at 8–9.

17 See Cong Giao Vu and Tri Uc Dao, State of Emergency in Vietnamese Law: Reflections on the Government Response to the Covid-19 Pandemic, *Australian Journal of Asian Law* 22 (2022) 2, pp. 5–19, at 9–13.

18 See Ugo Mattei, Liu Guanghua and Emanuele Ariano, The Chinese Advantage in Emergency Law, *Global Jurist* 21 (2021) 1, pp. 1–58, at 8–13.

19 Such was, e.g., the position in Austria – see Karl Kössler, Managing the Covid-19 Pandemic in Austria: From national unity to a de facto unitary state?, in Nico Steytler (ed.), *Comparative Federalism and Covid-19*, Routledge: Abingdon 2022, pp. 70–87, at 73. This approach was also taken by Slovenia.

20 See Tom Ginsburg and Mila Versteeg, *The Bound Executive: Emergency Powers during the Pandemic*, Virginia Public Law and Legal Theory Research Paper No. 2020–52 and University of Chicago Public Law Working Paper No. 747, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3608974>, at 25.

as 15 March 2020.[21] Some states adopted legislation specifically regulating – and enabling – the Covid-19 response. In the United States, the first such laws were adopted on 6 March[22] and 18 March 2020;[23] in France, on 23 March 2020.[24] Legislatures often moved in steps, addressing the urgent needs for the first Covid-19 response but then also reassessing the general framework. In Germany, the first law introducing a national lockdown was adopted on 27 March 2020,[25] then a second law that introduced protection for vulnerable groups on 19 May 2020,[26] and finally on 18 November 2020 a third law[27] was adopted that included a more detailed amendment of the legislation on communicable diseases, notably the general-purpose Infectious Diseases Protection Act (*Infektionsschutzgesetz*).

Thirdly, regardless of whether legislation had been amended, the pandemic challenged the ordinary division of labour between the legislative and the executive branches of government. In general, Covid-19 led to many parliaments amending their standing orders, with a few (such as Croatia, Serbia, India, Malaysia, Sudan and Guyana) even temporarily adjourned or dissolved and only a small minority (such as the Czech Republic, Bulgaria, Japan, China, Algeria and Uruguay) carrying on with business as usual, while most parliaments enacted some amendments to the procedure and/or social distancing measures.[28] In any event, however, the nature of the pandemic and the need to act rapidly in the face of the changing reality of Covid-19, as well as the developing understanding of its characteristics, often led to a shift of the balance in favour of the executive taking the lead on the pandemic response.[29] This shift

21 See Kössler, n. 19 above, at 73–75.

22 Coronavirus Preparedness and Response Supplemental Appropriations Acts of 6 March 2020, Public Law No. 116–123, H.R. 6074.

23 Families First Coronavirus Response Act of 18 March 2020, Public Law No. 116–127, H.R. 6201.

24 Loi n° 2020–290 du 23 mars 2020 d'urgence pour faire face à l'épidémie de covid-19 (JORF n°0072 du 24 mars 2020).

25 Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite vom 27. 3. 2020 (Bundesgesetzblatt Jahrgang 2020 Teil I Nr. 14, ausgegeben am 27.03.2020, Seite 587). That law also changed the Bundestag's rules of procedure to allow it to act more effectively – see Gisela Färber, Germany's Fight Against Covid-19: The tension between central regulation and decentralised management, in Steytler, n. 19 above, 51–69, at 52 and 57.

26 Zweites Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite vom 19. Mai 2020 (Bundesgesetzblatt Jahrgang 2020 Teil I Nr. 23, ausgegeben zu Bonn am 22. Mai 2020, Seite 1018).

27 Drittes Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite vom 18. November 2020 (Bundesgesetzblatt Jahrgang 2020 Teil I Nr. 52, ausgegeben zu Bonn am 18. November 2020, Seite 2397).

28 The list covering 166 states is available at the INTER PARES Parliamentary Data Tracker, available at <www.inter-pares.eu/en/inter-pares-parliamentary-data-tracker>.

29 Cf. Iamiceli and Cafaggi, n. 14 above, at 6–7.

could be said to occur in most states, even those in which the legislatures were also actively involved in the shaping of the pandemic response.[30]

All of these issues were then, fourthly, translated into a substantive problem: how to ensure that the measures taken to contain the pandemic were lawful and, if they entailed an interference with particular fundamental rights, proportionate to the interference with these rights? Whichever were the relevant authorities adopting the restrictive measures in a given state, they had to confront the uneasy reality of being obligated to act in the face of double uncertainty, uncertainty as to the nature (and dangers) of the Covid-19 pandemic as well as the utility and effectiveness of the measures contemplated to contain it. This was particularly acutely relevant – for the political branches when adopting the restrictive measures as well as the courts conducting judicial review – when it came to assessing the proportionality of an interference with a given right. While the existence of a legitimate aim (or proper purpose) for the restrictive measures was normally not in question, this double uncertainty rendered it difficult or practically impossible to assess the other steps of the usual proportionality review:[31] suitability (or rational connection), necessity and proportionality *stricto sensu* would normally all require a clear understanding of the benefits of the measures under review.

This, finally, forced a reconsideration of the link between the state authorities and scientific communities in drafting the pandemic response.[32] Although many states had already previously set up expert bodies vested with responsibilities in the field of communicable diseases, these structures were reassessed and sometimes revamped for the purposes of combating the Covid-19 pandemic. Special scientific advisory groups were called upon to advise the governments on the measures required by the pandemic, within the limits of the available data and the developing scientific understanding of the disease, itself

30 Ginsburg and Versteeg, n. 20 above, at 26, thus note that the legislatures were directly involved in the pandemic response in 64% of the 106 states surveyed, that in 75% of those states in which the state of emergency was declared it was initially declared or extended by the legislature, and that in 45% of the states basing the pandemic response on legislation the legislatures adopted new laws (while in further 23% they amended existing legislation). Even when legislation was the basis and set down the basic criteria for the introduction of restrictive measures, however, these were then often introduced and managed by the executive branch. That, of course, was all the more true in those cases where the legislatures were not even directly involved in the drafting of the pandemic response.

31 For the general explanation, see Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations*, Cambridge University Press: Cambridge 2012, at 243–370.

32 That link may work both ways, of course, e.g., as evidenced by the criticism of the WHO in allowing the political input into its handling of the Covid-19 pandemic – see Lukasz Gruszczynski and Margherita Melillo, The Uneasy Coexistence of Expertise and Politics in the World Health Organization: Learning from the Experience of the Early Response to the COVID-19 Pandemic, *International Organizations Law Review* 19 (2022), pp. 301–331, at 309–313 and 328–330, talking of the "inherently political dimension" of the WHO activities and global health that should be managed.

characterised by significant uncertainty. The authorities were expected – and required – to follow this scientific advice and adapt the pandemic measures accordingly, although these considerations – perhaps all the more so with the passage of time – had to be weighed against other rights and societal needs.[33]

The above list of considerations highlighted is not exhaustive. There were several other characteristics affecting the management of – as well as the appraisal of – the pandemic response in a given state.[34] In any event, often they could not by themselves be determinative of a state's pandemic policy or its effectiveness.[35] Many of the challenges were comparable, and they can be evaluated through the lens that would ordinarily be used to assess the lawfulness of such measures adopted by the states: the judicial review of the acts of the legislature and the executive in the performance of their duties.

Judicial Review and the Pandemic

In many courts, in particular the apex courts vested with the power of judicial review, the Covid-19 litigation instantly became a significant part of their docket after the onset of the pandemic in 2020. In Slovenia, for example, the Constitutional Court over time received some 900 applications directly challenging various pandemic measures introduced by the legislature or the executive, of which – discounting (nearly) identical cases – over 200 could be said to raise potentially precedential issues. While the modalities of constitutional review and the competences of courts naturally vary from state to state, the Covid-19 litigation affected all corners of the globe.[36]

The jurisprudence produced was vast in numbers and in the scope of issues addressed, and it would be both impossible and impractical to try and provide a thorough overview covering the gamut. Instead, the following passages

33 See, e.g., Patricia Popelier and others, Health Crisis Measures and Standards for Fair Decision-Making: A Normative and Empirical-Based Account of the Interplay Between Science, Politics and Courts, *European Journal of Risk Regulation* 12 (2021) 3, pp. 618–643.

34 Some of these related to the organisation of the state power (e.g., the distinction between autocratic and democratic states) or the level of centralisation in a given state. Others were related to geo-political considerations – consider the largely effective New Zealand response of the lockdown measures and border closures conditioned and enabled by its characteristics of an island country.

35 See, e.g., the comparison of the different pandemic responses in Germany, Austria and Switzerland, three culturally similar federal polities neighbouring on each other, spanning from the very centralised Austrian model to the much more decentralised German approach, in Thomas Czypionka and Miriam Reiss, *Three Approaches to Handling the Covid-19 Crisis in Federal Countries: Germany, Austria, and Switzerland*, in Greer and others, n. 15 above, pp. 295–319.

36 The Covid-19 Litigation Database (see n. 14 above) thus includes some 2000 cases from all the continents, albeit over half of them – while certainly reflecting the sensibilities and activity of national rapporteurs more than the frequency – coming from Europe and Latin America and the Caribbean combined. See the overview in Iamiceli and Cafaggi, n. 14 above, at 11–20.

focus on highlighting and evaluating the key aspects in which the disruptive reality of the pandemic could be said to also – at least potentially – challenge the existing practice of the courts in conducting judicial review. Some of these challenges concerned the procedural aspects of judicial review (above all the issues of standing and procedural requirements for cases to be decided on the merits). Others related to the substantive standards of judicial review. I turn to each of these issues in the following sections.

The Procedural Challenges

As stated previously, the pandemic led to a high number of judicial applications lodged with the courts, including those (apex) courts with the power to review the constitutionality of the restrictive measures enacted to combat the pandemic. In procedural terms, these cases were treated the same as all the cases,[37] with the courts first evaluating whether the procedural requirements were met for a case to be decided on the merits. At the Slovenian Constitutional Court, for instance, many of the applications received at the Constitutional Court were thus dismissed or not admitted for review following this first evaluation of the application. Nevertheless, in two ways in particular, the pandemic litigation challenged the ordinary assessment of the Court.

The first challenge concerned the issue of the applicants' standing. Most of the applications lodged with the Slovenian Constitutional Court in the first wave were petitions contesting the measures directly, alleging that they infringed the fundamental rights of the applicants, without having first made use of the judicial proceedings before ordinary courts. That was a procedural challenge in light of the ordinary rule that, except where an act of general application directly interferes with an individual's rights or legal interests, a petition challenging such an act may only be lodged together with a constitutional complaint against the individual act(s) (usually the judgment(s) of the ordinary courts), implementing this general act in the case affecting the individual concerned.[38] However, the Court has already crafted an exception in those cases where the applicant could only provoke the judicial proceedings before ordinary courts by intentionally exposing themselves to liability, in particular and most pertinently where misdemeanour penalties were to be

37 Perhaps with the notable exception that they were sometimes afforded priority due to their time-sensitive significance, i.e., the importance of developing appropriate constitutional standards guiding the governmental response to the pandemic. At the Slovenian Constitutional Court, all Covid-19 cases were designated as priority cases, leapfrogging the ordinary cases waiting on the docket.

38 See Zakon o ustavnem sodišču [*Constitutional Court Act – hereinafter CCA*] (Official Gazette RS No. 64/07, 109/12, 23/20 and 92/21), Articles 24(1) and (2). Cf. the rules for non-privileged applicants to challenge the (regulatory) acts of the EU directly before the Court of Justice of the European Union per Article 263(4) of the Treaty on the Functioning of the European Union (OJ C 326, 26. 10. 2012, pp. 47–390).

engaged for acting in contravention of the contested general act and where these requirements would force an individual to commit a misdemeanour in order to be able to contest the act.[39] This same exception was also held to apply to the pandemic applications, where the judicial proceedings before ordinary courts could only be pursued by the applicants by intentionally violating the measures (adopted mostly in the form of governmental ordinances) they wished to challenge.[40]

The second challenge concerned the requisite quality of the contested act, above all in light of a particular feature of the pandemic response that required the measures to be frequently reassessed and then revised, replaced or re-enacted by the adoption of new acts. This meant that the act originally challenged by the petition would sometimes expire in a matter of weeks, long before the courts could normally conclude the proceedings and adopt a reasoned decision on the merits. Again, looking at the experience of the Slovenian Constitutional Court, the ordinary assessment would make the Court hesitant to decide on the constitutionality of the act of general application that has ceased to be in force, unless the consequences of this act's unconstitutionality (or unlawfulness) had not yet been remedied as far as the petitioner is concerned.[41] This issue was of particular significance since in Covid litigation, as stated earlier, most petitions were not accompanied by a constitutional complaint against the decisions of ordinary courts that would apply the contested act in the applicant's case. However, here the Court has also already previously[42] recognised an exception to the general rule, holding that this rule should not preclude a decision in those cases concerning the expired acts whose validity or effects were designed to be of limited duration that raise particularly important precedential constitutional questions of a systemic nature which the Court had not yet addressed, and which may reasonably be expected to arise again with regard to general acts of equal nature and content, periodically adopted in the future.[43] The same exception was also applied in the pandemic cases, reaffirming that in such instances, applying the

39 See, e.g., Decision No. U-I-107/15 of 7 February 2019, ECLI:SI:USRS:2019:U.I.107.15, para. 17.

40 See, e.g., the first Order No. U-I-83/20 of 16 April 2020 (Official Gazette RS No. 58/2020), ECLI:SI:USRS:2020:U.I.83.20, para. 18, admitting the petition for review on the merits.

41 See Article 47 CCA.

42 See Decision No. U-I-129/19 of 1 July 2020 (Official Gazette RS No. 108/2020 and OdlUS XXV, 17), ECLI:SI:USRS:2020:U.I.129.19, para. 43. The case concerned two budgetary acts, the Amending Budget of the Republic of Slovenia for the Year 2019 (AB2019) and the Implementation of the Republic of Slovenia Budget for 2018 and 2019 Act (IRSB1819). The final decision in this case was delivered after the onset of the pandemic, but it had been under review since 2019.

43 This is not a revolutionary concept. In US law, for instance, the Supreme Court has long used a similar approach when reviewing issues "capable of repetition, yet evading review" – see *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911); and a recent reaffirmation in *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016).

usual limitations of Article 47 CCA would be contrary to the requirements of legal predictability and the protection of human rights and fundamental freedoms, which the jurisprudence of the Constitutional Court is also intended to ensure.[44] Similar approaches were taken by courts in other states.[45]

These exceptional circumstances did not mean, however, that all Covid-19 applications would warrant a decision on the merits. In most cases, such applications were still dismissed or not admitted for review,[46] with the courts finding that procedural requirements were not met or that the cases did not raise important precedential issues, or that – in the case of acts no longer in force[47] – it was not reasonable to expect that the issues raised would arise again in the same shape and form. However, in several cases the applications were reviewed on the merits, and in those cases the substantive challenges of the Covid-19 litigation had to be confronted.

The Substantive Challenges

The substantive challenges for the courts in conducting judicial review followed the challenges for the authorities in drafting the appropriate pandemic response.[48] Most importantly, reviewing the lawfulness of an interference with (other) fundamental rights by the restrictive measures introduced to combat the pandemic challenged the established operation of the proportionality test. However, another issue warrants mentioning first: the question of whether, in the context of the shortcomings of the pre-existing legislative frameworks and the shift in the balance between the legislatures and the executives in the drafting of the pandemic response, the restrictive measures even had a proper legal basis.

This issue was of particular significance in the Slovenian practice, both because the legislature did not act to refine the legislative framework authorising the executive to adopt restrictive measures, and because traditionally the principle of legality has long had particular significance in the Slovenian constitutional order, with the Constitutional Court early on affirming it as "essential

44 See, e.g., Decision No. U-I-83/20 of 27 August 2020 (Official Gazette RS No. 128/2020 and OdlUS XXV, 18), ECLI:SI:USRS:2020:U.I.83.20, para. 27.

45 See Iamiceli and Cafaggi, n. 14 above, at 6, citing the decision of the Italian Council of State No. 850 of 13 May 2021.

46 This was certainly true for Slovenia, but also for other courts. As per the Covid-19 Litigation Database (see n. 14 above), even out of the 51 decisions of the Italian courts meriting inclusion in the database, in 24 cases the applications were classified as inadmissible or rejected and in a further six they were partially rejected. For Germany, in 71 out of 101 decisions included in the database the applications were found to be inadmissible or rejected. For France, the same applied to 49 out of 79 cases listed in the database.

47 For an example from Slovenia, see the Ruling of the Constitutional Court No. U-I-8/21 of 2 June 2022, ECLI:SI:USRS:2022:U.I.8.21. For the explanation of my views on the application of this exception, see my concurring opinion to this ruling, paras 4–9.

48 See the previous section on the regulatory response.

for the relationship between the legislative and executive branches of power in parliamentary democracies".[49] Its significance also – and perhaps particularly so – extends to measures interfering with fundamental rights, where the Constitution vests the authority and the responsibility for setting out the criteria for their limitations in the legislature.[50] Thus, when most of the restrictive measures severely affecting fundamental rights of the entire population or its significant portion were adopted through governmental ordinances, the issue of whether an appropriate legal basis for such measures was provided in the relevant legislation, notably the Communicable Diseases Act (CDA),[51] came to the fore.

In the first decision tackling the issue of legality in the pandemic context, adopted in May 2021,[52] the Court found that the relevant provisions of the CDA were unconstitutional as they left too much discretion to the Government when adopting restrictive measures. In that case, the Court was reviewing several restrictive measures introduced by a Government ordinance, including the limitations of the freedom of movement and the right of assembly and association enshrined in Articles 32 and 42 of the Constitution. The Court reiterated, drawing on the jurisprudence of the European Court of Human Rights (ECtHR),[53] that such statutory interference must be sufficiently clear, formulated with sufficient precision, accessible and foreseeable.[54] At the same time, the Court was not oblivious to the realities of the pandemic requiring a swift response and relaxed the "ordinary" requirements of legality, noting that the legislative process may be too lengthy and inflexible and that in such circumstances it might exceptionally be permissible to leave it to the executive branch to prescribe restrictive measures and ensure the fulfilment of the positive obligations stemming from the Constitution.[55]

How can the appropriate balance between the conflicting values be struck? The Court's decision confronted this dilemma in two steps. In substantive terms, firstly, it found that even in such exceptional circumstances the law must determine the purpose and the types of restrictive measures, the scope

49 Decision No. U-I-73/94 of 25 May 1995 (Official Gazette RS No. 37/95 and OdlUS IV, 51), ECLI:SI:USRS:1995:U.I.73.94, para. 17.

50 See a relatively early expression in a case concerning criminal procedure in Decision No. U-I-25/95 of 27 November 1997 (Official Gazette RS No. 5/98 and OdlUS VI, 158), ECLI:SI:USRS:1997:U.I.25.95, paras 31 and 61–62, in which the reviewed statutory provisions were found not to be sufficiently defined.

51 Zakon o nalezljivih boleznih [*Communicable Diseases Act*] (Official Gazette RS No. 33/06).

52 Decision No. U-I-79/20 of 13 May 2021 (Official Gazette RS No. 88/2021), ECLI:SI:USRS:2021:U.I.79.20.

53 Quoting the ECtHR judgments in cases *Zakharov v. Russia* of 4 December 2015, paras 228 et seq.; *Stafford v. the United Kingdom* of 28 May 2002, para. 63; *Dragin v. Croatia* of 24 July 2014, para. 90; and *Chumak v. Ukraine* of 6 March 2018, para. 39.

54 Decision No. U-I-79/20, n. 52 above, para. 77.

55 *Ibid*., para. 83.

and the conditions for them to be introduced, as well as safeguards limiting the discretion of the Government in adopting the concrete measures.[56] The two provisions of the CDA under review were found to be lacking in this respect, leaving too broad a discretion to the Government, and were thus found to be unconstitutional.[57] However, if they were annulled, that would remove any legal basis that would allow for restrictive measures to be adopted, which might jeopardise the ability of the state to fulfil its positive constitutional obligation to protect the health and life of people and lead to an even greater unconstitutionality.[58] For that reason, secondly, the Court has only adopted a declaratory decision, finding the provisions to be unconstitutional but leaving them in force until such time that the legislature amends the law in line with the constitutional decision.[59] While in so doing, that decision also insulated the measures subsequently adopted from a challenge on the same grounds, the significance of legality was nevertheless repeated several more times in other decisions and became a common refrain of the Covid-19 jurisprudence.[60]

The other substantive issue, finally, concerned the proportionality review of the contested measures. As stated previously, this was affected, above all, by at least two major sources of uncertainty: uncertainty as to the severity of the threat by the under-known pandemic and uncertainty as to the effectiveness of the measures contemplated to contain it. Uncertainty in law was the result of uncertainty in science – the full reality of Covid-19 was unknown to medical science as much as to political decision-makers. That, in turn, rendered the usual criteria of proportionality – perhaps not so much the suitability of a measure, but certainly its necessity (i.e., that no less restrictive but equally effective measure was available) and proportionality *stricto sensu* (i.e., that the benefits of the measure for the aims pursued outweighed the interference with (other) rights) – very difficult to assess.

Accordingly, a major concern for the courts was determining how scientific evidence and expertise – along with the expert bodies tasked with compiling it – were to be used in determining the course of action.[61] One option that came to mind was the use of the precautionary principle in the area of pandemic regulation. It has been prominently present in the debate regarding the response to Covid-19 in Italy, as one of the states very seriously affected in the

56 *Ibid.*

57 *Ibid.*, para. 96.

58 *Ibid.*, para. 101.

59 *Ibid.*

60 The unfortunate fact that the legislature, itself partially caught in a political deadlock, has failed to act within the time limit of two months indicated in the decision, and in fact only revised the legislation after the following elections, more than a year after the Court's decision, is beyond the scope of this chapter.

61 For the comparative outline on this see Iamiceli and Cafaggi, n. 14 above, at 27–35.

first wave,[62] although not without criticism.[63] On the other hand, in Sweden the more restrained approach of the authorities to the pandemic was later criticised as not having followed the precautionary principle.[64] I admit to having some doubt, personally, as to the direct applicability of the precautionary principle to a pandemic context.[65] For many, however, in particular in Europe and South America, it was seen as complementary to the proportionality approach, with precaution providing the "if" and proportionality the "how" element of adopting and later reviewing the lawfulness of restrictive measures.[66]

In the context of proportionality review, that was then further confounded with the challenges in determining the balancing exercise. To the extent that regulatory measures pursued the aims of safeguarding public health or the individual rights to health and life, should these be seen as constitutional values of a higher order so as to (automatically or at least presumptively) justify interference with other fundamental rights? That even in such cases health interests should be balanced against other rights and freedoms has long been recognised in the prevailing jurisprudence of the courts[67] and was also reaffirmed in the Covid-19 context.[68] The issue is all the more relevant when

62 See, e.g., Donato Vese, Managing the Pandemic: The Italian Strategy for Fighting COVID-19 and the Challenge of Sharing Administrative Powers, *European Journal of Risk Regulation* 14 (2023) 1, pp. 113–140, first published online on 3 Sep 2020; Emiliano Frediani, The Administrative Precautionary Approach at the Time of Covid-19: The Law of Uncertain Science and the Italian Answer to Emergency, *Utrecht Law Review* 17 (2021) 3, pp. 6–17.

63 Frediani is thus critical of a disconnect (in his words, a "paradox") between a principled commitment to the central role of science and the adoption of initial measures without a transparent and objective risk assessment, and that the so-called precautionary action of the Italian Government was designed in a way that delayed an effective response to the pandemic – see Frediani, n. 62 above, at 12 and 14–15.

64 See Anders Nordgren, Pandemics and the Precautionary Principle: An analysis taking the Swedish Corona Commission's report as a point of departure, *Medicine, Health Care and Philosophy* 26 (2023), pp. 163–173, at 164–165, listing the findings of the Swedish Corona Commission to that effect but then proceeding to criticize them.

65 The reason being that in a pandemic context, the underlining uncertainty relates not to human activity that likely poses (some undefined) threat of harm to the protected good (environment and/or health), but to a natural occurrence which in important ways is independent of particular human activity. It is true that human activity may contribute to the spread of Covid-19 (cf. Nordgren, *ibid.*, at 168), but I still find the pandemic necessitating the adoption of restrictive measures a qualitatively different case from restricting a particular human activity because that activity may be the source of harm to the environment or health.

66 So Iamiceli and Cafaggi, n. 14 above, at 21–23.

67 See Conrad Nyamutata, Do Civil Liberties Really Matter During Pandemics? Approaches to Coronavirus Disease (COVID-19), *International Human Rights Law Review* 9 (2020), pp. 62–98, at 90–91.

68 See, e.g., UN Committee on Economic, Social and Cultural Rights, *Statement on the Covid-19 Pandemic and Economic, Social and Cultural Rights*, 6 April 2020, UN Doc E/C.12/2020/1, paras 3 and 11, stressing that that even in times of a pandemic the states should not neglect the interdependence of human rights and ensure that any measures taken are proportionate so as to ensure an appropriate protection of all human rights.

the restrictive measures themselves could have adverse health effects, both in terms of mental health[69] and in treating other pathologies.[70] Thus, while proportionality review had to be reassessed when the courts reviewed the constitutionality of restrictive measures, it could hardly be dispensed with.

In Slovenia, the proportionality test in the context of a pandemic was actually addressed by the very first decision on the merits, adopted in August 2020, in a case deciding on an application which did not raise the issue of legality but only alleged the disproportionality of the measures introduced by a governmental ordinance.[71] In its decision, noting the significance of considerable uncertainty facing the authorities when deciding on the appropriate response to the pandemic, which allowed for a wider margin of appreciation on the part of the authorities in selecting the appropriate measures, the Court developed general criteria for measures to be considered proportionate in the specific context of the pandemic: the measures were constitutionally sound if they were based on verifiable reasons, expert advice and forecasts which already existed and which the authorities were obligated to actively seek to obtain, if the relevant information was appropriately communicated to the public and if the measures introduced were time-limited.[72] The assessment of these criteria to individual cases then led to different outcomes in different cases, often in a divided court.[73] With similarly different outcomes in specific cases, propor-

69 See Erwin J. Khoo and John D. Lantos, Lessons Learned from the COVID-19 Pandemic, *Acta Paediatrica* 109 (2020) 7, pp. 1323–1325, at 1323–1324. Measures imposing quarantine, for instance, could lead to post-traumatic stress symptoms, avoidance behaviours, anger, fears of infection, frustration, boredom and anxiety – see Samantha K. Brooks and others, The Psychological Impact of Quarantine and How to Reduce It: Rapid review of the evidence, *Lancet* 395 (2020), pp. 912–920. This aspect is not to be underestimated – a comprehensive 2006 expert report on the health implications of the 1986 Chernobyl accident found that the "mental health impact of Chernobyl [was] the largest public health problem caused by the accident to date" – see UN Chernobyl Forum, Expert Group Health, Health Effects of the Chernobyl Accident and Special Health Care Programmes. World Health Organization, Geneva 2006, available at <www.who.int/publications/i/item/9241594179>, at 95.

70 Early analyses thus also called upon the authorities not to fall in a "Covid-19 trap", whereby other treatments would suffer – see Kathia Barro and others, Management of the COVID-19 Epidemic by Public Health Establishments – Analysis by the Fédération Hospitalière de France, *Journal of Visceral Surgery* 157 (2020), S19 – S23, at S21. Early on, for instance, a study could thus already estimate the total amount of years of life lost in the UK because of delays in the diagnosis and treatment of cancer patients – see Camille Maringe and others, The Impact of the COVID-19 Pandemic on Cancer Deaths Due to Delays in Diagnosis in England, UK: A national, population-based, modelling study. *Lancet Oncol* 21 (2020), pp. 1023–1034, at 1031.

71 Whether the Court should, nevertheless, of its own motion, in such cases always start by reviewing the legality of the statutory basis on which such an executive act was based was also a point of some division at the Court.

72 Decision No. U-I-83/20, n. 44 above, paras 50 and 56.

73 Thus, for instance, in Decision No. U-I-83/20, concerning limitations on the freedom of movement (including the general prohibition of leaving one's municipality of residence), the measures were found to be proportionate. In Decision No. U-I-793/21, U-I-822/21 of 17 February 2022 (Official Gazette RS No. 29/2022) ECLI:SI:USRS:2022:U.I.793.21, paras 62–79, the Court also

tionality review had to be undertaken in other jurisdictions, also leading to some increase in the judicial dialogue (as inspiration)[74] facing similar issues.[75]

Conclusion: The Role of the Law and the Judge in a Pandemic

What conclusions can be deduced from the pandemic response outlined herein? It certainly was a disruptive reality in the impact it had on the everyday lives of individuals as well as communities across the globe. It also, in turn, brought about a commonality of purpose, not just within the members of a given society but across societies.[76] Was it, however, also disruptive in the sense of requiring a legal revolution against the established operation of the constitutional orders? In his Opening Lecture opening this volume, Pitamic at one point poses a similar question in the context of the disintegration of the Habsburg monarchy and the applicability of surviving Austrian laws vis-à-vis the new laws and regulations: What are the courts to do, authorised as they are to rule on the validity of regulations?[77] The very same question could be said to be the recurring theme of the Slovenian experience of constitutional review in the time of the pandemic, with Covid-19 assuming the place of a political revolution but similarly challenging the unsettled waters of the ordinary operation of the constitutional order in extraordinary times.

I would dare posit that the answer is relatively clear, that it meshes well with the position taken by Pitamic some hundred years ago, and that it is partly already implied in his question quoted above. I thus offer the following three tentative conclusions as an evaluation of the pandemic jurisprudence outlined in this chapter.

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found to be proportionate the measures introducing the so-called Recovered-Vaccinated-Tested requirement for the performance of different tasks or activities, finding that the relatively mild interference with asserted rights was not disproportionate to the benefits pursued by the measures. In contrast, in Decision No. -I-50/21 of 17 June 2021 (Official Gazette RS No. 119/2021), ECLI:SI:USRS:2021:U.I.50.21, paras 36–51, reviewing several ordinances which interfered with the right of peaceful assembly and public meeting guaranteed by Article 42(1) of the Constitution, in some periods completely prohibiting public protests and in others limiting them to no more than ten participants, the Court found that they lacked a sufficient statutory basis but also were disproportionate as the Government failed to demonstrate the necessity of the measures imposed. It also found disproportionate, for not satisfying the requirement of proportionality *stricto sensu*, measures on the closure of schools and distance learning as far as children with special needs were concerned – see Decision No. U-I-445/20, U-I-473/20 of 16 September 2021 (Official Gazette RS No. 167/2021), ECLI:SI:USRS:2021:U.I.445.20, paras 28 and 42–51.

74 On the modalities of judicial dialogue, see Matej Accetto, Judicial Independence and Interdependence in European Union Law, in *Une justice proche du citoyen: Forum des magistrats et Audience solennelle*, Office des publications de l'Union européenne: Luxembourg 2023, pp. 71–83, at 76–82.

75 See Iamiceli and Cafaggi, n. 14 above, fn. 65 at 25–26, listing two examples of the Italian Council of State and the Italian Constitutional Court.

76 Cf. Pitamic at 11 in this volume.

77 *Ibid*. at 16.

The first is a strong repudiation of a fear that the Covid-19 pandemic would – or for some a belief that it should – challenge the established constitutional order to such an extent that it might necessitate a temporary withdrawal of the ordinary demands of the rule of law. The rich and diverse jurisprudence of the courts around the globe and the standards of judicial review established, refined or merely confirmed through this jurisprudence emphatically reaffirmed the significance of the rule of law and the role of the courts in safeguarding the constitutional order. The requirements of the rule of law not only did not preclude the effectiveness of the pandemic response but, to the contrary, helped assure its legitimacy and thereby bolstered its effectiveness. At the same time, without doing undue harm to the fundamental tenets of the rule of law, the constitutional order allowed for the particular circumstances of the pandemic to be taken into account and the constitutional standards appropriately adjusted.

The second is that this adjustment was ultimately perhaps not as radical as the disruptive reality of Covid-19 first implied. While it certainly challenged the ordinary operation of the political branches of government and consequently judicial review, many if not all of the issues it raised had already previously been confronted by the courts in their pre-pandemic jurisprudence. The prior sections show this for the Slovenian Constitutional Court, referring to precedents on applying the exceptional circumstances as concerns the issues of standing and the review of acts no longer in force, and the same applies – at a principled level – as concerns the issues of legality or the proportionality review. While the particular way in which the proportionality test was adjusted and the criteria determining whether a given measure was proportionate were set out anew, their underlining principles had also been established before. It is certainly the case that the courts have tried to, and often managed to, resolve the issues before them by recourse to the established constitutional standards and tenets of judicial review.[78]

The third, finally, and one implied in the Pitamic question quoted earlier, is the fact that the pandemic did not diminish the significance of the role of the judges. The pandemic required the action (or reaction) by all the branches of government – ideally, as per the familiar system of checks and balances, each performing its proper role. The final say on the lawfulness of the restrictive measures, on what the law is[79] and what the constitutional order allows or requires, however, fell to the courts. In that vein, while some called for the relaxation of the rule of law, others reaffirmed its significance by lodging applications with the courts and calling for the judicial review of measures enacted. The Covid-19 pandemic thus reasserted the role, the authority and the accompanying responsibility of the judge, not only as a long-time symbol of justice but also as its principal champion.[80]

78 Including, as outlined above with regard to the proportionality assessment, the precautionary principle – see text accompanying notes 62–66 above.

79 *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

80 Cf. Pitamic at 24 and Introduction at 2.

Index