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Contents

NICOLAUS COPERNICUS SUPERIOR SCHOOL | SGMK
Copernican Journal of Law
No. 2 (1/2025), p. 7
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Esteemed Colleagues and Readers!

It is with undisguised pleasure that I present to you the second issue of the *Copernican Journal of Law* a testament to the scientific endeavours of the College of Legal Sciences in Lublin of the Nicolaus Copernicus University in Warsaw – a new public University on the map of Poland committed to the highest standards of education while fostering interdisciplinarity and internationalisation.

The current issue contains contributions by Authors representing five foreign research centers: the Grigol Robakidze University (Georgia), the University of Florida (United States), the Public University of Navarre (Spain), the Machiavelli Center for Political and Strategic Studies (Italy), the University of Padova (Italy), and two domestic ones: the Cardinal Stefan Wyszyński University in Warsaw and the Nicolaus Copernicus Superior School in Warsaw. The papers within these pages are both compelling and original, addressing topical issues, in a way that stimulates reflection and encourage scientific discourse. In adherence to our rigorous quality standards and editorial guidelines, all seven articles have undergone peer review and careful selection.

I extend my sincere gratitude to the authors for their insightful contributions and to the reviewers for their invaluable expertise in shaping this issue. Special thanks are due to the Managing Editor, Prof. María Alejandra Vanney from Buenos Aires, for her tireless effort and commitment to the development of the journal. I also wish to acknowledge the esteemed members of the Advisory Board comprised of eminent specialists from sixteen prestigious universities across Europe, North and South America, for their guidance and support.

It is my hope that you, our esteemed readers, find this issue to be both enlightening and intellectually rewarding.

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NICOLAUS COPERNICUS SUPERIOR SCHOOL | SGMK
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The "Kafkaesque" in Judicial Reasoning: A Comparative Review of American and European Practices

• **Abstract** •

"Kafkaesque" perspective in judicial reasoning means, that law lacks intrinsic content. From this point of view, the conclusion can be drawn that both law and justice are empty in the context of Kafka's reality. Just because of these essential characters, they exist only due to their internal paradoxes or reification. As a result, something with no real form or content acquires a "phantom objectivity" through its highly formalized and bureaucratic form which are the main features of a "Kafkaesque" situation. Therefore, justice and the law become reduced to their result or verdict, possessing no real content until they are presented to a person involved. Therefore, a law that Kafka writes about is given in their experience to people who obey the law but have no knowledge of its content. So, such an emptiness of law is one of the characteristics of "Kafkaesque". That's why for outsiders, the law is irrational and inaccessible. On the other hand, it would not be impossible to recognize that such a nightmare situation needs to be revealed to be avoided. In this regard, the method of deconstruction only performs functions of diagnosing law systems by identifying their becoming empty of any content. However, it needs to be considered that deconstruction is often mistaken for destruction. However, according to the view presented in this article, deconstruction means exposing the underlying meanings both as juridical practices and their theories. This is one of the reasons why "Kafkaesque" performs the function of deconstruction towards the law and the legal system exposing their very content. The function of legal deconstruction largely determines the legal value of "Kafkaesque". Moreover, beyond deconstruction, it also embodies a (re) constructive function, manifested in promoting new principles of law.

Keywords: Kafkaesque law, Justice, Nightmare, System, Standard.

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Introduction

The article according to its aims deals with four aspects of justice systems: I) The "Kafkaesque" perspective in the American legal practice, II) The "Kafkaesque" perspective in the practice of the European Court of Human Rights III) The "Kafkaesque" perspective in the context of the European Court of Justice, and IV) The "Kafkaesque" perspective in the context of the European Court of Justice.

The analysis of the presented examples paradigmatic to justice systems shows that legal systems should not be irrational but fair, predictable, and rational. Moreover, they often testify to the arbitrariness and inaccessibility of modern legal systems. More than that, considering Kafkaesque as a standard of justice will make it possible for the judges' decision-making process to be based on shared values of rational choice. The legal evolution of the term "Kafkaesque" and the tendency to treat it as a standard of justice allows us to see how individual judges incorporate their commitment to rational choice and the rational decision-making process into their decisions.

In today's world judges and legal commentators often highlight certain similarities between the Kafkaesque legal system and the modern one. It is about the tendency of increasing bureaucratization of the system and the perverted bureaucratic logic based on which decisions are made. It is significant that "Kafkaesque" is used both to protect the interests of the plaintiff and the judicial system, which shows the growing tendency to use it as a standard of justice. This allows for the formation of a fair legal system based on liberal democracy and common law traditions. So, both the Kafkaesque legal evolution and the tendency to make it a standard of justice can be said to be parallel processes, and neither institutional nor national borders are a barrier to its spread. In addition, applying "Kafkaesque" to violate human rights indicates a growing tendency to make Kafkaesque justice a standard. It also shows that this phenomenon can be considered in the context of the "living instrument doctrine", which examines the issue not in the founders' imagination, but in the prism of today's circumstances.

Methods

This article aims to emphasize similarities and differences between American and European courts' practices about "Kafkaesque" based on the comparative method. The comparative method includes two aspects. On the one hand, a comparison is made between the federal and state levels of American justice in order to highlight their specificities. On the other hand, the comparative method allows

for the identification of the peculiarities of European courts including national ones. It also uses some elements of the deconstruction method to reveal characteristics of justice practices. Comments made by lawyers or other commentators about the decisions made by judges from a "Kafkaesque perspective" are often devoid of real legal force.

In this article, commentators pose transcendent questions to judges. Such questions serve a deconstructive function in that they reveal their true meanings. This article attempts to pose transcendent, i.e., extra-legal, questions to commentators themselves in order to reveal their phantom nature. Such comments are nothing more than phantoms of a phantom, i.e., simulacrum. Making true decisions involves much more complex structures. The discussion of the law from the standpoint of justice is a somewhat transcendent question and performs a deconstructive function, since justice does not enter the structure of the law, but transcends it, i.e., goes beyond it. So, deconstruction has a dual nature: It shakes up the reality but provides an opportunity to ask more fundamental questions.

The method of deconstruction shows that Kafkaesque should not be a moral admonition for courts and judges, but should have real power.

The "Kafkaesque" Perspective in the American Legal Practice

It is well known that Kafka has many followers in the US courts (Potter, 2004, p. 3). More than that, US Supreme Court Justice Kennedy says that every lawyer should read Kafka's "The Trial" to see through the eyes of his clients how he perceives justice (Mason, 2014, p. 9). In the US legal use of Kafka's works in judicial reasoning is increasing at a rapid pace. US judges show exceptional sensitivity and creativity in citing Kafka as an authority. This is partly due to the horrible cases of real-life discussed by them (Mason, 2014, p. 9).

In *People v. Colletti*,[1] two defendants appealed their convictions, arguing that they were denied due process and the right to a fair trial because the state failed to provide them with records of witnesses' testimony given to a grand jury. The judge explained that the obligation to produce such records would inevitably lead to a Kafka-like dream in which police departments and prosecutors' offices would turn into clerical centers recording witness statements for later transmission to the defense. Until then, all the references emphasized the "Kafkaesque nightmare" that the court should avoid (Potter, 2004, p. 10). Justice Moran characterized the court as avoiding a Kafka-like dream instead of a "Kafkaesque nightmare".

[1] 242 N.E.2d 63, 101 Ill. App. 2d 51, 1968 Ill.

It would be appropriate, in this regard, to mention "Kafkaesque academic test" a phrase first used by Judge Borden in the case *State v. Crosby*[2] (Burns, 2014, p. 321). Interestingly, it has been used exclusively by Connecticut judges first in criminal cases and then in civic ones. There is another interesting phrase "Kafkaesque specter" of an incomprehensible ritual which means violating the defendant's right to have an interpretation (Burns, 2014, p. 324).

There is a significant opinion on how Europeans view American justice: Leading decisions of the European Court of Human Rights indicate several marked differences between its jurisprudence and that of the United States Supreme Court. Not only there are different attitudes reflected in such decisions, but also various attitudes towards the dignity of individuals (Shoenberger, 1989, p. 11). It can be said that it's not difficult to recognize in such practices the Kafkaesque paradox.

Based on analyzing the most characteristic features of different practices general conclusion can be drawn that judges often use the term "Kafkaesque" when they disagree with the decisions of other courts (Potter, 2004, p. 21). On the other hand, in some cases, judges do not include Kafka's name in their cases, but on the contrary, consider them to be part of Kafka's world. In 8 of the first 10 cases of Kafka's name being used in the US legal sphere the adjective "Kafkaesque" or "Kafka-like" is used (Potter, 2004, p. 6). Thus, the division of the justice system into federal and state levels is a kind of hierarchical structure, which raises the expectation that the Kafkaesque nightmare that occurs in individual state justice systems will be corrected at the federal level.

The "Kafkaesque" Perspective in the Practice of the European Court of Human Rights

It is well-known that in general Kafka's influence is also verifiable in the legal field since it is a reflection of social factors. Thus, the distances between subject and order can be shortened, once legal phenomena are analyzed over other biases (Kosop and de Souza-Lima, 2017, p. 1). Another author based on analyzing Kafka's novels claims that where individualization effects fail the extremes of individual judicialization are also at risk of failing. The author proposes ways to avoid the double bind of collectivism and individualism. There is a dilemma of union and human rights (Roberts, 2023, p. 3).

From the point of view of the evolution of "Kafkaesque", the judgments of the European Court of Human Rights are important, in which it points to Kaf-

[2] 348 S.C. 387, 398–399, 559 S.E.2d 352, 358–59. App.2001.

kaesque elements in the decisions made by national courts. At the same time, there are cases when the judges disagree with the decision of the European courts. The case *O'Keeffe v. Ireland*[3] represents an interesting vision of a Kafkaesque situation: Any crime is a perfectly nebulous and undefinable entity, yet Josef K. is guilty – guilt is beyond suspicion. This is part of its essence: If you are accused and found guilty, you are guilty of being accused; if you feel guilty, this proves your guilt because otherwise, you would not feel what you feel (Airaksinen, 2019, p. 7).

In *Regner v. Czech Republic*,[4] the Court found that the limitation of the applicant's rights was contrary to the domestic courts' power to fully consider the documents before them, and therefore the essence of the protection afforded by the right to a fair trial was not violated. The observance of the "strong standard of review" referred to in this case appears to be an important point not only in terms of the protection afforded by the right to a fair trial but also it is no less important both in the aspect of "Kafkaesque" legal evolution and its consideration as a standard of justice. On the other hand, there are views of representing AI as a kind of remedy for Kafkaesque. AI technology can be used for legal decision-making and decision-support without appearing Kafkaesque (Kemper, 2020, p. 1).

Such a degenerated approach serves to make the individuals the food of the Kafkaesque torture machine. The analysis of the case *Al-Dulimi and Montana Management Inc. vs Switzerland*,[5] reveals that to avoid a Kafkaesque situation, it is necessary to ensure normative consistency. The meaning of such consistency lies in the fact that the UN Security Council should share the same values of human rights as recognized by the European Court of Human Rights. This will make it possible to avoid a normative conflict. From the point of view of legal evolution, the term "Kafkaesque" will expand the area of use of its use, which will contribute to its tendency to become a standard of justice.

This article is aware of the fact that the literary source lacks legal force, but it visibly and symbolically embodies the vague procedures of a vague and unfathomable legal bureaucracy, which is absolutely contrary to the principles on which justice is based (Mason, 2014, pp. 77–91). However, the legal system sometimes perceives Kafka's works as a moral admonition for the courts. Thus, the European Court of Human Rights, which is the international court of the Council of Europe and interprets the European Convention on Human Rights, in certain cases uses Kafkaesque as a standard of interpretation.

[3] Application No. 35810/09, January 28, 2014.
[4] Application No. 35289/11, September 19, 2017.
[5] Application No. 5809/08, June 21, 2016.

"Kafkaesque" Perspective in the Context of the European Court of Justice

The situation is different concerning the European Court of Justice, which is the highest court of the European Union in matters of EU law. It interprets EU law and ensures its uniform application across EU member states under Article 263 of the Treaty on the functioning of the European Union. One of the important issues that will be raised in this regard concerns whether the European legal system is sovereign or not. The "Kadi" case is paradigmatic in this respect (Kokott and Sobotta, 2012, p. 1). The fact is that in the European Court of Justice in 2008 Kadi was acquitted because the judge was unable to substantiate the charges brought against him. But the court upheld the sanctions against Kadi, freezing his assets (*European Commission and Others v Yassin Abdullah Kadi*).[6] Kadi is not only a highly significant case from several internal systemic doctrinal perspectives, but it is also useful to study the case for examining the nature of the law itself. Kadi's saga demonstrates the legal system's ability to produce just outcomes in the face of unjust laws, as well as its potential, in a more complex and fragmented array of legal forces, to reinforce the sense that the nature of law is unknowable and inaccessible (Mason, 2014, p. 9). Some authors question such a situation and characterize it as juridical passivism at the European Court of Justice (Várnay, 2019, p. 129), claiming that judicial passivism in the "extensive sense" would also encompass situations where the Court is using its judicial (e.g. interpretative) role, but it does so in a manner which deviates from the teleological interpretation to which the Court has accustomed us. The analysis shows that it is necessary to "internalize" legal norms external to the European legal space to establish an autonomous legal system of the European Union, which implies the creation of a mechanism for the enforcement of court decisions.

The "Kafkaesque" Perspective in the Context of European National Courts

There is a view according to which the national measure does not come within the scope of the EU Charter of Fundamental Rights – the Court does not have jurisdiction (Várnay, 2019, p. 137). The Court has observed that it has no power to examine compatibility with the Charter of national legislation outside the scope of EU law (Várnay, 2019, p. 137).

[6] C-584/10, July 18, 2013.

When a legal situation does not come within the scope of EU law, the Court has no jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction (Várnay, 2019, p. 137). On the other hand, Várnay says that "The Court could have displayed more proactivity and sought to reformulate the questions or rearticulate the referrals, as it had done in many other cases" (Várnay, 2019, p. 137).

An interesting reference to Kafka belongs to the genre of commentary. In 2019, journalist, commentator, and writer Jenny McCartney published a letter entitled: "The Kafkaesque Nightmare of British Justice", accompanied by the note: "British justice treats the accused like Kafka's Joseph K" (McCartney, 2019). "Kafkaesque nightmare" and "witch-hunting" of the British justice make Carl Beach's case paradigmatic in terms of "Kafkaesque" circumstances in the national justice system. Significantly, the presumption of innocence was ignored during the investigation process.

In terms of using "Kafkaesque" as a comment in the context of the decision made by the court, the decision made by the French court is interesting. A French court has ruled that 22 wind turbines in southern France are illegal and subject to dismantling. The judges of the Administrative Court of Marseille found that the builder did not have the authorization to install the 125-metre-high turbines and thus the wind farm is illegal. Kafkaesque dispute over "22 illegal wind turbines in the south of France", which acquired a somewhat comic character as Lida Kirchberger once used the term tragicomic to describe Kafkaesque (Kirchberger, 1986, p. 13).

On the other hand, the case of Andrea Rachaneli does not refer to the decision made by the national court, but on the contrary, the case refers to the decision that should have been made by the national court. The letter of Dimitri Kochenov, who analyzes this case as an epigraph, is prefaced with the following words: "Kafkaesque" is a word without any synonym. The gist of the case is as follows: The plaintiff was an Italian researcher working on a grant at the Max Planck Institute (MPI) in Germany. During that period, he was given a monthly grant to prepare for his Ph.D. in Germany and abroad. The applicant claimed that, during the period in which he worked, he was an employee under Article 45 of the Treaty on the Functioning of the European Union and was entitled to the same benefits as his German colleagues. The questions for the court were whether he could be considered a worker and whether there was discrimination when he was given less favorable conditions than a German by nationality. The Court found that the applicant could be a worker under Article 45 of the Treaty on the Functioning of the European Union if the activities were carried out for a certain period under the

direction of a constituent institution of that association and if he received remuneration for those activities – this was ultimately a matter for the national court to decide (*Andrea Raccanelli v Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV*).[7] Moreover, the private legal nature of the Planck Institute was not important in determining the application of a particular article of the said treaty. A private law association acting in the public interest was required to adhere to the principle of non-discrimination about workers. Although the question is ultimately up to the national court, the court recognized that Article 45 of the Treaty has a horizontal and direct effect on the functioning of the European Union.

It is obvious that although the contextual use of "Kafkaesque" does not directly refer to the legal realm, its use should not be perceived as a moral admonition. It is about promoting awareness of the difficulties inherent in law as a social artifact that regulates the behavior of non-lawyers. In the end, this circumstance largely determines the legal value of "Kafkaesque".

Conclusion

Although the term "Kafkaesque" is widely used, it is certainly not a legal tool to be used by the courts or in the legal space in general. US courts at both levels show great diligence in using "Kafkaesque", which is not the case for European national courts. But this term is rarely used in the context of the decisions of the European courts when they critically assess the decisions of the national courts. On the other hand, there is the use of "Kafkaesque" in the context of decisions made by national courts. Contextual use is possible, even a separate genre of use of this adjective. Non-lawyer analysts are more likely to apply such practice. At the same time, the opinion expressed in the legal literature should be considered that Kafka and his "process" are much more referred to by the American and British legal opinion.

Based on Kafka's artistic descriptions, there is a particular emphasis on how in their experience justice is given to people who do not have the privilege of having an idea of the inner workings of the legal system. It is this moment, how a non-lawyer perceives law in Kafka's works, that is not considered by legal theorists until it is revealed in analyzed cases. There are at least two most important points: one is that law has an internal ability to "save itself" from difficult circumstances, And the second is that the unknowability and unattainability of law for those who obey it become clear to man. The law regulates behavior both *ex ante* by establishing its standards and *ex-post* by judicial decisions.

[7] C-94/07, July 17, 2008.

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Transparency of the Parliament's Activities During the Legal Regime of Martial Law in Ukraine

• **Abstract** •

The article provides a general analysis of the legal nature of the principle of transparency in the activities of public authorities and identifies the main doctrinal approaches to its definition and standards of compliance with this principle by public authorities. The author emphasises the importance of its observance given the need to create conditions for accountability in the activities of public authorities.

It describes the constitutional and legislative regulation of transparency, openness, and publicity in the activities of the *Verkhovna Rada* of Ukraine (Supreme Council of Ukraine) as the only legislative body in Ukraine that directly affects the legitimacy of decisions made even in times of war. Provides analyses of the main practical elements of transparency of the functioning of the *Verkhovna Rada* during the martial law regime in Ukraine. Furthermore, the article identifies possible restrictions on the principle of transparency in the activities of the Parliament during martial law, which are permissible in extraordinary circumstances to ensure the safety of parliamentarians on the one hand, and, on the other hand, to continue to adhere to the principle of transparency in their activities.

Attention is drawn to the vulnerability of some approaches to transparency, openness, and publicity, which may lead to violations of human rights and freedoms. This refers to the prohibition to publish any information related to the *Verkhovna Rada* session before its completion and for some time afterwards. As a result, recommendations are provided to improve the coverage of the *Verkhovna Rada*.

Keywords: *Verkhovna Rada* of Ukraine, Parliament, Transparency, Openness, Publicity, Martial law.

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Introduction

Transparency in the activities of public authorities is a civilisation requirement that obliges such authorities to be public, open and transparent at all stages of their functioning. The legislative branch of power, namely the parliament, is no exception. The requirement for maximum accessibility of any information related to the activities of the parliament are stipulated not only by international standards and recommendations, but also by national regulations, internal organisational acts and policies. The origins of this requirement lie primarily in ensuring maximum legitimacy of any action of a public authority in general and of the parliament in particular.

However, it is difficult to deny the existence of exceptions when the above-mentioned transparency in activities may be limited. We are talking about extraordinary situations in the country or its individual parts. The question of the extent of such restrictions, their duration and permanence over a certain period in the activities of the Parliament, and the legal analysis of specific cases of restrictions remains open.

The purpose of the article is to analyse the implementation of the main components of the transparency principle in accordance with international standards and national legislation in the activities of the *Verkhovna Rada* of Ukraine (hereinafter – the *Verkhovna Rada*), during the martial law regime in Ukraine.

General Framework about the Rule of Law and Principles

An indispensable component of modern democracy and the democratic process in the activities of public authorities is the observance and implementation of the principle of transparency. In general, transparency is defined as the provision of information to citizens on how public authorities, their officials and employees use the powers they have been granted. However, this definition is somewhat limited. Any primitivities or excessive legal regulation in the context of the principle of transparency, for example, a legislative definition of publishing or disseminating information about the activities of a public authority, is unlikely to help achieve the goal and ensure an effective result (Venher, 2017, p. 80). Providing certain characteristics, defining key features of the transparency principle allows to understand its essence, to carry out the necessary implementation in legal acts and, most importantly, to implement it qualitatively and inclusively.

The principle of transparency in the activities of public authorities primarily applies to all information at the disposal of the authorities, including both the

executive and legislative branches of government and the judiciary (Open Government Standards, 2013, p. 2). Therefore, we can conclude that the requirement to adhere to the principle of transparency in their activities applies to any public institutions and agencies. In turn, information held by the relevant authorities is subject to transparency. This interpretation of the principle is related to the right of access to information, which is guaranteed by both international and national legislation. In addition, the principle of transparency should also be considered as a basis for legitimacy and a component of accountability in the activities of public authorities.

Transparency means being open to stakeholders and the public, as well as exercising their powers in a transparent manner. On this basis, public authorities are obliged to make public all information related to their activities, namely: to publish decisions made, to provide physical access to the public and/or media to their meetings, to explain aspects of the exercise of their powers. On the other hand, stakeholders should have equal access to data and information sources (Jashari and Pepaj, 2018, p. 61). Therefore, the legal nature of the principle is to create ways, methods and mechanisms by which a person can access all possible information about the authority itself and all aspects of its work, namely, the decisions it makes, the process preceding such decisions, the internal organisational structure, powers in the most accessible and understandable way.

One of the main hypotheses of our study of the principle of transparency as an integral part of modern democracy and its importance in ensuring the public interest means that the qualitative implementation of the principle of transparency as a component of the rule of law is possible through a combination of legislative definition and regulation of transparency, openness and publicity in the activities of public authorities, local and "internal" (official) legal regulation and the use of indirect means and methods to stimulate such transparency and openness.

The next important element in the study of the nature of the transparency principle is to determine its reflection directly in the various constituent elements (principles) of the rule of law, namely the principle of legality and the principle of legal certainty.

The principle of legality is a rather multifaceted phenomenon. Its main feature is the requirement for public authorities to act exclusively in accordance with the provisions of law. In their activities, such bodies must comply with the rule of law, for example, when adopting regulations, bylaws. In addition, a system is created and operates where laws are strictly enforced and respected, which contributes to the protection of human rights and fundamental freedoms and prevents arbitrariness and chaos (Venher et al., 2021, pp. 27–28). One of the criteria used to assess

compliance with the principle of legality is the degree of development of legislative procedures. Therefore, the assessment includes an analysis of the transparency and efficiency of the process of drafting parliamentary acts, and the extent to which the law regulates the procedures for drafting, discussing, adopting and publishing laws (or major draft laws).

The principle of legal certainty primarily means clarity of the grounds, content and objectives of legal provisions (Venher et al., 2021, p. 53). Any person should be able to foresee the consequences of their actions with the help of legal provisions, and there should be a model of consistent rule application by all public authorities. One of the criteria used to assess compliance with the principle of legal certainty is the accessibility and stability of legislation. This applies to the methods of promulgation of normative acts (compliance with the procedures of official promulgation), identification of sources of promulgation (their quality, accessibility, speed), and assessment of the period between the promulgation of a normative act and its entry into force.

As noted above, the origins of legal regulation of the principle of transparency in the activities of public authorities stem from the Rule of Law, but they are also reflected in the provisions of the Constitution of Ukraine. In particular, Part 2 of Article 19 of the Constitution of Ukraine enshrines the special permissive principle, according to which public authorities may act only as prescribed by the Constitution and the laws of Ukraine.[1] Therefore, when it comes to regulating the transparency of public authorities, it is necessary to use constitutional provisions and laws.

The right to access information is a constitutional human right. Article 34 of the Constitution of Ukraine provides that a person has the right to freely collect, store, use and disseminate information orally, in writing or in any other way. The existence of such a right gives rise to a positive obligation on the part of the state to ensure that this right can be exercised. However, this right is not absolute and may be restricted by law in the interests of national security, territorial integrity or public order in order to prevent disorder or crime, protect public health, protect the reputation or rights of others, prevent the disclosure of information received in confidence, or maintain the authority and impartiality of justice in accordance with the provisions of part 3 of Article 34 of the Constitution of Ukraine.

When it comes to the main elements of the transparency principle, there are three, namely publicity, openness and transparency itself. Each of these concepts

[1] *Verkhovna Rada* of Ukraine. Constitution of Ukraine. *Vedomosti Verkhovna Rada of Ukraine (VVR)*, 1996, No. 30, p. 141. June 28, 1996. Retrieved April 24, 2025, from https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text

has its own characteristics and needs to be defined to avoid confusion that could harm the exercise of the right to access information and the principle of transparency itself.

Transparency is characterised by ensuring a certain level of publicity in the functioning of public authorities.[2] This refers both to the actual publication of any information and to the processes and procedures for covering the activities of public authorities. According to Venher (2007, p. 80), this means holding public meetings, requirements for the advance publication of meeting agendas, draft acts, publication or publication of adopted decisions in the print media, the moment when the decisions come into force.

Openness, in turn, can be defined as the availability of actual access to the premises of the public authority, access to the transcripts of meetings, minutes, recordings (both video and audio) of meetings (Venher, 2017, p. 80), which means that everyone can directly receive information about the activities of public authorities. In other words, anyone who wishes to do so should be able to access information posted on official websites, information stands, in print media or any other media that have such data.

The practical application of the principle of transparency can be seen in the activities of the Parliament. As one of the branches of power, a constitutional representative body, it is obliged to directly adhere to the principle of transparency in its activities, since the said principle is, firstly, a component of the Rule of Law, secondly, defined in the Constitution of Ukraine and also provided for by international standards for representative bodies in functional constitutional democracies, and thirdly, it is necessary to reflect the actual functioning of the body to a wide range of people. The legitimacy of the parliament and its decisions also depends on the quality of transparency. Therefore, we need to identify the key features provided for by both national legislation and international legal acts that characterise the principle of transparency in parliamentary activities.

The Declaration of Parliamentary Openness defines key characteristics such as informing citizens about the parliamentary agenda, publishing draft laws, publishing minutes of plenary sessions and committee meetings, recording parliamentary votes (Organization for Security and Co-operation in Europe Parliamentary Assembly, Commonwealth Parliamentary Association, 2012). In conclusion, the Declaration lists the main requirements for the parliament, what information it

[2] For example, Article 11 of the Treaty on European Union: "2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society." Retrieved April 20, 2025, from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX-:12016M/TXT

should disseminate or make available to the public as much as possible for its activities to comply with the principle of transparency. This list includes elements of publicity and openness in the parliament's activities, but it does not consider one important feature of the concept of "openness" that has gained popularity in the twenty-first century – the activities of the media.

The study "Parliament and Democracy in the Twenty-First Century" analyses the main aspects of ensuring the principle of transparency and its components by parliaments. Transparency, and thus openness, is defined as physical access to parliamentary sessions. However, it is impossible to provide access to parliamentary sittings to everyone. Therefore, a possible balance for maintaining openness was found in the openness of meetings to the press and journalists, who in this case act as the "eyes and ears" of the public at large (Beetham, 2006, p. 43). Of course, the relationship between the parliament and the media is important, as their task is to inform the public about the general principles of the parliament's functioning, the course of parliamentary sessions, to enable representatives (parliamentarians) of different political views to express their opinions on political life.

The basis for legal regulation of the principle of transparency in the activities of the *Verkhovna Rada*, in addition to the already mentioned Articles 19 and 34 of the Constitution of Ukraine, is part 1 of Article 84 of the Constitution of Ukraine, which provides that the meetings of the *Verkhovna Rada* shall be held in open session, and closed meetings may be held only by the decision of the majority of the constitutional composition of the *Verkhovna Rada*. The constitutional provisions on transparency of the *Verkhovna Rada* directly mention only one component of the principle – openness – and only one form of the Parliament's activity. However, part 5 of Article 83 of the Constitution of Ukraine stipulates that the procedure of the *Verkhovna Rada*'s work is established not only by the Constitution of Ukraine, but also by the Rules of Procedure of the *Verkhovna Rada*. As a rule, the regulation of forms, methods and ways of implementing the principle of transparency (openness and publicity) in the activities of parliaments is enshrined in laws, not in the Constitution.

When assessing the constitutional and legal framework for the principle of transparency, it is also worth noting that parts 2, 3 and 4 of Article 94 of the Constitution of Ukraine define the issue of official publication of adopted laws, and part 5 of Article 94 of the Constitution of Ukraine provides for the mandatory publication of laws for their entry into force.

To understand the principles of the *Verkhovna Rada*'s activity and the requirements set for the Ukrainian parliament in terms of ensuring the implementation of the principle of transparency and access to information on all aspects of the

parliament's activity, we should analyse the Rules of Procedure of the *Verkhovna Rada* of Ukraine (hereinafter – the Rules). In addition to the constitutional provision on the openness of the *Verkhovna Rada*'s meetings, Article 3 of the Rules of Procedure states that they are also public, except in cases established by the Constitution of Ukraine and these Rules.[3]

The legislator understands openness (as a component of the principle of transparency) of the *Verkhovna Rada*'s meetings as access to the meetings of any persons, except in cases provided for by law. The procedure for access to open meetings is determined by an order of the Chairman of the *Verkhovna Rada* in accordance with part 2 of Article 3 of the Rules of Procedure. In turn, the publicity of the meetings of the *Verkhovna Rada*, in accordance with part 3 of Article 3 of the Rules of Procedure, is ensured by broadcasting them on television and radio, publishing verbatim bulletins of the meetings of the *Verkhovna Rada* and its decisions in the Bulletin of the *Verkhovna Rada* of Ukraine, the newspaper "Holos Ukrainy" and other publications of the *Verkhovna Rada*, as well as by posting information on the official website of the *Verkhovna Rada*. The time, scope, form of broadcasting, and volume of printing are determined in accordance with the law by the Rules of Procedure and individual resolutions of the *Verkhovna Rada*.

It is worth noting that a well-established form of active access to information about the activities of any public authority, which includes the Parliament, is a request for public information held by the relevant authority in accordance with the procedure established by a special regulatory act. In Ukraine, such act is the Law of Ukraine "On Access to Public Information".[4] *The Verkhovna Rada* is not an exception, as the paragraph 2 of part 5 of Article 3 of the Rules of Procedure stipulates that it provides information upon requests in accordance with the Law of Ukraine "On Access to Public Information". Consideration and response to requests for information are provided by the Secretariat of the *Verkhovna Rada*.

As mentioned above, the media are actively involved in indirectly engaging the public in the activities of the *Verkhovna Rada*. This is an important component of high-quality and strict adherence to the principle of transparency. Therefore, media representatives and journalists are accredited to the *Verkhovna Rada* for a certain period or for the entire term of the current convocation of the *Verkhovna Rada* in accordance with the Law of Ukraine "On Information" under part 3 of

[3] *Verkhovna Rada* of Ukraine. "Rules of Procedure of the *Verkhovna Rada* of Ukraine". February 10, 2010. Retrieved April 20, 2025, from https://zakon.rada.gov.ua/laws/show/1861-17#Text

[4] This Law defines the procedure for exercising and ensuring the right of everyone to access information held by public authorities, other public information managers as defined by this Law, and information of public interest.

Article 3 of the Rules of Procedure. Moreover, media representatives may be provided with materials that are provided to MPs, except for those materials that are not disclosed or not provided in accordance with the law.

When analysing the observance of the principle of transparency in the activities of the *Verkhovna Rada*, it is worthwhile to focus on the peculiarities of observing this principle in emergency circumstances, namely during the legal regime of martial law in Ukraine, which was introduced on 24 February 2022 in connection with the full-scale armed aggression of the Russian Federation against Ukraine. Article 34 of the Constitution of Ukraine provides, as mentioned above, that the right to access information may be restricted by law in the interests of national security, territorial integrity or public order. According to Article 64 of the Constitution of Ukraine, constitutional rights and freedoms may not be restricted except in cases provided for by the Constitution of Ukraine. However, the Constitution allows for restrictions on the right of access to information under martial law. Clause three of the Presidential Decree "On the Introduction of Martial Law in Ukraine" states that the constitutional right to access information may be restricted during the period of martial law[5] and, therefore, public authorities retain discretionary powers to (un)restrict this right.

Therefore, we need to find out whether the *Verkhovna Rada* applies restrictions to the principle of transparency in its activities during the martial law regime, and if so, to what extent, whether such restrictions violate the fundamental principles of democracy, human rights and the Rule of Law, and whether such restrictions are proportionate to the level of threat that exists. First, we will focus on the following information: announcements of plenary sessions of the *Verkhovna Rada*, agendas of relevant meetings, availability of draft laws, broadcasts of plenary sessions, publication of adopted decisions, and analysis of the activities of the *Verkhovna Rada* committees in terms of compliance with the principle of transparency.

It is important to note that in the first days of the full-scale armed aggression of the Russian Federation against Ukraine, access to the official website of the *Verkhovna Rada* was restricted, but there was no relevant decision of the *Verkhovna Rada* or the Chairman of the *Verkhovna Rada* on such actions. Since 23 February 2022, the State Service for Special Communications and Information Protection in Ukraine has reported constant hacker attacks on public and private telecommunications infrastructure,[6] and therefore, we can assume that the

[5] President of Ukraine. "On the introduction of martial law in Ukraine". Decree of the President of Ukraine No. 64/2022. February 24, 2022. Retrieved April 20, 2025, from https://zakon.rada.gov.ua/laws/show/64/2022/sp:max50:nav7:font2#n2

[6] State Service for Special Communications and Information Protection of Ukraine. "An-

decision to restrict access to the *Verkhovna Rada* website was made by another public authority exercising cyber defence powers.

Announcement of Plenary Sessions of the *Verkhovna Rada* of Ukraine

Informing the public in advance about the holding of plenary sessions, time and place of such sessions allows all interested parties and the public, firstly, to be informed about the meeting where decisions are made, secondly, to know when to come to the Parliament to participate in the relevant session, and thirdly, to draw a conclusion about the overall activity and fulfilment of constitutional duties by the Parliament. The media, in turn, have the opportunity to attend and report on plenary sessions.

However, due to the legal regime of martial law in Ukraine, the *Verkhovna Rada* has not announced its plenary sessions since 24 February 2022 and until now, on 1 December 2024. Therefore, we can state that to ensure the life and health of the Members of Parliament of Ukraine, prevent any unlawful obstruction of the *Verkhovna Rada*'s activities, and preserve confidentiality regarding the date, time and place of plenary sessions, information on the advance notification of the public about the relevant meetings of the *Verkhovna Rada* was limited.

It is worth noting that the *Verkhovna Rada* adopted the Resolution "On the Organisation of the Work of the *Verkhovna Rada* of Ukraine in the Conditions of Emergency and/or Martial Law" of 23 February 2022 (no longer in force), the Resolution "On the Organisation of the Work of the *Verkhovna Rada* of Ukraine in connection with the Act of Armed Aggression of the Russian Federation against Ukraine on 24 February 2022" of 24 February 2022 (no longer in force), as well as the Resolution "On Some Issues of Organisation of the Work of the *Verkhovna Rada* of Ukraine of the Ninth Convocation during the Eighth Session under Martial Law" of 6 September 2022 (in force), which states that the Speaker of the *Verkhovna Rada* determines the time and place of continuation of the *Verkhovna Rada*'s meeting.[7] It can be concluded that only MPs of Ukraine and some

other cyberattack on the websites of state bodies and banks". February 23, 2022. Retrieved November 03, 2024, from https://cip.gov.ua/ua/news/chergova-kiberataka-na-saiti-derzhavnikh-organiv-ta-banki

[7] *Verkhovna Rada* of Ukraine. "On some issues of organisation of the work of the *Verkhovna Rada* of Ukraine of the ninth convocation during the eighth session under martial law". Resolution No. 2558-IX. September 6, 2022. Retrieved April 20, 2025, from https://zakon.rada.gov.ua/laws/show/2558-20/sp:max50:nav7:font2#n13

authorised employees of the *Verkhovna Rada* Secretariat are informed about the continuation of the plenary session of the *Verkhovna Rada*.

Announcement of the Agenda of the Meeting

The agenda of a parliamentary meeting or any other document relating to the parliament's work schedule, plans for consideration of draft laws or other documents must be made available to the public for preliminary review and study (Organization for Security and Co-operation in Europe Parliamentary Assembly, Commonwealth Parliamentary Association, 2012). This allows people to be informed about the legislators' plans to regulate certain legal relations. In this case, it is primarily about due respect for legislative procedures and proper regulation of legislative activity, namely, the notification of decision-making. Although in rare cases the parliament may announce the adoption of a decision within a short period of time, it should be sufficient to allow the public and civil society to comment.

At present, the *Verkhovna Rada* does not announce or otherwise publish the agenda of its meetings (the *Verkhovna Rada* operates in the mode of one plenary session, during which breaks are announced). Therefore, this component of the principle of transparency in the activities of the *Verkhovna Rada* is also limited due to the legal regime of martial law. It is worth noting that the *Verkhovna Rada* has not adopted any decision to restrict public access to the agendas of plenary sessions, or which is also possible, such a decision has not been publicly announced.

One of the ways to partially ensure transparency in the activities of the *Verkhovna Rada* during martial law in the context of announcing the agenda is, indeed, to publish and make available all draft laws or other acts on the official website of the *Verkhovna Rada*.[8] An example is the draft Law of Ukraine "On Amendments to Certain Laws of Ukraine on Optimisation of Certain Issues of Compulsory Alienation and Seizure of Property under the Legal Regime of Martial Law", which was submitted to the *Verkhovna Rada* on 27 July 2022.[9] On the same day, 27 July 2022, the text of the draft law with supporting documentation was published on the official website of the *Verkhovna Rada*. On 29 July 2022, it was included

[8] Official website of the *Verkhovna Rada* of Ukraine. https://www.rada.gov.ua

[9] *Verkhovna Rada* of Ukraine. "Proposals of the President of Ukraine to the Law 'On Amendments to Certain Laws of Ukraine on Optimisation of Certain Issues of Compulsory Alienation and Seizure of Property under the Legal Regime of Martial Law'". Official web portal of the Parliament of Ukraine, July 27, 2022. Retrieved November 02, 2024, from https://itd.rada.gov.ua/billInfo/Bills/Card/40137

in the agenda and adopted as a basis with a shortened timeframe for preparation for the second reading. On 15 August 2022, the draft law was adopted.[10]

Therefore, in general, the *Verkhovna Rada* tries to provide a minimum amount of time to review the text of draft laws before they are considered at the plenary sessions of the *Verkhovna Rada*.

Broadcasting of Meetings

A separate issue of transparency in the activities of the parliament is the availability and accessibility of broadcasts of plenary sessions of the parliament, its committees, and commissions. In addition to the information on the recordings of the parliament's votes, which are provided directly by the parliament, usually on its official website, it is a well-established practice to broadcast the parliamentary sessions on television or other information resources. Broadcasting sittings is a direct expression of the transparency of the parliament, as de facto its activities are "visible through", and anyone can see the decision-making process and other aspects that are subject to coverage.

As mentioned above, the Rules of Procedure of the *Verkhovna Rada*, in part five of Article 3, states that publicity of the *Verkhovna Rada*'s meetings is ensured, among other things, by broadcasting them on television and radio. For the official broadcasting of the *Verkhovna Rada*'s sessions, the state enterprise "Parliamentary TV Channel Rada" was created and operates. Its main tasks are to comprehensively cover the activities of the *Verkhovna Rada*, committees, commissions, MPs of Ukraine, parliamentary factions (deputy groups), and local self-government bodies (Charter of the State Enterprise, 2016).

However, we are forced to state that after 24 February 2022, the *Verkhovna Rada* meetings are not broadcast.[11] On 6 September 2022, the *Verkhovna Rada* adopted Resolution No. 2568-IX "On Certain Issues of Coverage of the Work of the *Verkhovna Rada* of Ukraine of the Ninth Convocation under Martial Law",[12]

[10] *Verkhovna Rada* of Ukraine. "Proposals of the President of Ukraine to the Law 'On Amendments to Certain Laws of Ukraine on Optimisation of Certain Issues of Compulsory Alienation and Seizure of Property under the Legal Regime of Martial Law'". Official web portal of the Parliament of Ukraine, July 27, 2022. Retrieved November 02, 2024, from https://itd.rada.gov.ua/billInfo/Bills/Card/40137

[11] *Verkhovna Rada* of Ukraine. "On some issues of organisation of the work of the *Verkhovna Rada* of Ukraine of the ninth convocation during the eighth session under martial law". Resolution No. 2558-IX. September 6, 2022. Retrieved April 20, 2025, from https://zakon.rada.gov.ua/laws/show/2558-20/sp:max50:nav7:font2#n13

[12] Ibid.

which stipulates that during the period of martial law, live broadcasts of open plenary sessions of the *Verkhovna Rada* may be limited to the state enterprise "Parliamentary TV Channel Rada" in the interests of national security and in order to ensure the security of the *Verkhovna Rada* in accordance with the Constitution and other laws of Ukraine. Thus, the *Verkhovna Rada* has decided to restrict the principle of transparency in terms of broadcasting the *Verkhovna Rada*'s meetings in the interests of national security and in order to ensure the security of the *Verkhovna Rada*, despite the fact that broadcasting is an integral element of coverage of the *Verkhovna Rada*'s activities and a possibility of indirect access to the *Verkhovna Rada* for the public. It should be noted that in the period from 24 February 2022 to 1 December 2024, there is no document or information on restrictions on the broadcasting of the *Verkhovna Rada*'s sessions.

In fact, an analysis of the transcripts of the *Verkhovna Rada*'s sessions, which were not available during the first months after the start of the Russian Federation's full-scale armed aggression against Ukraine, shows that information on the announcement of meetings, agendas and broadcasts of the *Verkhovna Rada*'s sessions is limited by the conditional consent of all MPs of Ukraine and at the request of the Speaker of the *Verkhovna Rada*. For example, in the transcript of the *Verkhovna Rada* session of 3 March 2022, the Speaker of the *Verkhovna Rada* asked MPs to publish photos and information about the *Verkhovna Rada* sessions no earlier than 3 hours after the end of the session.[13] In the transcript of the *Verkhovna Rada* meeting of 15 March 2022, the Chairman of the *Verkhovna Rada* asks MPs to publish any information, photos and videos of the meeting no earlier than 3 hours after the end of the meeting.[14]

The practical implementation of the restriction on broadcasting parliamentary sessions raises many questions. Some MPs broadcast video of parliamentary sessions on their TikTok pages, as well as text broadcasts on their Telegram pages, where they publish information not only about adopted or rejected draft laws (name of the draft law, its number, number of votes), but also about the presence of representatives of public authorities at such sessions. This practice became widespread in 2024, which suggests that the logic and legitimacy of such a restriction is violated even among parliamentarians themselves.

[13] *Verkhovna Rada* of Ukraine. Transcript of the plenary session of the *Verkhovna Rada* of Ukraine. March 3, 2022. Retrieved November 4, 2024, from https://www.rada.gov.ua/meeting/stenogr/show/7984.html

[14] *Verkhovna Rada* of Ukraine. Transcript of the plenary session of the *Verkhovna Rada* of Ukraine. March 15, 2022. Retrieved November 4, 2024, from https://www.rada.gov.ua/meeting/stenogr/show/7983.html

Activities of the *Verkhovna Rada* of Ukraine Committees

Committees are the main structural unit of the Parliament where the bulk of law-making work is carried out. The requirements for transparency of the activities of the parliamentary committees are the same as for the Parliament. Given the specific characteristics of the committee, it is during their activities that transparency, openness and publicity can achieve the maximum effect of public engagement in the work of the Parliament. After all, when drafting laws, discussing them, introducing amendments, holding roundtables and meetings, public participation is key to influencing the work of the Parliament. As a general rule, draft laws are published on the official website of the Parliament after they are submitted. It is important that the public is informed about the issues under consideration. Therefore, the Parliament should seek to ensure that the public has access to preliminary analysis and background information to facilitate a broad understanding of the political debate on proposed legislation, and the role of committee activities in this regard is central (Organization for Security and Co-operation in Europe Parliamentary Assembly, Commonwealth Parliamentary Association, 2012).

According to Article 3 of the Law "On Committees of the Verkhovna Rada of Ukraine", one of the principles of the *Verkhovna Rada* committees' activity is publicity.[15] However, part 1 of Article 9 of the same law, which refers to the coverage of the committees' activities, mentions not only publicity but also openness as a component of the transparency principle. Such a mistake in rulemaking may have negative consequences in its application, leading to a restriction of the principle of transparency and violations of human rights and freedoms in terms of access to information.

The committees inform the public about their activities, in particular, by publishing the work plan, schedule of committee meetings, acts adopted by the committees, minutes and transcripts of committee meetings and hearings in the committees. Meetings and other events of the committees held in public are open to journalists, media workers and representatives of NGOs.

The Committee of the *Verkhovna Rada* on the Organisation of State Power, Local Self-Government, Regional Development and Urban Planning (hereinafter referred to as the Committee) can serve as an example for our analysis. The agendas of the Committee's meetings have not stopped being published on the Committee's official website since 24 February 2022. The peculiarity is that the

[15] *Verkhovna Rada* of Ukraine. "On Committees of the *Verkhovna Rada* of Ukraine". Law of Ukraine No. 116/95-VR. April 4, 1995. Retrieved April 20, 2025, from https://zakon.rada.gov.ua/laws/show/116/95-%E2%F0#Text

agendas are not published in advance, but rather at the beginning of the Committee's meeting. Therefore, in general, the Committee did not apply any restrictions due to the martial law in this regard. As for the announcement of the Committee's meetings, it is worth noting that such information is not available on the official website. Transcripts, as well as audio and video materials of the Committee's meetings, are available and published by the Committee despite the martial law in Ukraine. The Committee's website also contains publicly available materials of its activities, such as conclusions, decisions. It is worth noting that they are published on the same day that the Committee adopted the relevant document. No restrictions on its publicity were applied to this information either.

Instead, we could observe certain restrictions on access to information on the activities of other committees during 2022. In 2023 and 2024, all committees except the Committee on National Security, Defence and Intelligence and the Committee on Law Enforcement have already published their agendas, minutes and transcripts of meetings.

Publication of Adopted Draft Laws

A fundamental and basic component of the Rule of Law is the communication, promulgation or even publication of laws. All legal acts, once adopted by the legislature, must be promulgated and published before they enter into force, as this is a basic requirement of the principles of legality and legal certainty (Venher et al., 2021, p. 152). There can be no compromise on the possibility of neglecting this obligation by the Parliament or any other public authority. Except for laws on national security and territorial integrity, the Constitution and laws may provide for certain specifics regarding the public information on their adoption.

Article 94 of the Constitution of Ukraine clearly regulates the timing and specifics of the official promulgation of adopted laws of Ukraine, as well as their entry into force upon official promulgation. Most of the draft laws considered and adopted by the *Verkhovna Rada* between 24 February 2022 and 31 August 2022 were immediately signed by the Speaker of the *Verkhovna Rada*, sent to the President of Ukraine for signature, and published on the official website of the Voice of Ukraine the day after the President signed them. It is also important to note that most laws came into force the day after their publication.

Such efficiency in terms of the speed of signing and promulgation of most adopted draft laws may be explained by the need to regulate a significant number of legal relations that arose in connection with the martial law regime and the full-scale aggression of the Russian Federation against Ukraine. A novelty in

the publication of adopted draft laws in the activities of the *Verkhovna Rada* was the publication of the text of the adopted draft law signed by the Speaker of the *Verkhovna Rada* before it was signed by the President of Ukraine, despite the absence of relevant requirements in the legislation. For example, the adopted Law of Ukraine "On Amendments to Certain Laws of Ukraine on the Activities of Private Enforcement Officers and the Enforcement of Court Decisions, Decisions of Other Bodies (Officials) during the Period of Martial Law" was returned with the signature of the Speaker of the *Verkhovna Rada* on 1 August 2022 and immediately published on the official website of the *Verkhovna Rada*.[16] However, an analysis of the implementation of these procedures showed that the *Verkhovna Rada* complied with the provisions of the Constitution of Ukraine, the legislation, and the Rule of Law, despite the extraordinary nature of the events in the country.

Certain Issues of the *Verkhovna Rada*'s Activities in the Context of the Principle of Transparency

There are sensitive issues, such as those related to national security and defence, territorial integrity, preservation of the constitutional order, that may be considered at a parliamentary session. Their specificity allows, based on constitutional provisions, to hold closed sessions of parliament, to which the public either has extremely limited access or no access or information at all. However, to prevent abuse of this right, there should be mechanisms, firstly, to define the range of issues on which closed sessions can be held, and secondly, procedures with a high level of complexity for deciding on holding such a session.

Article 84 of the Constitution of Ukraine stipulates that a closed meeting is held by a decision of the majority of the constitutional composition of the *Verkhovna Rada*. The Rules of Procedure detail the relevant provisions in Article 4, which states that closed plenary sessions of the *Verkhovna Rada* to consider certain issues shall be held by a decision of the *Verkhovna Rada* adopted after a shortened discussion by a majority of votes of the MPs from the constitutional composition of the *Verkhovna Rada*. In addition to the persons specified by law, persons additionally designated by the *Verkhovna Rada* may be present at a closed session. In general, these provisions are rarely applied and only in exceptional cases.

[16] *Verkhovna Rada* of Ukraine. "Proposals of the President of Ukraine to the Law 'On Amendments to Certain Laws of Ukraine on the Activities of Private Enforcement Officers and the Enforcement of Court Decisions, Decisions of Other Bodies (Officials) during the Period of Martial Law'". Official website of the Parliament of Ukraine, April 26, 2022. Retrieved November 02, 2024, from https://itd.rada.gov.ua/billInfo/Bills/Card/39503

The official website of the *Verkhovna Rada* failed to provide information on the presence or absence of closed meetings between 24 February 2022 and 10 October 2022. It is worth noting, however, that most of the restrictions on the principle of transparency in the activities of the *Verkhovna Rada* since 24 February 2022 are in line with the provisions of the Rules of Procedure on closed meetings, despite the absence of a relevant decision of the *Verkhovna Rada* on their application.

Conclusion

The analysis of the general features of the principle of transparency in the activities of public authorities, the study of the presence and implementation of the constituent elements of the said principle in the activities of the *Verkhovna Rada* during the legal regime of martial law in Ukraine, the introduction of which is associated with the full-scale armed aggression of the Russian Federation against Ukraine, allows us to draw the following conclusions:

a. The principle of transparency in the activities of public authorities is a civilised requirement, stemming from the very essence of the existence of such bodies, allowing the public not only to be informed as much as possible about all aspects of the functioning of public authorities, to create a basis for accountability, but also to be part of the process of work of the relevant bodies through the information they know.
b. The Rule of Law does not have a separate constituent element (principle) that would correspond to the principle of transparency, but the essence of the principle of legality and legal certainty contains mandatory characteristics that correspond to the principle of transparency. Therefore, there are requirements for public authorities, including the Parliament, to strictly adhere to transparency, openness and publicity in their activities to ensure the legitimacy of decisions made at the highest level.
c. The Parliament should be guided by general standards and rules to ensure its transparency. However, it also has certain specific features, which are usually defined in the Constitution and other national legal acts. Such requirements are more stringent than those for other public authorities, as the constitutional role of the Parliament is extremely high, which creates additional opportunities for its full and maximum transparency, openness and publicity to avoid secrecy, corporatism and doubts about the legitimacy of its decisions, as well as to ensure public awareness and involvement in its activities.
d. The Constitution of Ukraine provides for the openness of the *Verkhovna Rada*'s sessions and provides for the possibility of holding sessions in

a closed session. The constitutional provisions also guarantee everyone the right to access information. The Rules of Procedure of the *Verkhovna Rada* detail the specifics of transparency, openness and publicity in the activities of the *Verkhovna Rada*. It defines the requirements for openness of meetings, participation of media representatives, announcement of plenary sessions, publication of agendas and decisions adopted by the *Verkhovna Rada*. Thus, the totality of the national legislation allows us to conclude that the principle of transparency in the activities of the *Verkhovna Rada* is enshrined in the law.

e. The analysis of the key components of the principle of transparency in the activities of the Parliament during the martial law in Ukraine, namely: announcement of plenary sessions of the *Verkhovna Rada*, announcement of the agenda of the session, broadcasting of sessions, activities of the *Verkhovna Rada* committees, publication of adopted draft laws, as well as certain issues of the *Verkhovna Rada*'s activities in the context of the principle of transparency, showed that despite the extraordinary circumstances that have arisen in the country, the *Verkhovna Rada* is trying to generally continue to adhere to the principle of transparency in its activities. This is especially true for the publication of adopted decisions, as well as for the transparent activities of the committees.

f. However, the announcement of sittings, agendas, and broadcasting of sittings were subject to severe restrictions. Members of Parliament are prohibited from publishing any information related to the *Verkhovna Rada*'s sittings before and sometime after the end of the session. An assessment of the respective restrictions on the principle of transparency shows that in a certain period, when the threat level was high and the overall security situation was extraordinary, such restrictions could be permissible, but they should also have been based on officially adopted decisions and comply with the law. Currently, these restrictions are still in place, some of them are based on relevant organisational decisions of the parliament, but the assessment of their continued expediency raises some doubts.

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Rethinking Radbruch's *Laws That Are Not Right and Right Above the Laws*. A New Translation with Introductory Note

• **Abstract** •

A new translation of Gustav Radbruch's *Laws That Are Not Right and Right Above the Laws* is published and its relevance explained and illuminated. Although there is an excellent translation published by the *Oxford Journal of Legal Studies*, the present one adopts a perspective closer to Roman Law and, therefore, closer to Radbruch's own juridical vocabulary and understanding of justice. It is difficult to over-emphasize the relevance of Radbruch's short work. He had been a positivist before the Nazi Party's rise to power. After the experience of Hitler's totalitarian rule, he realized that legal positivism is wrong and proposed some judicious principles for the application of natural Right to the problems posed by crimes committed during the Nazi era. This little work should have been the death blow for positivism. Surprisingly, however, after the formulation of Radbruch's deep insights there was a strong positivist reaction that threw them into oblivion. There even have been attempts to destroy Radbruch's character through a misconstruction of his actions. It is time to bring his insights back to memory and to defend his character.

Keywords: Gustav Radbruch, Positivism, Natural Right, Legal certainty, Invalid laws.

Introductory Note: Relevance of this Text

Gustav Radbruch was a Social-Democrat, an eminent German jurist and philosopher of Law. After the devastation of totalitarianism and war, Arthur Kaufmann, the jurist, stated that in 1945 there were only two great philosophers of Law in the German speaking world left: Hans Kelsen and Gustav Radbruch (Martínez

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Bretones, 2003, p. 78).[1] Immediately before the Nazis came to power, he defended Positivism, although not in a Hartian sense (Paulson, 2006, pp. 18–19).[2] He thought that the plurality of fundamental views made it necessary to abide exclusively by positive Law, which would guarantee legal security or certainty and would be inspired by the various conceptions of justice competing in society (Radbruch, 1973, chapters 9–10, pp. 164–179). Underlying this conception of legal positivism was the belief that statutes promulgated in a country of a long rational tradition could never be outrageously unjust and actually worse than a false peace or security. However, the experience of Nazism shattered this belief. At the end of the War, Radbruch was reinstated by the Allies in his Chair at the University of Heidelberg and became the Dean of the School of Law. He was sick and felt weak, which is why he was not able to re-write neither his *Introduction to the Science of Law* nor his *Philosophy of Law*. Yet, he left us precious, short writings on the latter discipline: *Fünf Minuten Rechtsphilosophie* and *Gesetzliches Unrecht und übergesetzliches Recht*. The latter piece is the one that we are presenting here in translation. A couple of years after writing it, Radbruch retired, in 1948. One year later he died.

This work had an enormous influence and attempted to elucidate the justice and conformity to Law (or injustice and disconformity to Law) of the criminal prosecutions that took place after the War and punished as crimes actions that were legal according to the Statutes and positive norms that were valid at the time when they were committed. His position was very nuanced and really shed light on the issues examined. He had no spirit of revenge, although he had been expelled from the University in 1933 and banned from publishing for having been a Social-Democrat and for criticizing the reform of the criminal Law system by the Nazis (through his 1933 paper *Strafrechtsreform und National-sozialismus*) (Martínez Bretones, 2003, pp. 60–61, 63–66). He only sought what was just and right, and on this he was faithful to his 1919 paper, *Ihr jungen Juristen!*: "[jurists] must feel united […] against every violation of Right with no regard to who the violator is, against whom or why he acted" (Martínez Bretones, 2003, p. 42). According

[1] She is citing G. Radbruch, *Gesamtausgabe*, A. Kaufmann (Ed.). (1987). Heidelberg: C. E. Müller Juristicher Verlag, note 2, vol. I, p. 44.

[2] Paulson is right that there is continuity in Radbruch's pre-Nazi rule and post-Nazi rule legal philosophical views. But he stresses that continuity too much. He perceives in Radbruch's earlier writings the tension between the different values (purposiveness, legal certainty and justice), but not well the issue of the different views concerning the meaning of "justice" itself. Due to this variety of views, Radbruch held before the Nazi rule that the courts are subject only to the valid laws, even if they seem outrageously unjust, because the courts are forbidden to use their private judgment concerning "justice," so that they have to declare the Right which is contained exclusively in positive laws. See Radbruch (1973, p. 178).

to Radbruch, National Socialism was able to subject the jurists, and especially the judges, in Germany because of the long and almost undisputed reign of the positivistic theory of Right plus the fear of death. For this reason, he thought that the majority of the judges who were tried after the war should be acquitted. Some authors have recently attempted to use this lack of a vengeful spirit against him. They argued that it was Radbruch's character flaws that led him to defend the judges who decided cases according to Nazi law. They objected that the Nazi legal theory was not positivistic and, therefore, Radbruch's explanation of the failure of the judges was completely wrong (Morris, 2016).[3] This is a non-sequitur because, although obviously totalitarian regimes are not positivistic (Nazis did not like "neutrality" and Communists use "alternative theory of Law"),[4] Radbruch never argued that

[3] The author also holds that Radbruch's 1934 lecture "Relativism in Legal Theory" held a position entirely different from his 1932 book *Rechtsphilosophie*, but this claim is wrong. All the content of the 1934 lecture that Morris cites in his paper is also in the 1932 book, especially in chapter 10, where the "relativist conception of reason and science" is invoked as grounds for legal or juridical positivism. Morris also claims that after the war Radbruch did not study legal proceedings. This is extremely surprising because the very paper Morris is criticizing ("Gesetzliches Unrecht und übergesetzliches Recht") is in its entirety precisely a review of legal proceedings. Morris gives an example of one courageous judge, Kreyssig, to state that it was possible for judges to resist the Nazi tyranny. Morris wrongly states (on p. 669) that Kreyssig rejected Nazi legal theory and failed in his attempt of saving some human lives because he invoked natural law instead of positive law, when (a) one page earlier Morris shows that Kreyssig argued that, in order to consider that positive law grounded the injustice he was asked to tolerate, "[he] would need to see the original [order by Hitler commanding the murder of handicapped people with the argument that their lives were unworthy]", and (b) Morris also demonstrates that Kreyssig was forced to use the natural law argument when he was shown Hitler's written order (p. 669). So, Kreyssig accepted Nazi legal theory and was forced to use natural law arguments, according to the evidence that Morris himself brings into his paper. But Radbruch did not deny that it was possible for a judge to resist Nazi tyranny, he just stated that Positivism made resisting difficult for the judges and that the threat of death excluded the subjective element of the crime, in the case of judges. I disagree with this latter point, but for this I do not blame Radbruch's character. About the other points that Morris brings to the fore concerning Radbruch's character, I do not know sufficiently the facts to judge. However, Morris himself confesses that he does not know the facts either, but attempts to fill the gaps by criticizing Radbruch's pity for his friend Schlegelberger, although both in public statements and in private correspondence Radbruch stated that he found just the guilty verdict against his friend. It is easy to criticize from the outside those who have kept their innocence amidst an established totalitarian regime. It seems that his zeal for legal positivism is what leads Morris to try to destroy the character of one of the morally and scholarly strongest champions of natural Right theory. In any case, it is certain that Morris fails to draw the lesson from Kreyssig's example: it is obvious that he found the courage to effectively oppose injustice precisely in those sources that Morris wants to reject: religion and Natural Right theory.

[4] It must be clarified that the rejection of positivism by totalitarian regimes does not come from the regimes' commitment to truth. Hannah Arendt admirably grasped that totalitarian regimes utterly reject the notion of truth as correspondence. See Arendt (1994, pp. 384–385).

the Nazi legal theory was positivist. His point was that legal positivism made all but impossible the resistance against the Nazis, as long as these kept the formalities that allowed to cover their crimes with positive norms. He did not defend a judge who violated the positive law to please his masters, but only the judge who applied the positive law because he had been trained in considering that, and only that, as the Right (*Recht*, *ius*).

Shortly after a decade of their publication Radbruch's two mentioned works on the philosophy of Law were the subject of sharp criticism. Perhaps a reason for this is that in the 50s some of the new powers-that-be seemed to have been concerned with the prevalence and resurgence of Natural Right theories in the field of Legal Philosophy. A picturesque manifestation of this concern was the organization of the *Bellagio Conference on Legal Positivism* that took place in Northern Italy in 1960, generously funded by the Rockefeller Foundation with the aim of promoting legal positivism and burying once more the classical theories of Natural Law that Radbruch had espoused and promoted. Among the senior participants at this conference, we found none less than Norberto Bobbio, Alf Ross and H. L. A. Hart[5] (who in 1958 stated that to hold that the post-war trials in Germany signaled the overthrow of positivism and the triumph of the doctrines of natural Law, "seems to me to be hysteria").[6] This conference led Bobbio to a confirmation of his positivist theses (Silva, 2008, p. 112),[7] lending force to Italian legal positivism in general. Thus, the conference proved to be a very strategic move, because, as stated by the authors of a paper that outlines the conference, its participants, its purpose and its results, "North Italy [… is] the area in which the most important work on legal philosophy is taking place [in 1960]" (Falk and Shuman, 1961, p. 214).

The report on the *Bellagio Conference* brought to daylight some ideological motives that often lurk behind the spousing of positivism. It did so in passages such as the following: (a) the apparent neutrality of Kelsenianism in Italy "smokescreened a strong commitment to common sociopolitical positions […]. Especially did it become evident that in the background of many Italian presentations was a desire to strengthen the legal order against interference from the Catholic Church either directly by institutional interference or indirectly through its advocacy of natural law" (Falk and Shuman, 1961, pp. 217–218). (b) Legal positivism, viewed in its historical role can be identified as a group of related legal theories that tried to

[5] See, Falk and Shuman, (1961).

[6] See, Hart (1958, p. 619).

[7] A. Ruiz Miguel (1980, pp. 30–31) is of the same opinion.

describe the new state-dominated legal order. At the same time, many of the early positivists were eager to establish the state as liberated from its one remaining rival for law-making power–the church. Thus, there is an anti-natural law objective found at the very inception of legal positivism. Along with this, one discerns a correlative tendency by the early legal positivists to take an anti-metaphysical view of human experience and to rely instead upon empirical observation (rather than reason or revelation) to discover the content of the legal order" (Falk and Shuman, 1961, p. 223). And (c) The authors of the report find reasonable that there are different conceptions of positivism in the United States and in Italy, because "special factors indicate that what is regarded as liberal theory in the United States might operate in a reactionary fashion in Italy" (Falk and Shuman, 1961, p. 227).

Thanks to this surprising frankness, the deepest motives of these critics of natural Right theory surface in the said paper as the following: (1) an anti-metaphysical commitment that postulates that Man must be the ultimate measure of justice and law; (2) a Statist view that aspires to eliminate any rival to the State in defining what is legal, particularly the Church; (3) in some cases, it is also an attempt to find limits to the regulations of the State within the State itself (Falk and Shuman, 1961, pp. 219–220 and 223–224).[8] Radbruch is especially spiteful to those who cherish these motives, since he stated very clearly that no "objectivity" could resist totalitarianism; only a courageous fidelity to justice and Right [*Recht*] and to God, its ultimate source, could effectively resist. In this regard, a very interesting point is that Radbruch, in his 1932 book limits his citation of the New Testament to Romans 13:1, "be subject to the authority that has power over you", while in 1946 he widens it to include Acts 5:29, "obey God rather than men".

Another quality of Radbruch's approach that is especially threatening to positivism is that he was a professional jurist. So, he knew that there is no opposition between "positive Right" and "natural Right", but only between the positivistic theory of Right and natural Right theory. His natural Right theory, in other words, was not of the rationalist kind that conceives a set of "natural Laws" parallel to the set of "positive Laws". No, he saw that the art of the jurist sought for Right [*Recht*, *ius*] and this required a responsible use of his professional knowledge.

There is another reason that makes Radbruch's approach to natural Right interesting. He based the force of natural Right neither on subjective rights nor on

[8] Cristóbal Orrego and Max Silva have demonstrated that both H. L. A. Hart and Norberto Bobbio rejected natural Right theory in part because both understood that it would lead to acknowledge a divine principle of justice. See Orrego (1997, chapter 6, especially pp. 415–419); and Silva (2008, p. 341).

the prohibition of "crimes against humanity" (although he mentions these due to the norms imposed by the Allies) nor on rationalist theories, although he, of course, like Cicero, invoked human dignity as the basis of Right. He uses a clear and laconic classical approach to natural Right.[9]

The latter reason is also why I think my new translation adds something to the excellent translation by Bonnie Litschewski Paulson and Stanley L. Paulson. I have tried to preserve the German difference between *Gesetz* and *Recht* that is so difficult to express in English. This difficulty has been present for long enough time in the history of English legal thought. Already Bracton found it in his *Introduction*. As Paul Vinogradoff expresses it: "He [Bracton] finds himself confronted with a peculiarity of English phraseology, namely, with the absence of an equivalent in English to the word *ius*. Though writing in Latin, he does not want to make his teaching dependent on a foreign use of terms, and therefore he introduces, though very shortly, the terms *lex* and *consuetudo* –law and custom– explaining that they correspond to *jus*, which in this case would be rendered by the English word 'law'" (Vinogradoff, 1909, p. 94). According to Vinogradoff, by "law" was understood "the objective order of things and duties" (1909, p. 94). However, since the prevalent meaning of *ius* in Roman Law actually is "what is just" in the concrete case (what the judge should declare, and the mean of the virtue of justice found in things and in each concrete juridical relation), I have resorted to the solution of the English translators' of Aquinas' and Cicero's works, who might reflect a long tradition in juridical philosophy. They translate *ius*, the equivalent to the German *Recht*, as right (in the objective sense).[10] Perhaps some interpreters would think that Law in one of its meanings is equivalent to the Roman *ius*. I would

[9] In the classical and Roman view of Law, and also in the traditional Western view until recently, the pretended separation of Right and morality would have been regarded as absurd. Of course, what is prudent for a judge to declare is not the same as what is prudent for a private mind or conscience to conclude in practical reasoning. Ius, nonetheless, is the object of justice, one of the cardinal virtues. And "Ius est ars boni et aequi."

[10] Thomas Aquinas, *Commentary on the Nicomachean Ethics* (1964), book 5, lecture 12. Cicero (2014). The handbooks of Roman Law, instead, followed Bracton's tradition and either translated "jus" as "law" or left it as "jus." See, for example, Sherman (1917). Leo Strauss uses the word "right", but in the central passage of his *Natural Right and History* (1953, pp. 156–165) the many meanings proposed by him (laws applicable in normal times, immutable principles, the preservation of society, the height in rank of an objective and the urgent) do not include "the just thing." I would say that Thomas Hobbes in his *Leviathan* contributed very much to the disappearance in English of the meaning of "right" as a translation of ius understood in its primary meaning as "the just thing." See Hobbes (1909), Part 2, chapter 14. For an introduction to the controversy on the meanings that ius has had during the history of Western thought, the reader can see Villey (1969); Tierney (2001); and Casanova (2016, pp. 113–140).

disagree with such interpreter, but, even if I am wrong, a translation that preserves the problem and does not preclude the realization that such problem exists seems to have special value.[11]

I do not think this short work by Radbruch contains in itself the solution to all the problems concerning the existence of natural Right and its connection to positive Right. What it contains is a testimony that man, through intellectual and professional training, can know the Right that gives its meaning to the existence of the courts. The parties of a juridical controversy seek at the court a *just*, rational solution, and it is the task of the judge to find it, enlightened by the laws but with his eyes fixed on the intelligible reality that is the subject matter of his discipline. Thus, although the judge must follow in principle the commands of positive law (as Radbruch and Aristotle have taught us)[12] and must use the legal forms that guarantee that both parties are properly heard,[13] he can discern that in a particular case the law does not point at the rational solution,[14] the Right, or even that, in general, a positive law is a violation of Right. In our tradition, the judge is understood as the most proper subject, bearer of the virtue of justice.[15] As long as we keep at least a spark of this great tradition, we must accept that the judge, through his knowledge of what is just, might find gaps in the law and correct such gaps, and in extreme situations might find that a valid law is unapplicable due to its extreme violation of justice. As Theodor Viehweg formulated it: "In our discipline [*Recht*] we deal with the question of what is just here and now. This question, unless things can be changed, is unavoidable in the decisions of the courts. If this eternal question of the just resolution of controversies and of human rightness were missing, then we would have lost the ground on which jurisprudence is based" (Viehweg, 2007, p. 151). If this were lost, we would come to the situation in which Hans Kelsen would be right: there would be no real gaps in the Law (Kelsen, 1970, pp. 245–249) and we would have to admit that the indirect Administration (understood as one of the three "functions" of the State), the power by which public clerks "apply the law", imposing fines or other sanctions, is not different in essence from the jurisdiction of the courts. The difference

[11] The strength of the word "Right" (in German Recht, in Italian diritto) is such that the very existence of the word is what allegedly has forced the Italian positivists to postulate a non-cognitivist conception of morality in order to defend juridical positivism. See Falk and Shuman (1961, p. 228).

[12] See *Rhetoric* I 1, 1354a31–b16.

[13] The forms must be observed, and they exist for the protection of the great principle, audiatur et altera pars.

[14] This is what Aristotle called *epieíkeia* in book 5, chapter 10 of the *Nicomachean Ethics*.

[15] See *Nicomachean Ethics* 5.4, 1032a21–22.

would be merely organizational (the separation of the bureaucratic apparatus, on the one hand, and the courts, on the other) and due to historical inertia (Kelsen, 1970, pp. 262–267).[16] For a jurist this should be a horrifying nightmare. Gustav Radbruch's piece is a strong stand against a tendency that has crept into Western culture towards precisely such nightmare.

The Romans, by the influence of Aristotle mediated by Cicero (Viehweg, 2007, pp. 37–53), were the creators of our discipline. In a way, Radbruch, admirer and reader of Cicero (Martínez Bretones, 2003, p. 71), is the great witness that we need to direct our eyes toward our Roman origins again.[17] But our Western world seems reluctant to return to its roots. For a very long time many of our greatest minds have turned their backs to this knowledge of the "just thing", the *ius* of the Romans. After experiencing the great plague of Nazi totalitarianism, Radbruch has called us to finally supersede positivism in all its forms, normative, judicial, or cultural. There is real evil and there is real Right, and to know them and punish the one and enforce the other is the essence of the courts' main business.

[16] This same idea is stated more clearly in the French edition of the Pure Theory of Law. See, Kelsen (2009, pp. 121–122).

[17] Vinogradoff proved that English Law was very much influenced by Roman Law, contrary to what is often believed: "Civil law did not become a constituent of English common law acknowledged and enforced by the courts, but it exercised a potent influence on the formation of legal doctrines during the critical twelfth and thirteenth centuries, when the foundations of common law were laid." (Vinogradof, 1909, p. 84). Also: "[Bracton's…] *Introduction* was undoubtedly intended to strengthen native legal doctrine by the infusion of legal conception of a high order drawn from the fountain head of civilized and scientific law" (p. 90), that is to say, Roman Law and its reception in Italy. More recent studies on Roman Law not only confirm Vinogradoff's judgment, but extend it to the cultivation of English Law in later centuries. See, for example, Watson (1991). The Preface states the case.

Translation by Carlos A. Casanova

"Laws That Are Not Right[A] and Right Above the Laws".[B] By Gustav Radbruch

I

By means of two principles Nazism subjected to itself, on the one hand, the soldiers and, on the other hand, the jurists: "an order is an order" and "the law is the law". The principle of "an order is an order" has never been fully applied. The duty of obedience stopped when orders for criminal purposes were given by the commander (MStrGB [Military Criminal Code] Sec. 47). The principle of "the law is the law", however, knew no limits. It was the expression of the positive legal thinking that prevailed through many decades almost unopposed among the German jurists. "Legal violation of Right" was therefore a contradiction in terms, as was a Right that was above the law [or legislation]. But both problems are now confronted in our practice again and again. For example, in the *Journal of the Jurists of Southeastern Germany* (p. 36) a decision of the District Court of Wiesbaden was published and discussed, according to which "the laws declaring the property of the Jews to be forfeited by the State were quite contrary to natural Right and therefore null from the moment of their publication" (Kleine, 1946, p. 36).

II

In the area of criminal Right, the same problem has been raised, notably through declarations and decisions of the courts within the zone occupied by the Russians.

1. In a trial at the Thuringian Juries, in Nordhausen, the court clerk Puttfarken was sentenced to life in prison. His crime was to have caused the conviction and execution of the merchant Göttig by a denouncement of him.[18] Puttfarken had

[A] Or "legal violation of Right".

[B] The translator used Radbruch (1946); and a Spanish translation of 1971 by J. M. Rodríguez Paniagua (Transl. and Ed.), pp. 1–22. It is hard to translate the title into English because "law" is used today to express what in Latin is expressed as *lex* (in German, *Gesetz*) and/or as *ius* (in German, *Recht*). Moreover, in English right is normally understood today as subjective right: "I have the right to do this or that". I will translate *Gesetz* as law or legislation; and *Recht* as objective right. Objective right is what the Romans called *ius* and Aristotle *tò díkaion*. I will use Right (capitalized) to mean objective right, "what is just", what the judge should declare as just, not "my right to do this or that", subjective right.

The footnotes contained in the original will be enumerated with Arabic numbers; those added by the editor/translator will be identified with Greek letters.

[18] A similar case was opened against those who denounced the Scholl siblings. [Translator's note: this note appears in the Spanish edition only.]

reported Göttig [to the Nazi authorities] for an inscription he left in a WC: "Hitler is a mass murderer and is to blame for the war". The conviction was not only for this inscription, but also for listening to foreign radio broadcasts. The plea of the Thuringian Prosecutor, Dr. Kuschnitzki, has been extensively reproduced by the press (in *The Thuringian People*, in Sonneberg, on May 10, 1946). The Prosecutor first asks the question: was the act contrary to Right?

> Although the defendant declared (according to the Prosecutor's report) that he made his denunciation on the basis of his Nazi convictions, this is juridically irrelevant [i.e. irrelevant from the viewpoint of Right]. There is no juridical obligation to denounce [no obligation in accordance to Right], not even out of political convictions. Not even in the Hitler era this legal obligation existed. The decisive factor is whether he acted in the service of the administration of justice. But this presupposes that the courts are ready to pass sentence in accordance to Right [or to Law]. Lawfulness, the pursuit of justice, legal security[Γ] are the requirements of a judicial system. All three conditions were missing from the political criminal justice system in the Hitler era.
>
> He in these years who denounced another, should expect and did expect that he was not delivering the accused person to a legal trial with legal guarantees for the investigation of the truth and for a fair judgement, but he was delivering the accused person to arbitrariness.
>
> I fully subscribe, therefore, a report on this issue written by the Dean of the School of Law of the University of Jena, Full Professor Dr. Lange. At the third year of the War the situation in the Third Reich was well known so as to be aware that if someone was held to account for a note that stated 'Hitler is a mass murderer and he is to blame for this war', then this person's life would not be spared. A man like Puttfarken could not know how the courts would bend the law, but he could be certain that they would do it.
>
> There was also no legal obligation to denounce, according to Article 139 of the Criminal Code. It is true that this provision threatens with punishment the person who has reliable knowledge of an act of high treason and fails to notify the authorities in good time; and it is also true that the Supreme Regional Court in Kassel sentenced Göttig to death for attempted high treason, but according to authentic Right there was no attempted high treason. The sentence, courageously stated by Göttig, 'Hitler is a mass murderer and is to blame for the war', was always only the bare truth. He who spread and proclaimed it did not threaten the *Reich* or its security. He only tried to contribute to the removal of the illness suffered by the *Reich* and thus to save the *Reich*, which is the opposite of treason. One must be careful not to alter or muddle, through formalist considerations, this clear fact. It may also be doubtful whether the so-called *Führer* and Chancellor of the *Reich* could ever have been regarded as a legal head of

[Γ] Translator's note: this is hard to translate. I suppose the right way would be "legal security". The concept means that everybody knows what is according to Right and what is not, so that everybody can be certain that what he or she is doing is or is not in accordance to Right or to the Law.

State at all, whether he was therefore protected by the articles concerning treason.[Δ] In any case, in his denunciation, the defendant did not and could not have (due to his lack of knowledge) even mentioned the issue of the legal classification of the offence he was denouncing. He also never declared that he had told on Göttig because he had in fact seen in Göttig's action the crime of attempted high treason and therefore had felt obliged to file the denunciation.

The Attorney General then poses the question, whether Puttfarken is guilty of the action committed by him.

Puttfarken essentially admits that he wanted to bring Göttig to the scaffold. A number of witnesses confirmed this. Now, that is the intention of a murderer according to Article 211 of the Criminal Code. The fact that Göttig was sentenced to death by a court of the Third Reich does not affect Puttfarken's agency. He is a mediated agent. There is no doubt that the precedents of the Reich Supreme Court concerning mediated agency consider other types of cases, mainly those in which the mediated agent uses as instruments objects without will and incapable of liability. Nobody could have thought that a German Court could be the instrument for a crime. But today we are facing precisely this type of fact. Puttfarken's case will not be the only one. The fact that the Court acted in accordance with formal Right does not prevent the instantiation of mediated agency when the Court's decision is null and void. In any case, the remaining doubts that we could still keep, have been removed by the complementary Thuringian Act of February 8, 1946, which, in its Article 2 and in order to dispel doubts, changes the writing of Article 47, first paragraph of the Criminal Code: 'Any person that performs the criminal act by himself or through another person, even if the other person acts in accordance to Law, must be punished as the perpetrator of the crime'. With this, no new Right with retroactive effects is established, but this is simply the interpretation of the Criminal Law in force since 1871.[19]

I myself believe that, after careful consideration of the reasons in favor and against of the typification of the actions [by Puttfarken] here considered as murder by mediated agency, I see no reason to reject it. But let's assume (and we have to consider this possibility) that this court perhaps comes to a different conclusion. What would follow

[Δ] Editor's note: In a trial like this one, this statement is, to say the least, subject to legitimate doubt. How was a clerk supposed to even fathom the supposed complete illegitimacy of Hitler when he won the elections is 1933, was legally appointed Chancellor by Hindenburg and acknowledged as such by many heads of States, like Stalin (the Russian) and Chamberlain (the British)?

[19] In his edition of the Criminal Code in the Thuringian version, Professor Richard Lange (1946, p. 13) states that "many doubts have risen concerning the concept of mediated agency in cases in which the perpetrator has used the administration of justice to achieve his criminal intent (procedural fraud, political denunciation). Article II of the Law of 8 February 1946 on the Supplement, etc., therefore, made it clear that mediated agency is punishable even if the instrumental agent has acted in compliance with an official obligation and/or legally".

> from there? If one rejects the conclusion of mediated agency, one can hardly fail to regard the judges, who, contrary to all Right and reason, condemned Göttig to death, as murderers. In that scenario, the defendant would have assisted in the murder and would have to be punished accordingly. Should also these considerations find serious objections in this court − and I do not exclude this possibility −, then Act No. 10 of the Allied Control Council of January 30, 1946, remains in place, and according to its Article 2 c, the accused was guilty of a crime against humanity. In the framework established by this Act, whether the country's national law is infringed no longer matters, but all inhuman actions and procedures are punished, in particular if they are motivated for political, racial or religious reasons. According to Article 2, n. 3, whoever is found guilty of having committed such crime must be punished with the penalty that the court may determine, including the death penalty.[20]
>
> As a jurist, I am used to restrict myself to merely juridical valuations. But it would be very good to consider reality in itself and come to a conclusion in accordance with healthy common sense. The juridical background is no more than the instrument with which the conscientious and responsible jurist can come to a conclusion that is juridically acceptable.

The jury gave a damning verdict not based on mediated agency, but on cooperation to murder. According to this, the judges who condemned Götig against Right and law, would have to be prosecuted for murder.[21]

2. In fact, the press (see *Tägliche Rundschau*, March 14, 1946) states that the Saxony State Prosecutor, Dr. J. U. Schroeder, has the intention of demanding criminal liability for "inhumane court decisions", even if they were based on National Socialist laws:

> The legislation of the National Socialist Party State, on the basis of which death sentences, such as those referred to, have been handed down, is devoid of any juridical validity.
>
> Such legislation is based on the so-called 'enabling law' [giving Hitler full power to legislate without the Parliament], which was not established by the two-thirds majority vote required by the Constitution. Hitler had forcibly prevented the Communist members of the Reichstag from attending the meetings and had them arrested in contempt of their Parliamentary immunity. The remaining representatives, namely

[20] The criminality according to KontrGes 10 (German Bankruptcy Act of 1910) 10 is not discussed in the following paragraphs, because the German courts are not primarily in charge of this (Article III ld). [Translator's note: This footnote is absent in the Spanish translation.]

[21] Another denunciation trial took place at the Munich Court against those who denounced the Scholl siblings. Denazification is directed against a politically and morally base character, without having to ask about the lawfulness or legality or the culpability of their activity. Hence follows a demarcation of Criminal Law's limits, but also interference with it. Cf. Article 22 of the Exemption Act. [Transtator's note: this footnote is not in the Spanish text.]

from the Center, were coerced by the threat of the SAs to cast their votes in favor of the enabling law.[22]

No judge can invoke, and no precedent can be set on, a law that not only is unjust, but *criminal*. We invoke the human rights that surpass all written statutes, the indefeasible and immemorial Right that denies validity to the illegitimate commands of inhumane tyrants.

Based on these considerations, I hold the opinion that the judges who have pronounced judgments contrary to the principles of humanity, and have pronounced death sentences for trifles, should be prosecuted.[23]

3. There are reports from Halle that the executioners[E] Kleine and Rose were sentenced to death for their active participation in numerous unlawful executions. Kleine participated in 931 executions from April 1944 to March 1945, for which he obtained the amount of 26,433 Marks in compensation. The conviction seems to have been based on Act No. 10 of the Allied Control Council (crimes against humanity). "The two defendants freely practiced their gruesome profession, because any executioner is free to step down at any time due to health reasons or on other grounds" (*Liberal Democratic Newspaper*, Halle, June 12, 1946).

4. The following case is also known from the Federated Land of Saxony. (See article by the Prosecutor General Dr. J. U. Schroeder of May 9, 1946.) In 1943, a Saxon soldier, who in the eastern front was commanded to guard prisoners of war, had deserted, "disgusted by the inhuman treatment that the prisoners experienced, and perhaps also because he had had enough of the service in Hitler's army". When he escaped, he was unable to forgo a visit to his wife at her home. There he was caught and was to be transferred by a chief guard. He managed to get a hold of his loaded service pistol unnoticed and to shoot the chief guard in his back and kill him. In 1945 he returned from Switzerland to Saxony. He was arrested, and the Public Prosecution was ready to proceed against him on the grounds of treacherous murder. But the General Prosecutor ordered him to be freed and stayed the procedure, considering that such was the course of action prescribed by Article 54. He invoked the state of necessity in order to ground the exemption of

[22] It would also need to be examined to what extent regimes that result from revolution achieve legitimacy due to the "normative force of the factual". By the way, the allegation that the two-thirds majority required for the approval of the Authorization Act was achieved only through the exclusion of the Communists is ungrounded, according to the friendly remark from my colleague Jellineck.

[23] Concerning the criminal liability for judicial decisions contrary to Right, see the noteworthy work by Buchwald (1946, p. 5ff).

[E] Translator's note: literally in German it reads "executioner assistants". But this derives from a tradition in which the main executioner attended the hard cases (like killing with an ax) and left the easy cases to his assistants. These were really, in English, "executioners".

liability on the supposition that "what was then proclaimed as Right by the people in charge of guarding it cannot be today considered as such anymore. Deserting from the armies of Hitler and Keitel does not mean in our conception of Right anything that either goes against the honor of the deserter or may call for punishment: he is not guilty".

Everywhere, then, a fight against legal positivism has been raised, taking as the point of departure that there are laws [*leges*, acts, statutes] that are not Right [*ius*] and that there is a Right that is above the laws.

III

Positivism, in fact, with its conviction that "the law is the law", rendered the German juridical profession defenseless against laws of arbitrary and criminal content. Positivism is not in a position to device with its own resources a reasonable ground for the validity of laws. It is true that Positivism believes that the validity of a law is proven by it having the power to assert itself. But on power perhaps necessity can be grounded, never duty and real validity. Real validity can be grounded only on the value that is inherent in the law. Of course, any positive law without regard to its content has already some value, because it is always better than the total absence of laws and of juridical security [or *legal certainty*]. But legal certainty is clearly not the only value, and it is neither the decisive value that must be realized through Right. In addition to legal security, there are two other values: expediency and justice. In the order of precedence of these values, we must assign the last place to expediency (with respect to the common good). In no way is Right [*Recht*, *ius*] all that "benefits the people", but ultimately benefits the people only what is Right, what creates legal certainty [juridical security] and strives for justice. Legal certainty, which is a property of any positive law because of its positivity, occupies a mean position between the values of expediency and justice. Both, justice and expediency require legal certainty. That Right be secure in its interpretation and application, not such here and now but different tomorrow and there, is a requirement of justice itself. When there is conflict between legal certainty and justice, between a law [statute] that fails in its content but that is positive, and a just Right that has not reached the firmness of a law, we truly witness the conflict of justice with itself, a conflict between apparent justice and true justice. This is the conflict admirably expressed by the Gospel when it commands us, on the one hand, "be subject to the authority that has power over you"[Z] and yet, on the other hand, commands, "obey God rather than men". The conflict between legal certainty

[Z] Translator's note: I decided not to use the English version, but to translate the German text,

and Right could be resolved preferring positive Right which enjoys the firmness given to it by its enactment and by its coercive power, even in case it is unjust and prejudicial. But, if the contradiction between positive law and justice reaches an unbearable degree, then the law [statute], as an "incorrect Right", must yield to justice.[H] It is impossible to draw a clearer line between the cases in which we confront laws that are not Right and the other cases in which, despite the incorrect content, the laws keep their validity. It is possible, however, to draw with all precision a different dividing line: when the law does not even attempt to achieve justice, when while devising the positive law the core of justice (which is equality) is purposely left aside, the law is not just "incorrect Right", but it entirely lacks the nature of Right. This is so because it is impossible to define Right, even positive Right, without mentioning that it is an order established whose meaning is to serve justice.[Θ] By this standard, entire parts of the National Socialist legal system never attained the quality of valid Right. The most prominent feature in Hitler's personality, which also became a prominent feature of the whole "Right" of National Socialism was his complete lack of the sense of truth and the sense of Right: because he lacked any sense of truth, he could give, without shame and scruples, the accent of truth to anything that was rhetorically efficacious; because he lacked any sense of Right, he could impose as law the grossest arbitrariness. At the beginning of his rule, we can point out the friendly telegram he addressed to the murderers of Potempa, at the end [of his rule, we can point out] the sinister defamation of the July 20, 1944, martyrs. Already on the occasion of the Potempa trial Alfred Rosemberg stated in the *Völkische Beobachter* (*People's Observer*) the becoming theory that one man is not equal to another, and one murder is neither equal to another murder.[I] The fact that in France the murder of the pacifist Jaurès and the

in order to grasp Radbruch's mind better. The first quotation is from Romans 13:1 and the second from Acts 5:29.

[H] Editor's note: The court would be unable to make this judgment without knowledge of the Right existing really in the concrete situation subject to its knowledge and decision. In this case, the court has to act in accordance with the Roman maxim: *non ex regula ius sumatur, sed ex iure, quod est, regula fiat*.

[Θ] Editor's note: This observation on the meaning of the law is absent from Hans Kelsen's account of Right. This is one of the reasons why he might think that there is no substantive difference between the courts and the administration of the State.

[I] Editor's note: this is certainly a gross violation of the nature of commutative justice as Aristotle described it in book 5 of the *Nicomachean Ethics*: "for it makes no difference whether a good man defrauds a bad one, or a bad man a good one, nor whether a man who commits adultery be a good or a bad man; the law looks only to the difference created by the injury, treating the parties themselves as equal, and only asking whether the one has done, and the other suffered, injury or damage" (1132a1–5).

attempted murder of the nationalist Clemenceau had been valued very differently was right [according to Rosemberg]; it would be inconceivable to apply the same punishment to a person who committed a crime for patriotic motives and a person who is moved by reasons that are (according to National Socialist assessment) contrary to the people. In this way it was left clear since the beginning, the intention to deprive the "Right" of National Socialism of the essential requirement of justice, i.e. to treat equally those who are equal. As a result, it [such apparent Right] was deprived entirely of the nature of Right. It was not just an incorrect Right, but it was no Right at all. This is particularly true of the provisions by which the National Socialist party, against the partial character that is an essential trait of every party, claimed the totality of the State. Provisions that treated as sub-human and/ /or denied human rights to certain human beings also lacked the nature of Right.[K] Those provisions lacked the nature of Right, as well, that established punishments with no consideration of the differing gravity of the crimes, punishing with the same penalties actions widely diverging in gravity, even imposing frequently the death penalty with no other consideration but the need of intimidating at a given time. These are just some examples of laws that are not Right.

One may not ignore – especially after the experience gained during those twelve years [of National Socialist rule] – the great dangers for legal certainty [juridical security] entailed by this conception of "laws that are not Right", by denying the standing as Right to positive laws. We must hope that this lack of Right stays as a unique case of disorientation and confusion of the German people, but we must be ready to confront any eventual return of this State deprived of Right. For this, we need to fundamentally supersede juridical positivism, because it was this doctrine that destroyed all the defenses apt for combatting the National Socialist abuse of the law.[24]

IV

This has been said in consideration of the future. Regarding the laws of those twelve years with no juridical validity we must bring justice detracting from legal

[K] Editor's note: The terminology of "human rights" is in the new legislation imposed by the Allies. I think that what lies under Radbruch's observation here is that all true Right is born, as Cicero stated, from our love of human beings. If we lost this love, then our juridical discipline would end up being lost as well. See Cicero, *De Legibus* I 43: "In fact where will liberality be able to exist, where affection for the fatherland, where piety, where the will either to deserve well of another or to return a service? These things originate in this, that we are inclined by nature to cherish human beings; that is the foundation of right".

[24] Buchwald (1946, p. 8ff.) also accepts the notion of a supra-legal Right. See, also Roemer (1946, pp. 5ff).

certainty in the smallest possible measure. Not just any judge should be allowed to create laws with his own hands, but this function should be given to a higher court or to legislation (Kleine is in agreement with this opinion, *Journal of the Jurists of Southeastern Germany*, p. 36).[Λ] A law [statute] of such kind exists in the zone occupied by the United States and it is based on an agreement reached in the Council of the Territories, the "law on the reparation of the violation of Right in the National Socialist administration of criminal justice". Since this law declares that "the political acts of resistance against National Socialism and/or militarism are not punishable", the difficulties raised by the case of the deserter (see above, n. 4), for example, could be solved. In turn, the other, sister law, the "law for the punishment of the criminal actions of National Socialism" may only be applied to the other cases here referred if the respective deeds were already punishable, in accordance with the Right then valid, at the time of their commission. Therefore, we must consider the punishability of the other three cases independently of this law, and according to the laws contained in the *Reich*'s Criminal Code.

In the case of the denouncer there is no obstacle to point out the mediated commission of murder by the denouncer if there is such murderous intent for the completion of which the court and the juridical automaton of criminal procedure were used as instruments. This kind of intent is found "when the perpetrator has some kind of interest on the elimination of the accused person, because he wants to marry his wife, or because he wants to seize his house, or take his workplace, or because he has vengeful desires or any other similar motive["]. (In this sense has pronounced judgment the cited report by the Jena Full Professor Richard Lange).[25] In the same way in which the person who abuses his authority inducing his subordinates to commit crimes is a mediated perpetrator, so is as well the person who, with criminal intent, sets in motion the judicial apparatus through his denunciation. The use of the court as a mere instrument is especially clear in those cases in which the mediated perpetrator could have counted, and in fact counted, with a tendentious exercise of the judicial function, be it due to political fanaticism, be it for pressure from those who held power at the time. If the denouncer did not have this murderous intention, but he just wanted to provide material to

[Λ] Editor's note: Radbruch is writing about the current situation in 1946: he was calling for a judicious application of the principle that many National Socialist laws were void. The punishment of crimes committed in accordance with valid laws could not be left licitly to the whim of just any judge.

[25] Of course, in the doctrine of participation there is a height of subjectivism brought in by the intention of the agent regarding a kind of "subjective anti-juridical element" (the unlawfulness), that is in the person of the remote agent but is not present in the instrumental agent. [Translator's note: this footnote is not in the Spanish translation.]

the court and leave the rest to the judge's decision, he could only be accused of having caused the sentence and, indirectly, of the execution of the death penalty, and this only as an assistant to the murder, if the court, in turn, has committed the crime of murder through its decision and execution. This is the line followed at the Nordhausen Court.

In turn, the punishability of judges for murder presupposes the simultaneous determination that they have perverted the administration of justice (Articles 336 and 344 of the Criminal Code). Because, indeed, the decision of an independent judge may be the object deserving punishment only when he has not complied with the fundamental principle to which his independence must submit: the subjection to the law, that is to say, to Right. If, in accordance with the principles we have laid out, it can be determined that the law applied was not Right (as, for example, in the case of the death penalty decided in accordance with the principle of free assessment), but rather made a mockery of any intention of obeying justice, we witness a case of objective violation of Right. However, since judges were so immersed into the dominant juridical positivism that they did not know other Right than that established in positive laws, one may ask, whether they could possibly act with the criminal intent of perverting the administration of justice when applying positive laws. Even if we admitted that they could, they would still have a last resource for their defense, although certainly painful, to adduce the danger of death in which they would have entered [if they decided in accordance with the real Right], given the National Socialist conception of Right, that is to say, the absence of Right despite the existence of laws. They could have recourse to the [argument of] state of necessity established in Article 54 of the Code of Criminal Law. We stated that it would be painful because the *ethos* of the judge must be directed to justice at all costs, even of his own life.[M]

The easiest question to answer is the question of the punishability of the auxiliaries of justice that execute the death sentences. We may ourselves be swayed neither by the impression that the persons who hold this profession of executing

[M] Editor's note: I actually find that this exculpation of the judges is not right. First of all, as Aristotle formulated it in *Nicomachean Ethics* bk 3 chapters 1 and 5, the ignorance of the law (unless it is hard to know: see 1113b29–1114a7) is a sign of evil character, not a cause that excludes liability. In a difficult case, perhaps the judge could be exculpated. But in many cases, he could not. This means two things: first, that positivism is a blinding ideology, but there are situations in which reality must impose itself to the mind and, if it doesn't, that is due to the evil character. And second, that there are situations in which human beings are either heroes or criminals, as Aristotle argues in chapter 1 of bk. 3 (see 110a26–27). I think that Radbruch here is moved by shame because his *Rechtsphilosophie* claimed that the judge should always apply the positive norm, even if he thought that it was unjust. See Radbruch (1973, pp. 178–179).

death sentences against their neighbors produce on us nor by the extraordinary circumstances and the economical profitability of such profession. When the executioner's profession was still a sort of hereditary craft, those who practiced it were used to always exculpate themselves with the idea that they just executed what the judges were in charge of deciding: "the lords control evil, I just enforce their final decision". This famous saying of the year 1698 is once and again repeated when the executioner's sword falls. The death penalty decided by a judge cannot be a punishable murder unless it is grounded on perversion of the administration of justice. In the same way the executioner may not be punished for an execution unless it is an instantiation of the type established in Article 345 of the Criminal Code: deliberate carrying a penalty out that must not be carried out. Concerning this issue Karl Binding states (in his *Treatise of Criminal Law*, special part, volume II, 1905, p. 509): the person in charge of carrying out the decisions of the courts finds himself, regarding the sentence that he has to carry out, in a relationship analogous to that of the judge regarding the law. The whole duty of the executioner lies on subjecting himself accurately to the sentence. The sentence is what determines his whole activity: "this activity is just if it subjects itself to the sentence, unjust if it does not. Since the core of culpability lies only on this deviation from the only authority that determines the execution considered as such, this crime can be named (the one typified in Article 345) as perversion of sentence". It cannot be the job of the executioner to examine the conformity to Right of the decision. For this reason, he cannot be harmed by the sentence's perversion of the administration of justice, and one may not find him guilty for not having resigned to his position.[N]

V

We disagree with the opinion expressed in Nordhausen that "considerations juridical-formal" are prone to "muddle the clarity of the facts". We think exactly the opposite: after twelve years of contempt for legal certainty, it is today more needed than ever, to rely on "formal" juridical considerations in order to protect ourselves from temptations that could easily rise in the animus of those who have suffered threats and oppression during these twelve years.[O] We have to search for justice,

[N] Editor's note: This is reasonable. One may not ask a person like this to judge the juridicity of a decision handed down to him by the highest jurists of his country. That the Nazis were mass murderers escaped the notice of some foreign governments for a long time. A private citizen subject to the constant totalitarian propaganda and occupying a position of executioner might well be innocent.

[O] Editor's note: Clearly, as human being, Radbruch felt the impulse towards revenge. But he kept it in check.

but at the same time we must (1) protect the legal certainty, which is but an aspect of justice itself; and (2) rebuild the State subject to the rule of law, so that both values [justice and security] can be satisfied as much as possible.[11] Democracy is certainly a precious good, but the rule of law is like our daily bread, like drinkable water, like the air that we breath. Perhaps democracy is precisely this: the only form of government able to guarantee the rule of law.[P]

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[11] Editor's/translator's note: This is reasonable. The forms of Law are wise and prudent and without them there can be no Right. The numbers in this paragraph I introduced to make clearer the translation.

[P] Editor's note: This seems false to me. A cursory study of history teaches that other regimes may guarantee the rule of law better than many democracies. I would agree with this other formula: only real republics guarantee the rule of law. But "republics" may adopt any good regime.

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Legalising the Right to a Fair Death

• **Abstract** •

The text addresses the topic of dying with dignity, referring to the statements of Pope Francis, who considers it obligatory to dispense with disproportionate and useless means of prolonging the agony of the sick. The author emphasises that accepting death in such cases does not mean desiring it, but recognising its inevitability. The problem stems from the multidimensionality of death (biological, psychological and social), which causes imprecision in the discourse on the subject. In the Slavic tradition, death is symbolised by *Marzanna*, whose destruction in spring rituals signified the victory of life over death. Ultimately, the text emphasises the duty to protect life, including the right to die with dignity.

Keywords: Euthanasia, Homicide, Human dignity, Right to protect the life, Right to die with dignity.

Introduction

In the 1970s, Hanna Krall, a journalist for *Polityka*, travelled to Łódź to prepare a report on heart surgery. She asked cardiac surgeon Marek Edelman for a consultation. However, the topic of the Warsaw Ghetto Uprising came to the forefront of the conversation. Edelman fights the myth that death by arms is better than death by starvation and gassing, death in a gas chamber is not worse than death in combat, on the contrary, it is more difficult, how much easier it is to die shooting, how much easier it was for them to die than for Pola Lifszyc's mother. At the same time, the doctor realises that this heroic in its form and spectacular death on the barricades was necessary to show the world the truth about the Warsaw Ghetto: "We knew that it was necessary to die in public, in front of the world. After all,

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mankind has agreed that dying with a gun is more beautiful than without a gun" (Krall, 2024, pp. 1–6, 7). This piece of literature makes it clear that the issue of fairness in death is conventional, conventional in nature. Therefore, the aim of this article is to emphasise the distinction between the unavoidable fact of death and the right to dignified conditions of dying.

Human Dignity and the Ways of Dead

Roman law distinguished between the type of execution of a citizen of the Roman Empire and a non-citizen. Deprivation of life (*summum supplicium*) was carried out by crucifixion (*damnatio ad ad furcam/crucem*), burning (*vivi crematio*), surrender to beasts (*damnatio ad bestias*) and beheading (*capitis amputatio/decollatio*). Unlike the last of these, beheading with the sword, which was the primary type of death penalty imposed on citizens (*civiles*), later known as *honestiores*, all the others were reserved for slaves and the lower social strata of ancient Rome known as *humiliores*. Also in Old Roman law, death by beheading was considered more equitable than qualified and motivated death penalties, considered by humanists to be contrary to the concept of the social contract (Kubiak, 2010, p. 112). Moreover, mutilatory punishment (*mutilatio*) was considered a disgraceful corporal punishment involving the deprivation of particular parts of the body of the condemned, and was already known in the Code of Hammurabi (Szczepańska, 2023, p. 180). Qualified death penalties, on the other hand, were associated with the commission of a qualified offence which fell under a particular type of death penalty, e.g. in old Poland the death penalty by being buried alive was envisaged for some crimes (Bardach et al., 2009, p. 183).

The word "fair" is found in Polish law, in the Labour Code, where "fair remuneration" is mentioned.[1] In addition, in legal dogmatics, the concept is characterised by being vague. In terms of the philosophical principles of law, it is possible to define the concept of fairness on the basis of the dignity of the person (Rosmini, 2011, p. 4). It is assumed that a decent act is good and right at the same time. It should be made clear that an act can be morally good or bad, and legally effective or defective, and that if the intention of the author is respect for the dignity of the human person or the lack thereof, then consequently, if the action itself affirms that dignity, we are dealing respectively with a decent act, the result of which is righteous behaviour, or adequately with an unworthy act if that dignity is negated (Staniszewski, 2007, pp. 369–391).

[1] Labour Code (*Journal of Laws* 2023.1465, consolidated text of July 31, 2023), Article 13.

However, the ultimate and immutable principle that every human being has personal dignity has had different contents and applications throughout history: the content and applications of this principle in the caveman are not the same as in the man of today's civilisation. Slavery was once considered morally legitimate and even accepted; today, however, it is considered morally illegitimate. The same applies to the death penalty (García Faílde, 2021, pp. 69–88). The fact that a positive law can oblige a citizen to do or not to do something presupposes that this citizen is obliged to do what this positive law stipulates; but it is clear that this citizen's obligation cannot come from this law or from himself. Hence, European legislators have decriminalised suicide, but this does not mean that they have legalised it (Szudejko, 2023, p. 45). Legalisation is more than decriminalisation and so, for example, in Spain, adultery is decriminalised because it is not a crime but it is not legalised and can therefore be the cause of separation of civil marriages. Positive law, by legalising euthanasia, is said to grant the right to take one's own life; but this so-called right is neither a true objective nor a true subjective right. The term objective right evokes the idea of the conformity of something to what that something ought to be; this objective right confers on its possessor a subjective right, a moral capacity, a moral power, to do something or not to do something without being able to be legally prevented from doing so, because to this subjective right corresponds the obligation of others not to impede its exercise (*erga omnes*). Having the subjective right to do something morally lawful is more than being empowered to do something morally lawful, because having this right adds to having this power the obligation of others not to prevent me from doing what is good. The possession of the legendary right to death and life (*ius vitae necisque*) is an argument akin to the argument from the equation, which, although it has some journalistic merit, is based on faulty logical assumptions (García Faílde, 2021, pp. 69–88).

Dead and Life are Facts and not Rights

Death and life remain facts, and the generally accepted rule is that facts are not debated. Szudejko very rightly points out that the Polish Basic Law (Article 38 of the Polish Constitution[2]) grants the right to the protection of life, not the right to life (Szudejko, 2023, p. 8). Similarly, Juan José García Faílde observes that a right to die cannot be granted because it is a fact, everyone who is born will die regard-

[2] Constitution of the Republic of Poland of April 2, 1997 (*Journal of Laws* of 1997, No. 78, item 483 as amended).

less of whether or not a 'right to die' is granted. Dying with dignity is not the same as avoiding an unworthy death, because there is no unworthy death (García Faílde, 2021, p. 75).

As García Faílde writes, "I am the first to defend this right already proclaimed in January 1973 in an article published in *Le Monde* by three Nobel Prize winners J. Monod, L. Pauling and G. Thompson and 37 other personalities from the cultural world". As García Faílde goes on to write "For me the right to die with dignity means the right to a natural death assisted by the usual life-sustaining measures: palliative care, nutrition, hydration, medication, etc. And the exclusion, and therefore the suspension, if already initiated, of disproportionate medical treatments and techniques" (2021, p. 75). The right to die with dignity does not therefore imply the right to euthanasia, i.e. the right to be killed in a life-threatening situation. Euthanasia is a positive or negative act, i.e. the commission or omission of something that a person does out of pity (compassion) for another person, whether that person consents himself or whether other authorised persons consent for him, using painless procedures and with the intention of taking his life and thereby ending his present and/or future physical or mental suffering. Euthanasia therefore belongs to the group of homicide and not to the group of assisted or unassisted suicide. Two basic factors are involved here: the direct intention to kill (the intention to kill another person) by taking or shortening that person's life, and the methods used to implement that intention (García Faílde, 2021, pp. 75–79).

As can be seen, therefore, homicide will always remain homicide if it exhausts the elements of an act described in substantive criminal law. On the other hand, if we disregard the question of this wicked behaviour, which has as its intention the deprivation of a person's life, and thus dispose of the unnecessary intent, we can begin to discuss the limits of the protection of human life. It is a truism to state that the death of a human being has very far-reaching legal consequences, linked to the definitive cessation of legal personality or even the question of inheritance. Hence, what are the limits of even a therapy aimed at preserving human existence (Szudejko, 2023, p. 13).

Let us recall the case of a Polish patient who was in a clinic in Plymouth in the United Kingdom. This patient was in a vegetative state following a massive heart attack and cardiac arrest lasting 45 minutes, with no chance of waking up, while his body only functioned thanks to artificial lung ventilation. Significantly, the patient's next of kin: his wife and daughter had expressed their wish for the life support apparatus to be switched off, and the UK court had also given its consent. There was therefore no argument for continuing to support the life of a patient whose brain no longer worked. However, there were calls, both from

celebrities and medical professionals, that this patient should be saved from euthanasia (Szudejko, 2023, p. 52).

The patient must not be subjected to an endless, disproportionately expensive and useless struggle against death by prolonging the agony beyond all reasonable and bearable limits. According to García Faílde, Pope Francis has taken a new step forward by saying that, in this case, refraining from such measures is not only permissible, but obligatory. To suppress disproportionate measures in such cases is not to wish the death of the patient, but to accept that death cannot be prevented (García Faílde, 2021, p. 75). This is already justified in the 1992 published Catechism of the Catholic Church, in no. 2278, where the doctrine is described by these words: "Discontinuing medical procedures that are burdensome, dangerous, extraordinary, or disproportionate to the expected outcome can be legitimate; it is the refusal of 'over-zealous' treatment. Here one does not will to cause death; one's inability to impede it is merely accepted. The decisions should be made by the patient if he is competent and able or, if not, by those legally entitled to act for the patient, whose reasonable will and legitimate interests must always be respected". As an example of exceeding this scope of dignified dying conditions, Garcia Failde points to the Spanish euthanasia law.[3] In his view, Catholics should oppose this solution to the question of self-determination of one's own death, which enables them to Article 16.1 of the Spanish Constitution of 6 December 1978, developed in the Spanish Organic Act 7/1980 of 5 July, according to which the State is obliged to harmonise the respect due to citizens who object on grounds of conscience with the presumed legal goods of public interest protected by law. The euthanasia law, García Faílde comments, provides for conscientious objection by doctors and health professionals as legitimate, but says nothing about conscientious objection by clinical or hospital facilities. Such legislation, with the introduction of the status of conscientious objection, according to the author, marks a process towards reducing law to morality (García Faílde, 2021, pp. 84–85).

The source of this incompatibility on death is the multidimensionality of the death phenomenon and consequently the ambiguity of the term that defines it. Three dimensions are reduced to a common name: biological, internal (psychological) and external, with the consequence that the discourse on death becomes imprecise (Szudejko, 2023, p. 46).

[3] Organic Law 3/2021, of March 24, on the regulation of euthanasia, in *Official Gazette* No. 72, March 25, 2021, pp. 34037–34049.

Between the Right to the Protection of Life and the Right to a Fair Death

The first scientific means of determining death became the cardiopulmonary criterion, also referred to as karyocentric or clinical. During the heart implantation procedure, the recipient's lungs, which continue to be mechanically ventilated, and the heart, which is explanted and destroyed (disposed of), cease to function. In such a situation, according to the karyocentric criterion, there is a death of the recipient, which (if established) would cause serious consequences in legal terms. In addition, the application of the karyocentric criterion in practice makes it difficult to take some organs from the donor, because according to this criterion, the donor is a living person at the time of explantation who dies only as a result of the procedure – his heart stops working.

The most recent proposal in terms of ways of determining death is the neocortical (cortical) death criterion, based on the idea that the essence of humanity is the organism's ability to sustain the subjective state of consciousness that forms a person's identity and personality. The permanent loss of this capacity determines the end of his or her existence. The basis for the determination of death is the cessation of the cerebral cortex, which performs the aforementioned brain functions. The criterion of cerebral death has proved so suitable for the changed reality of medical practice that it has been recycled quite widely in legal orders and in clinical practice. The brain death criterion sometimes requires specialised examinations using diagnostic equipment, which makes it not as intuitive as the karyocentric criterion. In addition, despite the occurrence of brain death, spinal cord perfusion is preserved in patients, with the result that spinal reflexes and automatisms, such as flexion movements of the fingers of the hand, the knee reflex, rhythmic movements of the facial muscles or movements of the trunk, may appear after a period of areflexia induced by spinal shock. These reflexes may give the impression to non-medically trained people that the patient is still alive, which certainly does not contribute to understanding the essence of the criterion of brain death. In Poland, the determination of cerebral cessation can be made unanimously by two doctors holding a second degree of specialisation or a specialist title, one of whom must be a specialist in anaesthesiology and intensive care or neonatology and the other in neurology, paediatric neurology or neurosurgery. Irreversible cardiac arrest is declared unanimously by two doctors with a second degree of specialisation or a specialist title, one of whom should be a specialist in anaesthesiology and intensive care or neonatology and the other in emergency medicine, internal medicine, cardiology, paediatric cardiology or paediatrics

(Article 43[4]). The legislator has adopted the two criteria described above for the determination of death: brain death, defined in the wording of the legislation as permanent irreversible cessation of brain function, and karyocentric, defined as irreversible cardiac arrest preceding the removal of organs from the body of the deceased (Szudejko, 2023, pp. 3–10).

Death is not only an individual experience – it also has a social dimension, which is reflected in funeral rituals and elaborate forms of veneration of the dead. Man has always attached great importance to death and memory, and the gradual disappearance of the body after death can be interpreted as a symbolic victory of the spirit over matter, which in the human experience appears impermanent and imperfect.

However, dying itself is not only a social issue – it also has a deep psychological and existential structure. Science, while often claiming to remain neutral towards anthropological issues, in reality always reflects a particular vision of the human being and the resulting worldview assumptions. When it comes to analysing qualitative experience, phenomenology, which seeks to capture the essence of phenomena and their internal dynamics, proves to be the most appropriate tool. Both the psychologist and the psychopathologist must take into account these philosophical foundations – for it is impossible to fully understand human existence without reference to basic categories of being. Freud's psychoanalysis and behaviourism, both of which derive from 19th century materialist positivism, are examples of this connection. Ludwig Binswanger's analyses, on the other hand, would be unthinkable without Husserl's phenomenology and Heidegger's existentialism. Heidegger's conception of being, despite some problematic elements, brings two important insights to Catholic anthropology: firstly, that man is not a thing in the midst of things, but a conscious existence rooted in the world (*Inder-Welt-sein*); secondly, that there is no pure, detached 'I' – existence always takes place in community with others (*das Ich-Sein ist Mit-Sein*, *Mit-Anderen*) (García Faílde, 1999, pp. 93–96).

In this context, naturalistic psychology, which treated the psyche as a closed system, proves to be insufficient. In reality, the soul and the world coexist in a dynamic unity in which the external and the internal condition each other. The experience of space and time is not just a neutral background but is shaped by our

[4] Act of February 24, 2017, amending the Act on the Medical and Dental Professions and the Act on the Collection, Storage and Transplantation of Cells, Tissues and Organs (*Journal of Laws* of 2017, item 767), which resulted in the transfer of the provisions on the manner of determining death to Articles 43 and 43a.

body and mental state. The loss of time that we experience in deep contemplation or existential crises shows how much our experience of reality depends on our mental condition. However, it is not a question of time *per se*, but of emotionally experienced space. Everyone intuitively understands that the landscape changes its character depending on our mood – in joy the space expands, in sadness it shrinks, and in despair it becomes empty. The experience of one's own body is central to one's relationship with space – an adult moves through it differently from a child, and a tall person perceives it differently from a short one. This relationship was recognised by Alfred Adler, according to whom the categories of 'high' and 'low' in human thinking are indelible because they relate to fundamental oppositions: vitality and defeat, triumph and inferiority, for both the healthy and the neurotic person. In a broad anthropological perspective, two basic forms of being can be distinguished: *Dasein*, i.e. being in the world in an ordered way, which inevitably involves certain constraints and hierarchies. *Sein*, i.e. being in a space commensurate with one's own life, surrounded by close people with whom one remains in communion. Space can be experienced in different ways: one can distance oneself from it or engage with it, find oneself in it or lose oneself in it, feel safe in it or fear it – as in the case of claustrophobia, where psychological fear materialises as a physical experience of spatial limitation (García Faílde, 1987, p. 338).

Death, both socially, psychologically and philosophically, reveals the complex relationship between man and the world. In the experience of dying and mourning, fundamental aspects of being-in-the-world are manifested, as well as the interpenetration of external and internal realities. An existential approach to these issues makes it possible to see that death is not just a biological end, but a key moment in the structure of human existence that gives meaning to the whole experience of life.

When considering the temporal dimension of existence, we perceive that past, present and future exist only in and for the individual consciousness. It is individual perception that makes time something real – not as an objectively existing category, but as an internal experience in which one measures it, experiences it and gives it meaning. Paradoxically, time is 'mine' because I am the one who experiences it and can use it, but at the same time it is not mine because I have no control over it – I cannot stop it, undo it or retrieve it. On this basis, it can be concluded that the human person, as a unique and irreplaceable individual, experiences his or her existence in and through the world, creating a concrete reality – both physically and mentally. Each human being is unique and at the same time subject to constant change, although he or she retains certain elements of identity that allow him or her to remain himself or herself despite the passage of time. It is this prin-

ciple of personality that constitutes the essence of humanity, while the differences between people are not only reduced to the degree of change, but also include the organisation of mental life, which is realised differently in each individual (García Faílde, 1999, pp. 364–368).

Facts that have taken place cannot be undone – they have happened over time and remain irreversible. We can only attempt to repair their effects, although the act itself is not revocable as such. This is the drama of human existence: we live in a moment stretched between memory and desire, between the melancholy of the past and the ephemeral and the hope for what is constantly receding into the distance. Awareness of time is not uniform – it changes according to circumstances: time can flow unbearably slowly or pass unnoticed, its perception depends on age, emotional states (boredom, joy, fear) and the values we ascribe to its various aspects. The past can be both a wealth of memories and a source of remorse. The present can be experienced as a creative moment, but also as weariness, pain, stagnation. The future can appear as a promise or as a space of dependence and impotence, in which we realise that our actions are not always our own – that we are sometimes powerless in the face of events that shape us, but which we do not initiate ourselves (García Faílde, 1999, pp. 457–458).

The differences in the perception of time become particularly pronounced in the face of death: for the dying person, time may lengthen in suffering or shrink in sudden end; for the loved ones, the pain of loss may make time stand still or, on the contrary, may bring relief to the grief experienced. The past of the dying person is recorded in the memory of others, the present is the last act of his or her existence, and the future is no longer his or her own – it belongs to those who remain. It is certainly possible, and even easy, to make predictions on the basis of knowledge of a person's aims, principles, habits; but experience shows that even a person for whom we would put our hand in the fire is always capable of surprising us. Nature is extremely dialectical: it is a continuum surpassing itself, as shown by our aspiration in the time of anguish that man feels in the face of his own end, that in the great passions a transcendent intention arises from the infinite attraction of happiness, for what animates the human being is the will of self. But the history of thought and individual experience show us, sometimes dramatically, the ambiguity of the person who, if on the one hand, discovers his own worth, reveals, on the other, an irreversible fragility. This is the unfortunate fate of the great master, as Pascal observes, who consoles himself with the discourse of the thinking reed. The unhappiness remains, however, and deepens when the suspicion arises that thought, instead of saving humanity, is only able to point to its catastrophe. In every human being, then, there is a fundamental aspiration to be in full relationship with one-

self, to possess oneself, to be free, and at the same time this self-realisation appears and appears illusory because of the multitude of obstacles it encounters. For Heidegger, as consider García Faílde any falsification of being is, its 'fall'. In this way, the individual manoeuvres of being (*Dasein*) continually repeat themselves over time in a desperate without being able to grasp their meaning. Man is left with no choice but to 'be ready for anguish', to surrender to his destiny, which is the destiny of death, to lean over the abyss and plunge into the abyss of nothingness, savouring its dizziness. Meanwhile, the luminous arc of hope is between the individual being and the world, between the reality of natural life and the supra-biological world of spirit. Yet, in all these relations, the psychic life of man always remains part of the world (García Faílde, 1999, pp. 94–99).

If human identity is a unique, dynamic and unrepeatable process, and the experience of time is intimately linked to individual consciousness, then the right to die decently becomes a natural extension of the same principle. If it is man, through his consciousness, who determines his own experience of life, then he also has the right to determine the conditions of his dying.

The right to die with dignity is not only concerned with the biological aspect of the end of life, but above all with its dignity dimension. Every person has the right to have his or her death in accordance with his or her values, beliefs and individual sense of identity. To deny this autonomy would be to deny the fundamental truth of the uniqueness and uniqueness of the human person, as well as his or her ability to shape his or her own experience of time and existence.

The right to die with dignity is therefore not only an ethical issue, but also an ontological and phenomenological one – it reflects the fundamental fact that it is the individual who experiences his or her time, and that his or her life, and thus its end, should remain consistent with his or her personal existence.

Conclusion

In the Slavic tradition, folk wonder at the facts of life and death is personified by *Marzanna*, the goddess of the winter die-off of nature, who was burned in spring and thrown into overflowing rivers as a symbol of rebirth and the victory of life over death and dying. Just as for our ancestors, the fact of living and dying will evoke wonder in us, but this does not absolve us of our duty to protect life, including that of dying with dignity and prosecuting murder (Szudejko, 2023, p. 43). Especially important seems to be the social recognition that death is a fact, and since it is a fact, it is not required to grant anyone any right to it, everyone will die, it awaits each of us. However, society can, in the face of the inevitable law of

nature, provide decent conditions for dying. The situation is similar with the phenomenon of life. It seems more correct than to speak of the right to life to speak of the right to protect life, since life itself is a fact, and again the question is more about what cost society is able to bear to protect this life, where to draw the line?

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The Role of the Legal Profession in Europe

• **Abstract** •

This text explores the evolving role of lawyers in the European context, at both national and supranational levels, in light of the integrated system for the protection of rights. It highlights that lawyers have transcended their traditional role as defenders to also become creators and guarantors of rights within civil society. This transformation entails an increasing relevance of the social and ethical dimension of the legal profession, as well as greater responsibility on the part of lawyers. Finally, it mentions the potential tension between current formal law and living law.

Keywords: New Rights, Multilevel, Human Rights, Judicial Creation, Lawyers.

Introduction: Reflections on the New Role for Lawyers in the Multilevel System

The current debate concerning the role of the legal profession of lawyers in Europe leads to several reflections aimed at understanding how a new role for lawyers is deeply defining itself in the European as well as in the national context, in the name of that qualitative leap made necessary by the "frenetic expansion of the catalogue" of rights (Flick, 2013, p. 63–74), rights ordinarily finding their sources in the judiciary's judgments (so-called living law), originating therefore from the judges' pronouncements. A new role, the one for lawyers, which also becomes a challenge, entailing the need to recognize, on the one hand, that lawyers have the fundamental function of *defenders* of the rights of which numerous centers of interest are the bearers and, at the same time, even the fundamental function of creators, unitedly with the judiciary's judgments, of those rights and

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interests and, on the other hand, that lawyers are also called upon to take on the responsibility for their affirmation within collective sentiment and thus within civil society.

The reference is not only to the rights of lawyers' individual clients, but also and primarily to those fundamental rights which, while they once had an essentially national origin, currently, by virtue of the so-called *multilevel* system – a kind of intertwining, an overlap between national Courts and supranational Courts and between national law and supranational law –, also and primarily have a supranational origin. In other words, lawyers must stand up in defense not only of the rights and interests of individual clients, but also of those inalienable rights which are necessary prerequisites for the existence of the former.

The European Parliament resolution of March 23, 2006 itself has highlighted this fundamental role of the legal profession of lawyers as a fortress of democracy and of the Rule of Law. Consequently, there is "not only a great responsibility in the exercise of the legal profession in order to protect the client (…), but also a social responsibility on the part of lawyers (...) precisely because their profession is closely linked not with the mere rendering of a service to the benefit of the client, but with the role that lawyers play within society" (Alpa and Mariani Marini, 2014, p. 177).

The contribution that lawyers can offer and that they are already offering to the development of *living* law, also with the aim of protecting rights, confers to lawyers themselves a fundamental role in bringing about those necessary changes within society, which are at times not perceived, or at least not readily perceived, by the political class, or in any case which are perceived only as a result of repeated rulings on the part of judges, in that ever-expanding activity of replacement and of substitution of a legislative power which is not always sensitive to the needs arising from society.

Lawyers and the Protection of New Rights and of Already Established Ones

The issues, subject of discussion to which the next paragraph will be devoted, are those relating to: i) the social relevance of the role for lawyers, ii) the ethical dimension of the legal profession, as well as iii) the responsibility on the part of lawyers. These issues prove to be of pressing relevance, especially if we keep into due consideration that we are living in what Norberto Bobbio called the "age of rights" (Bobbio, 2014) – an age in which, in many cases, rights particularly fundamental rights, emerge from judicial initiative, in accordance with that desire to

expand the catalogue of rights which draws from that beautiful work by Hannah Arendt in which the recognition of the idea of the existence of "the right to have rights" is advocated for (1962, p. 298).

While from this rights-creating and law-creating perspective, the very delicate work on the part of judges, often acting in substitution of political power and of legislative power, proves to be fundamental, just as fundamental is the role of lawyers who will have to work side by side with judges not only in protecting already 'established' rights, but also in the phase which is functional to the recognition of new rights, by expanding, or by contributing to expand, the catalogue of the new rights themselves of which the different centers of interest are bearers. In this context, lawyers are even called upon to carry out a sort of examination and check of the work on the part of the judiciary, which is often called upon to contend with supranational laws immediately applicable in the national sphere.

This aspect regarding the examination and check of the judiciary's work carried out by lawyers, while proving to be of absolute importance, too often, however, does not find its proper recognition, perhaps due to a kind of subalternity, at times not even thinly veiled, of lawyers to judges. In a complex context in which increasingly intense and close relations are intertwined between domestic law and fundamental rights – which find their recognition at the supranational level – and with an increasing role for both national and supranational judges, it consequently becomes necessary to strengthen the role of lawyers, who are called upon precisely to verify the correctness of the judiciary's work.

As a result, lawyers are called upon not only to contribute through judicial action to the recognition of those new rights of which the numerous centers of interest are legitimate bearers, but also to perform a safeguarding function in order to protect already existing rights as well as the *newly born* ones. Indeed, as pointed out by Anton Giulio Lana, lawyers are recognized as having a "privileged" role among the "defenders of human rights", given the defense of rights that they are called upon to exercise in court, being also constitutionally legitimated to do so, safeguarding the Rule of Law which is *condicio sine qua non* for living in a democracy (Lana, 2023, p. 190).

Such a defense of rights must currently be carried out in a territorial sphere that constitutes, or at any rate has until recently constituted, a novelty, having to cover the entire European territory, and even looking beyond the European perimeter, in a therefore supranational perspective which makes said defense activity all the more complex. Moreover, the same so-called *multilevel* system of protection of fundamental rights entails that the technical assistance offered by lawyers takes on a fundamental, indispensable importance.

A trace of said fundamental nature arises from the content of Article 47 of the Charter of Fundamental Rights of the European Union, titled "Right to an effective remedy and to a fair trial", which reads as follows: "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice". This provision overlaps with the one in Article 6 of the European Convention on Human Rights (ECHR), titled "Right to a fair trial", in which not only the principle of the right to a fair trial is established, but whose paragraph III reads as follows: "Everyone charged with a criminal offence has the following minimum rights (…) (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require".

Living Law and Current Law and Judicial Effectiveness

It is not difficult to predict that the exercise of legal aid is destined to increase in the future, particularly given the creative role increasingly assumed by the judiciary – a role that entails, or at least should entail, an ever-greater and necessary involvement of lawyers. Indeed, we find ourselves ineluctably witnessing the growing importance of traditional legal aid as a direct consequence of the judiciary's increasingly pervasive role in the judicial creation of fundamental rights. In line with the works of distinguished legal scholars, it appears undisputed that judges and lawyers perform their respective functions by proceeding hand in hand, particularly within a supranational context, in accordance with the principle of reciprocity articulated by Piero Calamandrei (1956, p. 23): "In this dialogue between judges and lawyers, I would not say that judges are the protagonists: what matters is the binomial comprised by these two inseparable elements, the relationship of reciprocity occurring between these two forces, in the balance of which all the problems, legal and moral, of the administration of justice are summed up".

It is therefore clear that the legal profession of lawyers, in this scenario, is undergoing a deep requalification process, also in accordance with the supranational context toward which the profession is by this time oriented in order to protect human rights, and those rights that constitute "original legal firstlings"

(Flick, 2013, p. 65), such as, merely by way of example, the rights to diversity and the rights to the quality of life. Indeed, it is well known that there is a proliferation of the requests for recognition of fundamental rights, which find recognition not so much in legislative activity as in so-called *judicial effectiveness*, therefore in the judgments on the part of both national courts and European courts, courts that constitute *de facto* the new legislative frontier, and thus act as a substitute for legislative power. It is precisely in this activity of *judicial effectiveness* and of acknowledgement of ever-new fundamental rights to be recognized, as well as of the constant safeguarding of already recognized rights, that the role for lawyers called upon to protect said rights fits in. So much so that, as correctly noted by Giovanni Maria Flick, what characterizes the European context on the subject of rights is not so much the centrality recognized to human rights, but mainly the effectiveness of their protection, through that *multilevel* which determines the coming together of the sources of law and the individual courts called upon to *ius dicere*.

With regard to so-called *judicial effectiveness* or, if you will, with regard to the function of judges-legislators, it is worth noting that given the increasing number of so-called creative judgments, functional to the expansion of the number of provisions, the need for the constant involvement of lawyers becomes even more pressing. Lawyers are called upon to avoid a gradual devaluation of the legal rules – and therefore of the law itself – in favor of the so-called living law, which forces current law to chase the judges' creative work, at times so creative as to appear even fanciful, with the concrete risk of a lack of homogeneity in judicial pronouncements, unanchored as they are from a clear legal context.

Social Relevance of Lawyers, the Ethical Dimension of the Legal Profession and the Responsibility on the Part of Lawyers

The above observations induce a further consideration regarding the nature of the role that lawyers have within civil society, besides the role of legal defense and of representation of individual clients. In other words, the question arises as to the nature of the role and duties of lawyers not only toward their own clients and their direct interlocutors, the judges, but also toward civil society, by virtue of a profession – namely, the legal profession – to be understood also as a levee against possible violations of rights on the part of the powers present in society. Among these powers, one must certainly mention political power and economic power, the latter of which has objectively been strengthened also due to the weakness of politics, not only in the European sphere, with the economy having

undergone a transformation from being a means to an end to becoming the end itself, a shift that is affecting the lives of us all.

That is not all. We find ourselves in the presence of a technological development which has also undergone a transformation in the social context from being a means to an end to being the end itself. From a legal perspective, technology has itself become a source of new rights, which are threatened moreover by the expansion of the very same technology. Indeed, technology allows for previously unthinkable results, from which potential rights arise asking to be recognized. At the same time, however, those same rights that find their origin in technology and in its constant advancement may be subject to limitations by technology itself, with the result of the latter posing a threat to those very same rights to which it has given origin.

Thus, a kind of social responsibility on the part of lawyers has emerged that requires lawyers to move past that perimeter, known to all those who practice the legal profession, constituted by the protection of the interests of individual clients and of the individuals being represented, to embrace the protection of human rights of people and of the interests of society itself, beyond that typical mandate relationship upon which ordinary legal aid activity is based, a responsibility which also recalls the concept of professional ethics. We are speaking of a principle of actual responsibility, in light of the fact that lawyers, when called upon to carry out their profession, to exercise legal aid, are at the same time tasked with protecting those inviolable rights of individuals that extend beyond the sphere of the legal defense of the represented party, assuming a kind of function that one might define as *meta-procedural*. This is precisely the nature of the social responsibility on the part of lawyers, which undoubtedly recalls professional ethics, which in turn certainly encompasses professional deontology itself, transcending, moreover, its boundaries by encompassing in its own turn not only the social responsibility on the part of lawyers but also the protection of the values of equality, justice and solidarity, values that form and must by this time form the background, including the cultural one, of lawyers in both the European and national context. This is a (social) responsibility that is an integral part of the legal profession of lawyers.

So much so that, following this line of thought, there has been a move toward a substantial harmonization between the deontological rules of the Council of Bars and Law Societies of Europe and the principles also recalled by the concept of social responsibility on the part of lawyers, aiming toward an ever-increasing harmonization of the national codes of ethics with the one for European lawyers. Thus, the social responsibility on the part of lawyers must by now be understood as an actual deontological obligation of both a supranational and national nature.

Regarding the aforementioned thesis, the analysis conducted by Michael G. Karnavas proves to be of particular interest, as it examines every aspect of the legal profession, highlighting – through a kind of comparative analysis – the similarities and differences between the common law system and the civil law system (Karnavas, 2016).

As already underlined above, there is certainly a close connection between the social responsibility on the part of lawyers, within the above-mentioned terms, and professional ethics, which require the professional activity of lawyers to be informed by the principles of fairness and competence. Particularly significant in this respect is Italian Law 247/2012, "New Rules Governing the Legal System of the Profession of Lawyers", with that provision set forth in Article 1, which reads as follows: "The legal system of the profession of lawyers, given the specific nature of the function of legal defense and in consideration of the primary legal and social relevance of the rights it is appointed to protect: a) regulates the organization and exercise of the legal profession of lawyers and, in the interest of the public, ensures the professional suitability of its members in order to ensure the protection of the individual and collective interests on which it produces effect; b) ensures the independence and autonomy of lawyers, which are indispensable prerequisites for the effectiveness of legal defense and of the protection of rights; c) protects the trust on the part of the community and on the part of clients, providing for the obligation of behavioral fairness and for the care of the quality and effectiveness of professional services". Even more incisive from the perspective of professional ethics is the provision set forth in Article 3, titled precisely "Duties and Deontology", the second paragraph of which reads as follows: "The legal profession of lawyers must be exercised with independence, loyalty, probity, dignity, decorum, diligence, and competence, bearing in mind the social relevance of legal defense and respecting the principles of correct and fair competition": thus, how could one overlook the close connection between the social role of lawyers – *the social relevance of legal defense* – and the principles by which the professional activity of lawyers must be informed?

In this sense, is relevant the report of Hans-Jürgen Hellwig (2002, p. 263). Also, the characteristics of a lawyer have been correctly summarized in a study by Jingwei Xu, Zhengmin Li, and Siyu Li (2022, p. 1): "The legal profession plays a vital role in society, tasked with the essential duty of preserving justice, safeguarding rights, and upholding the rule of law. Central to this noble endeavor are the principles of legal ethics and professional responsibility, which serve as the moral compass for lawyers and legal practitioners. These principles guide their conduct and decision-making processes, ensuring that they serve their clients' in-

terests while upholding the broader principles of justice and fairness. Legal ethics demand that lawyers act with integrity, honesty, and loyalty to their clients. They must also maintain confidentiality and avoid conflicts of interest. Additionally, they are obliged to zealously represent their clients within the bounds of the law".

It follows that lawyers, in order to exercise the fundamental social role they are called upon to carry out, must, in addition to maintaining their independence, also be diligent and competent, thus adhering to the aforementioned ethical principles. This is also essential to building citizens' trust in the legal profession, which is, first of all, called upon to protect the rights of the weakest. Said independence means lawyers must be free from any kind of internal and external pressure. This is an issue of absolute importance as evidenced by the contents of the United Nations Human Rights Council's Special Rapporteur on the independence of judges and lawyers (Satterthwaite, 2023), presented in July 2023 to the United Nations General Assembly. Indeed, this report underlines the need to guarantee everyone the enjoyment of all human rights. In this perspective, therefore, a preponderant role is recognized to judges and to lawyers, with the individual countries having to adopt appropriate measures to guarantee the independence of the judicial system, in order to concretely protect said rights in the face of constant, numerous attempts to violate them. Moreover, already in the summer of 2022 the "Rule of Law Report" presented by the European Commission to the European Parliament, the European Council and the European Economic and Social Committee highlighted, on the one hand, the need to ensure the independence of judges, stating that "The independence of the judiciary is fundamental to ensuring the fairness of judicial proceedings" and, on the other hand, the fundamental role of the legal profession of lawyers, underlining that "Lawyers are fundamental actors in judicial systems based on the Rule of Law. Lawyers and their professional associations play a fundamental role in strengthening the Rule of Law and in ensuring the protection of fundamental rights, including the right to a fair trial".[1]

On this topic, see the aforementioned work by M. G. Karnavas and the analysis carried out by Julinda Beqiraj and Lucy Moxham (2022, p. 141), stating that "At a European level, the Council of Europe's Commission for Democracy through Law, known as the Venice Commission, draws on Lord Bingham's definition. In its 2011 'Report on the Rule of Law', the Venice Commission considered the historical origins of the Rule of law and related concepts of *Etat de droit* and

[1] Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, (2022) "Rule of Law Report", COM (2022) 500 final, Luxembourg, July 13, 2022.

Rechtsstaat, as well as instances of the concept of the Rule of Law at national and international levels. It was also careful to distinguish the 'Rule of Law' from 'Rule by Law', which it described as 'a purely formalistic concept under which any action of a public official which is authorised by law is said to fulfil its requirements'. The Venice Commission went on to identify a consensus around six necessary elements of the Rule of Law: (1) Legality, including a transparent, accountable and democratic process for enacting law; (2) Legal certainty; (3) Prohibition of arbitrariness; (4) Access to justice before independent and impartial courts, including judicial review of administrative acts; (5) Respect for human rights; and (6) Non-discrimination and equality before the law. It concluded that the Rule of Law 'does constitute a fundamental and common European standard to guide and constrain the exercise of democratic power'. Subsequently, the Venice Commission developed a 'Rule of Law Checklist' as a tool to assess respect for the Rule of Law". Also noteworthy, on the subject of the impartiality and independence of judges, is the article by Lotta Maunsbach (2022, p. 131) noting that "Independent and impartial judges (courts) are a cornerstone of a State governed by the rule of law. In Europe, we uphold this principle as part of the right to a fair trial, as set out in Article 6 of the European Convention on Human Rights (ECHR) and Article 47 of the Charter of Fundamental Rights of the European Union (CFR). The basic ideas are, first, that anyone is entitled to have a dispute heard by a court of law in a procedure that meets specific requirements, that is, in a fair trial. The State has a duty to make such judicial dispute-resolution procedures possible. Second, it is an essential characteristic of a democracy that individual judges and the judiciary as a whole are independent of all internal and external pressures, so that those who appear before them, and the wider public, can have confidence that their disputes will be decided fairly and in accordance with the rule of law (…). The importance of judicial independence is more evident than ever. In recent years there has been a backsliding of the rule of law in the European Union (EU), with some Member states no longer respecting these fundamental values of the Union".

One should not overlook the fact that the ethical principles we have previously referred to are also called upon to inform the way in which lawyers exercise their profession within the courtrooms. Indeed, in the context of judicial trials, the principles of loyalty and fairness must be applied to all those who, within the courtrooms, are called upon to be protagonists – first and foremost, the judges.

Conclusion: Distinguishing Features of the Legal Profession

In conclusion, this analysis of the evolving role of lawyers within the multilevel European system underscores several distinguishing features of the legal profession that hold significant public and social relevance, often warranting greater consideration. As Piero Calamandrei prophetically stated, lawyers stand as central figures in the administration of justice, a role that has only intensified in the contemporary European context.

This centrality necessitates an ever-increasing emphasis on deontology and continuous legal training for lawyers, both nationally and across Europe. Such ongoing education is not merely beneficial for navigating an expanding and increasingly supranational legal market, but it is also a fundamental requirement given the proliferation of rights sources. Lawyers bear an ethical obligation to remain constantly updated on these developments.

Considering these current realities, it is evident that every lawyer must embrace a significant shift in their professional practice, demanding a concerted effort that surpasses the demands of a purely national legal landscape. By undertaking this transformation, as powerfully asserted by Giovanni Maria Flick, the enduring and profound values of the legal profession can be safeguarded amidst the challenges of our time. Ultimately, the proactive adaptation of lawyers to this new multilevel system is crucial for upholding the principles of justice and the rule of law in Europe.

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Vico's Philosophical Legacy 300 Years After the Publication of the First Edition of the 'New Science'. Vital Signposts for the Contemporary Reflection on Law and Justice

• **Abstract** •

Giambattista Vico's philosophy offers very interesting and stimulating arguments now that – in the 'post-modern' age – we can critically outline and experience the outcomes (and the failures) of modernity. Underrated, and probably also misunderstood, by many of his contemporaries – for his critical approach towards several aspects of the evolving modern thought at the beginning of Enlightenment – Vico (1668–1744) developed, through a 'solitary' although not isolated path, a diverse and original philosophy, deeply related with the humanistic tradition of classical thought. Such a view nowadays appears to be for many aspects alternative to the modern vision, and, for that reason, rich of interesting suggestions for the contemporary reflection, also in the field of legal philosophy.

Keywords: Giambattista Vico, Nature Law, Individualism, Rationalism.

Introduction: "To the Universities (*lit.* 'Academies') of Europe"

Three hundred years ago, in 1725, Giambattista Vico published the first edition of his most famous work, *The New Science* (Vico, 2001),[1] the first of three different editions (1725; 1730; 1744), on which the Italian philosopher would concentrate his speculative efforts until the end of his life, in 1744.

It is interesting to notice the dedication of this work: "To the Universities of Europe". Vico's intention had a clear European ambition, and, indeed, his work

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[1] The original title, in Italian, was: *Princìpi di una scienza nuova intorno alla natura delle nazioni per la quale si ritrovano i princìpi di un altro sistema del diritto naturale delle genti*.

was meant to intercept some of the main debates of his time, albeit in a critical way, which placed the Author in a sort of 'alternative path', in many aspects contrary to some of the 'mainstream' ideas of his time.

In the early 20's, as we learn from his *Autobiography* (*Vita scritta da se medesimo*, *1725–28*), Vico had gone through a moment of profound disappointment: after the effort of publishing two important books on legal-philosophical themes (*De Uno Universi Juris et Fine Uno* – 1720, and *De Constantia Jurisprudentis* – 1721), Vico did not succeed in his attempt to obtain a better paid teaching at Napoli University's School of Law. Another candidate, with stronger political support, was selected in his place (Vico, 2001, p. 9).

Nevertheless, *no-one is prophet in his homeland*, and indeed Vico's legal works obtained an enthusiastic review in the Netherlands, by Jean Le Clerc, editor of the journal *Bibliothèque ancienne et modern* (Vico, 2001, p. 53).[2] Le Clerc appreciated, in particular, the perspective within which Vico highlighted an intimate connection between law, history and philosophy. This acknowledgement stimulated in the Italian Philosopher the inspiration and the determination to design an even more ambitious project, meant to deepen the philosophical, methodological and anthropological principles which had animated his reflection on the law. These efforts went exactly in the direction that had sparked also Le Clerc's interest, such as the connection between law, philosophy and history, which is exactly one of the driving themes of Vico's *New Science*.

There is indeed, a 'double movement' that underlies Vico's work at this point: *from* Europe and *towards* Europe. Vico's legal philosophy was first inspired by the debate on natural law which was quite topical in the European cultural context between the 17th and 18th century, but the Author consciously undertook a critic of many aspects of the 'modern' approach to nature law's theory. On the other hand, Vico's 'alternative path' did not meet recognition in his homeland (which made him often feel like a stranger, as he declares in his *Autobiography*), but, as we mentioned, the most important acknowledgment of Vico's peculiar path came from another European country, stimulating the philosopher to further investigate and specify the theoretical background of his considerations.

The image of 'the stranger' underlines how the difference between Vico's peculiar thought and the mainstream of his contemporaries placed him into a distinctive path that never fully 'fits' into the categories of the modern vision, which had become dominating by that time. Nevertheless, Vico's path was indeed solitary

[2] The full text of Le Clerc's letter is available in the documents' section published as *compendium* of Marchetti (1994, pp. 67–171).

but never isolated: there is evidence, in several parts of his works, that the Italian philosopher consciously played a critical role towards many aspects of early Enlightenment's modern philosophy, with the aim of expressing a circumstanced critic (Vico, 1990).[3] Such an attitude helped him to develop a personal approach in dialogue both with the tradition of classical humanism and with some of his times' main issues (Lilla, 1993).

This role of Vico's perspective can be confirmed also by the work of jurist Emanuele Duni (1714–1781), who assumed Vico as main reference in his legal-philosophical works: Duni – as visible, for instance, in his *Saggio sulla Giurisprudenza Universale* (1760) – took part in a critical way to the theoretical debate in the ripe 18th century, inheriting and bringing forward some of Vico's argumentations and critics to the 'mainstream' approaches to natural law, gaining visibility both in the Italian and European debate – mostly in France (Reggio, 2025).

My overall thesis is that Vico was a man who lived *in* his time, but *did not fully belong to* his time (Chevallier, 1990, p. 556; Scarpato, 2017, pp. 27–58).[4] In this sense, his perspective provides a very valuable viewpoint for understanding some important topics of the modern heritage as they had been seen from the critical point of a contemporary. As I will briefly try to argue, Vico's philosophy is quite topical for at least two reasons: (1) if it is true that our 'post-modern' age inherited many of modernity's theoretical premises, studying someone who had been critical to modernity right at the time in which this perspective had become dominating in western philosophy offers a precious viewpoint for reflecting on where we come from. Now that we can critically outline and experience the outcomes (and the many failures) of modernity, a dialogue with Vico might help outlining which conceptual choices, at the parting of the way, brought us here. The second reason may appear lesser 'academic' but is not less important: (2) rediscovering someone who was able to think and move 'against the flow' of his time, often paying the price for this resistance to homologate to intellectual 'fashions', is an example of how scholars should cultivate critical thinking and freedom of thought, despite the concrete possibility of being misunderstood or even meet ideological or political opposition.

[3] Such an attitude clearly emerges, for instance, in his work – written in 1709, exactly three hundred years ago – dedicated to a comparation between the modern and the 'ancient' method of studies, where the author explores limits and potentials of both these approaches.

[4] If authors, like e.g., Jean Jacques Chevallier sustain that Vico was not only a 'stranger' but an 'unknown' to his time, more recent studies underline that Vico's speculation is not inconsistent in the flow of the Italian and European debate.

This second point probably shows where Vico's dedication "to the Universities of all Europe" emerges as both a legacy and as a warning: alternative paths are often costly, in terms of success and even more, but it is thanks to those alternative ways that freedom of research and intellectual debate can flourish and stimulate the ability to 'think outside of the box'. In 1725 and in 2025.

In the following pages, I will try to summarise some of the main conceptual signposts that can help us envision Vico's 'discarded paradigm' and to rediscover its importance also for the contemporary reflection, mostly (but not only) in the field of legal philosophy.

Natural Law as a Framework for Understanding Vico's Critic to Modernity[5]

While in the last edition of the *New Science* the reflection on law appears 'diluted' among other themes, which project Vico's reflection into a wider approach to what we would call today 'human sciences', the 1725 edition shows a stronger relation to the above-mentioned legal-philosophical works, which had been later collected into the *Universal Law* (1721). Despite this difference, it is interesting to notice how the reflection on law – and mostly on natural law – offers a sort of interpretive pattern for analysing Vico's distance from some common traits that typically characterised the theories of natural law, widespread in the European cultural *milieu* during the '600s and '700s (Caporali, 1996, pp. 357–378; Cacciatore and Caianello, 1997, pp. 205–218; Battistini, 2004).

Vico's interest in legal-philosophical issues, and in the topic of natural law, has indeed a common origin with the mainstream natural law theories. It had emerged in 1716, after his discovery of Grotius' *De Jure Belli ac Pacis*. Grotius, as we know, is traditionally considered the initiator of the modern natural law 'School', and it is interesting to notice that the Italian Philosopher would later acknowledge Grotius as one of this main 'authors'. We need to understand, though, the meaning of this term, whose etymology comes from the latin verb *augeo* (to increase): with the term 'author' Vico acknowledges someone as a peculiar source of inspiration but this includes also the possibility of a critical distance, and this is the case of Grotius. From the reading of *De Jure Belli ac Pacis*, indeed, Vico had the intuition that natural law could offer a very interesting philosophical platform for analysing the relationship between Law, Philosophy and History, with a specific attention

[5] Some parts of this work further elaborate considerations which I had proposed in an earlier writing (Reggio, 2012, pp. 1–29).

to human customary rules, to languages and to other cultural expressions. On the other hand, though, Vico criticized the way his contemporaries had evolved theories of natural law, mostly assuming Grotius as main philosophical reference.[6]

In his legal works, and even widely in the 1725 *New Science*, Vico confronted himself with different theories of nature's law, assuming a critical attitude towards the modern approach – embodied by philosophers such as Hugo Grotius, Thomas Hobbes, Samuel Pufendorf and John Selden – attacking the epistemic, methodological, anthropological and metaphysical premises that he found at the base of those theories.[7]

For this reason, although apparently limited to the reflection on the role and function of nature's law, such a debate provides quite an articulated critique to some of the modern view's pillars. Studying Vico's approach to the problem of law permits, therefore, to reach a wider spectrum of reflection, in which law is both the starting and meeting point of various and articulated philosophical considerations.

Nevertheless, while the reflection on natural law offers a very interesting framework for understanding Vico's peculiarity under a variety of interpretive lenses, it is important to understand that Vico's distance from the mainstream approach of modern thinking had already emerged in his early works, in which the Author had mostly focussed on epistemic and methodological issues. Before returning to the legal-philosophical core, then, we need to briefly confront with these early works, since, in our understanding, they contribute to consolidate some theoretical pillars that characterize Vico's philosophy as a whole, despite the difference of topics and approaches that emerged during his overall life and speculative adventure.

Pitfalls of the 'Cartesian' Fashion. In Search for a Third Way Between Rationalism and Scepticism

Vico's critic to the modern approach to knowledge targets two different aspects: (1) a *reductionist perspective,* visible in the 'restriction' of knowledge to those forms of rationality which belong to (or imitate) the structure of science (so, a type of reasoning which is based on a hypothetical-deductive structure and aims at high

[6] On the ambiguity of the reference to Grotius in Vico, see Fassò (1970). On the critics to the modern theories of natural law, undertaken by Vico, see: Bellofiore (1954); Pompa (1975); Morrison (1978); Caponigri (1980); Caporali (1992); Galeazzi (1993); Voegelin (1996); Zanetti (2011); Reggio (2021).

[7] "Vico argued on behalf of the humanistic tradition". Nevertheless, as F. J. Mootz (2009, p. 12) reminds, "Vico's critic is neither ill-informed nor atavistic".

levels of certainty); (2) an underlying *rationalistic attitude*, which tends to shadow the structural limitedness of human knowledge.

In his dissertation *De Nostri Temporis Studiorum Ratione* (1709) Vico criticized the privilege accorded, in his age, to the deductive – science-based – structure of reasoning, and especially to the claim of developing systems where conclusions are deduced from axiomatic premises, from which they descend '*more geometrico*' (Verene, 2008). Although he recognizes clear potentials to the modern development scientific method, both in the sector of formal and empirical sciences, Vico argues that a reduction of knowledge to this exclusive model 'compresses' rationality into an abstract frame which comes out to be inadequate to the complexity of reality (Mootz, 2009, pp. 13–16).[8] There are, indeed, many limitations connected to this 'Cartesian fashion': according to Vico, human forms of knowledge and communication have a wider range of possibilities, which reflects the complexity and multi-faced articulation of human beings, whose structure is characterised also by emotions, feelings, fantasy, and different types of 'reason'.[9]

Leaving no space to common sense, imagination, emotions and to those type of reasoning which are not 'geometric' but neither 'irrational' (and whose reflection clearly appears in virtues like prudence, wisdom and equity) would obtain a double backdrop: it would reduce the range of sectors on which it is possible to recognize the presence of knowledge, and, moreover, it would outline models of reasoning which are completely inadequate to facing the complexity of human life.[10] This would clearly appear – as Vico underlines – most especially in those fields which nowadays we would categorise as 'human sciences', (such as, i.e., law, philosophy, political sciences, literature, history), and it would cause harmful consequences in many fundamental sectors of daily experience (e.g. politics and justice). The latter sectors are indeed 'built' around the 'human world', and, necessarily, need to be tailored around human complexity, which is structurally multifaceted and requires an equally eclectic approach (this theme would later emerge as one of the *New Science*'s conceptual cores) ('t Hart, 1983, pp. 5–28).

The defence that Vico undertook in favour of disciplines like dialectics, rhetoric, history and poetry, as well as virtues which belonged to the humanistic educa-

[8] For a clear overview of Vico's argumentations in his *De Ratione*.

[9] Vico's observations were written three centuries ago: it is nevertheless surprising that – from the field of neuroscience – a critic to the 'Cartesian' separation of mind and emotions has been recently undertaken by Damasio. See, Damasio (1994); Damasio (2000).

[10] As Mootz (2009, p. 13) observes, Vico reminds us that "the critical method undermines the cultivation of common sense, which subtends both practical judgement and eloquence, thereby restricting knowledge to an arid and abstract intellectualism".

tion, such as prudence, eloquence and wisdom, targets a problem which has both a theoretical and practical characterization: as we mentioned, a reason which is narrowed to 'Cartesian' model is both abstract and inadequate to human reality. As Vico puts it, to adopt that view would imply, sooner or later, to end "caught in the web of contingency" (Vico, 1990). In this sense, the Italian Philosopher argues for an enhancement of the dimensions of *phronesis* and *praxis*, which had been instead strongly compressed, if not discarded, in his time, as it would clearly emerge during the Enlightenment.[11]

As I will further stretch, there is also a strong connection between Vico's theory of knowledge and the anthropological model which stems from his philosophy. As Vico states in his work *De Antiquissima Italorum Sapientia*, "human knowledge is like human beings themselves, limited and imperfect" (1998, p. 197). Such a reminder to the limited skills of human reason must not lead to think of Vico as an advocate of scepticism: as the Italian philosopher clearly wrote, in fact, "neither dogmatics know everything, nor scepticals know nothing" (1998, p. 191).[12]

Without even trying to outline in this writing a resume of Vico's complex theory of knowledge, we can try to understand why and in which terms dogmatism and scepticism can be said to be 'wrong' and why, in this sense, Vico's approach emerges as quite topical also for the current debate. Very simply, the gist of the sceptic claim is built around the more or less implicit premise that 'truth does not exist' (with all its possible variations, including 'everything is relative'; 'all is a linguistic game'; 'all forms of knowledge are merely the result of pragmatic agreements'). In Ronald Dworkin's words (1996, pp. 87–139), such an attitude states that "at bottom, in the end, philosophically speaking, there is no 'real' or 'objective' or 'absolute' or 'foundational' or (…) 'right answer' truth about anything, that even our most confident convictions about what happened in the past or what the universe is made of or who we are or what is beautiful or who is wicked are just our convictions, our conventions, just ideologies, just badges of power, just the rules of the language games we chose to play".[13] If we read through the lines, though, such a sceptical-relativistic claim stands on a self-contradiction: denying the existence of

[11] The recovery of the latter dimensions will find a renewed interest in the XX century, in which philosophers from different areas will return to Vico's speculation as topical in this sense. See, e.g., Gadamer, Voegelin, Capograssi.

[12] See, on this approach to the limits of knowledge, also Cacciari (2008).

[13] Such a view, as Dworkin (1996, pp. 87) notices, "...wearing names like 'post-modernism' and 'anti-foundationalism' and 'neo-pragmatism', now dominates fashionable intellectual style. It is all but inescapable in the unconfident departments of American universities: in faculties of art history, English literature, and anthropology, and, for example, in the law schools as well".

truth by claiming to say something true in the meantime and to the same regard.[14] Again, if someone tries to reduce everything to being contingent 'rules of a language-game', such a sentence itself states a rule that claims to be valid for 'all' the situations, and, therefore, appears to be universal. Or, whenever someone says that all is just a matter of opinions, that would be a mere opinion, too, whose opposite could be equally affirmed at the same time and by the same way.[15]

At the (apparent) opposite, a dogmatic attitude tends to see truth as attainable in a stable way, as if truth was an object which can be 'possessed': a manifestation of such an idea appears, for instance, when someone claims that certain and incontrovertible conclusions can be deduced from 'absolute' or self-evident premises. Nevertheless, if we seriously assume such a scheme, we will need some other criteria which may help us define how, and in which terms, certain premises can be taken as absolute or self-evident.[16] Moreover, the idea of seeing truth as an object (an attitude that in contemporary philosophy is usually named 'realism') entails a logical error: as Hilary Putnam (1990, pp. 28–29) pointed out, "Like Relativism, but in a different way, Realism is an impossible attempt to view the world from Nowhere. In this situation it is a temptation to say, 'So we make the world' or 'our language makes up the world' or 'our culture makes up the world'; but this is just another form of the same mistake. If we succumb, once again we view the world – the only world we know – as a *product*".

[14] All opinions are equally sustainable. All except the one which states that all opinions are equally sustainable, otherwise it would be a mere opinion, too. As Dworkin (1996, p. 88) correctly noticed (although reaching conclusions that I don't share) "these influential theories are 'Archimedean'", since "they purport to stand outside a whole body of belief, and to judge it as a whole from premises or attitudes that owe nothing to it. Of course they cannot stand outside thought altogether, to deny real truth to every thought. For even Archimedeans need some place to stand, as their progenitor conceded. They must assume that some of what they think (at an absolute minimum their beliefs about the good reasoning) are not just their own or their culture's invention, but are true and valid- indeed 'objectively' so". The base on which those ideas try to stand is contradictory with the content of those ideas themselves. So, there comes a parting of the way: either the content that those ideas express is false, because its contradicted by the premise under which that idea can be expressed, or that premises must be valid under another lens, that means 'true', or at least 'foundational'; this way, nevertheless, the premise would deny the content of the whole following set of ideas.

[15] For a critical analysis of such type of problems in the context of the critic to 'post-modernism', see Slob (2002, pp. 50–65).

[16] In such a model – as Harold I. Brown (1988, p. 77) states – it is required "that rationally acceptable claims be justified, and that the justification proceed from rationally acceptable principles in accordance with rationally acceptable rules. Each of these demands leads to an infinite regress until we can find some self-evident rules from which to begin, but these have not yet been found, and there is no reason to expect that they will be forthcoming". See, for a further analysis of this confutation, Williams (1996, pp. 60 and ff.).

These considerations – taken from the contemporary debate – seem to confirm that, in effect, neither scepticism nor dogmatism are sustainable, as Vico had pointed out.

Still, the meaning of such a double-edged confutation might remain obscure, or even appear like a dead-end. On contrary, the confutation of scepticism and dogmatism shows a common root behind two opposite mistakes: trying to treat truth as an (non-existing or fully attainable) object: we cannot deny the existence of the truth, nor can we claim to possess it, as if it was an 'object' of our rational capabilities. This means, in other terms, that – when we're thinking of the 'truth' – we must not confuse *unobjectivability* with *nonexistence*.[17] If we cannot possess truth, nor deny its existence without contradicting ourselves, this leads to a situation of unending research.[18] We can probably suggest that, in this sense, Vico assumes a 'Socratic' approach.

The relationship between limitedness and research, in any case, is a vital point, which shows how limitedness is a double-edged concept: on the one hand it reveals a frontier which needs to be respected, on the other it promotes a dynamism (made of research, attempts, confrontations, revisions…) which acts both as a thrust and as a promoter of a critical attitude.

This idea of limit is similar to the one that appeared also in Vico's anthropological conception: being conscious that human mind has the possibility of achieving a limited (in quantity and quality) knowledge does not work as a barrier, but shows instead that knowledge is possible, yet structurally problematic and revisable: it requires a continuous activity of research. "Wonder is the son of ignorance and the mother of all sciences", we read in the *New Science*'s XXXIX *axiom*: ignorance plays a propulsive role, by promoting wonder and, with it, the desire of knowledge, which is mother of sciences.

In another part of the *New Science*, Vico related the perception of such limitedness to the promotion of both knowledge and ethical life. Limit acts a warning against self-absolutization, but does not express a denial of dialogue and research: instead, it shows their necessity.

[17] I am fully in debt, on this specific point, with the lesson of Italian philosopher of law Francesco Cavalla. See., e.g., Cavalla (1996); Cavalla (1990, pp. 142–202).

[18] At this point the 'classical' root of Vico's philosophy is clearly revealed, since the idea of an unending, dialogical search for the truth – done with consciousness of its presence but also of the impossibility of achieving it in a stable and objective way – is one of the most important legacies of the 'classic' vision: it leads back to the immortal lesson of Socrates, and to the way it has been inherited and renewed by the Christian tradition (to which Vico frequently appeals). About the connections between the unending search of the Socratic tradition in Greek and classical philosophy and the developments of the Christian doctrine, my reference goes to the fundamental work of Ratzinger (2004).

This dynamic and its relationship with the societal dimension will be further examined later on, with reference to the notion of *pudor* (shame). For the moment we can outline that Vico's the attitude to knowledge supports a relational concept of humanity, exactly as modern rationalism supported an individualistic approach to mankind. We are, at this point, at the basis of Vico's distance from the modern understanding: against a rationalistic attitude, the Philosopher opposes a theory of knowledge based on the consciousness of human structural limits; against an individualistic (and utilitarian) anthropological model, Vico opposes a non-naïve conception of human beings which acknowledges a structural relational attitude. This is detachable already from Vico's theory of knowledge, as I tried to show: if being conscious of human limitedness means entering an unending search for what truth is (and what it implies, what it requires from each one of us…) one must also recognize that in this search, no human being is superfluous, no human being can be put to silence nor set free from asking and providing reasons.

Vico's Critique to the Individualistic (and Utilitarian) Anthropological Model

By analysing the main argumentations spent by philosophers and jurists within the context of the debate on nature law's theories – most especially in his *Universal Right* (1720) and his *New Science*'s first edition (1725) – Vico observes how they all tend to assume as a (more or less explicit) premise the individualistic nature of human beings (from which they argue for an artificial origin of society and law). Human beings are in fact conceived as self-sufficient, 'atomistic' subjects, able to individually state goals and means for their actions, and, finally, to individually outline articulate projects for transforming reality according to their own utility or well-being.[19]

Vico argues that such an anthropological premise would be first of all belied by history itself: since we have memory of it, in fact, humanity has been living within a societal frame (Vico, 1744, VIII *axiom*). Therefore, as Vico concludes, the idea of a natural, pre-societal, condition of human beings (which can be found in many Nature Law theories, with a strong accent in Hobbes), would be just hypothetical and, most importantly, lacking factual (historical) evidence.[20]

[19] Hannah Arendt provides a very topical image of that anthropological idea by describing it as *homo faber* (*faber*, in Latin, means smith, and a smith transforms reality by modifying its state and form according to his will). See Arendt (1958).

[20] Vico faces this issue in depth in the first edition (1725) of his *New Science*, especially in its chapter V.

What is instead proved by historical data is instead the natural attitude of mankind to live and remain in a society. The evidence of a societal attitude, in fact, is provided by history itself and – as Vico frequently underlines – by many features of human beings, such as, for instance, language, that the Italian philosopher sees as a token of the communicational 'structure' which characterizes human beings.[21]

More specifically, Vico's anthropological model is centred in the idea of a natural relationality of human beings, which he immediately connects to natural law.[22] As the philosopher puts it, in fact, arguing the natural origin of society (since we're structurally aimed at societal organization) equals to admitting the presence of a natural law (and vice-versa), since a social structure requires rules, and rules themselves require a social structure. With such an argument, Vico underlines that the 'originary' dimension of law is bound to the need of granting, fostering and protecting (*dominium*, *libertas*, *tutela*) relations among people.[23]

It emerges that the law is not only rooted in humankind's relational character, but also philosophically (and practically) justified by its role of habilitating, protecting and restoring the anthropological reciprocity which underlies the law itself. The bi-univocal connection between the relational predisposition of human beings and the regulatory role of law shows that – contrary to the Hobbesian view – law should not be (solely) intended as a command given by authority, as an act of sovereignty. The presence of commands and sanctions is connected to the need of providing laws with effectiveness, but is neither the one and only manifestation of law, nor its ultimate justification: law – according to Vico's perspective – is one of the most important expressions of people's attitude to 'be' and 'live' in a society, and to regularize, protect and cultivate a relationship of mutuality within such a framework.

Following this argumentation, it emerges that 'relationship' and 'mutuality' act both as *principle* and *limit* of law itself: therefore, laws cannot have a fully open and disposable meaning.[24] Indeed, they ought to be evaluated in light of their

[21] See Vico, (2003, chapter XLV).

[22] Such a concept reveals a strong connection with the 'classical' heritage of Graeco-Roman philosophy (Plato, Aristotle, Cicero) as well as with the Christian tradition (that Vico explicitly assumes, under the main influence of Augustine and Suarez).

[23] Granting, fostering and protecting human relationality (or intersubjectivity) are the three 'dimensions' of right: *dominium*, *libertas* and *tutela*. A rather old but still precious study of this aspect of Vico's philosophy can be found in Capograssi (1925, pp. 437–451).

[24] Nevertheless, this does not mean that nature's law expresses a fully clear and developed set of rules which are to be 'translated' into practice: nature's law embodies principles (*neminem laedere, honeste vivere, suum cuique tribuere*) whose practical application remains intrinsically problematic and therefore requires a constant and common research.

capability of protecting and fostering relations of mutuality and equity among people. Without claiming the presence of a 'code' of natural principles from which 'deduce' a set of rules (such a view would be probably quoted by the Italian philosopher as 'dogmatic'), Vico's vision of law never allows to fall into an absolutistic scheme: authority – he reminds us – "can never be opposed to truth. Therefore, those would not be laws, but legal monsters".[25]

According to Vico's argumentations, some of the most important 'institutions' of mankind, such as marriage and family, religion and worship, as well as different forms of institutionalised justice, appear all to express (with some cross-cultural commonalities, although through different and autonomous historical and geographical contexts), a practiced dimension of relationality (Vico, 1744, IV, II). Moreover, these institutions are granted by norms and, in the meanwhile, are able to produce rules themselves: the connection that Vico acknowledges between societal dimension and regulation leads the Italian philosopher to the conclusion that legal institutions would not be an 'artificial' creation, but a historical manifestation of an 'originary' tension that moves human beings to social organisations, and to cultivate an aspiration to relationships characterised by equity and justice.[26]

The latter conclusion does not depend on a naïve vision of mankind, nor it represents some prototype of social evolutionism: although he strongly underlined the historical evolution of natural rights and social institutions as a mirror of an evolving rationality, Vico reminded, on the other hand, that there is always the possibility – at any point of human experience – that dialogue and mutuality be denied in favour of the language of violence and abuse of power (Voegelin,

[25] See Vico, *De Uno Universi Juris Principio et Fine Uno*, chapter LXXXIII (my translation). For the official translation, see Vico, G. B. (2003). The connection that Vico states between justice and truth would require a broader reflection on Vico's conception of truth, which is far beyond this writing's purpose: for the moment, let us simply notice that in Vico's view truth is deeply connected with facts, happenings, and, most of all, with the conceptual 'structures' that they appear to reveal. Authority, therefore, can never be seen as the ultimate source of law and justice: authority can produce certainties, but these don't necessarily have the characteristic of being true. About the distinction between truth and certainty, see again *De Uno Universi Juris Principio et Fine Uno*, chapter LXXXII and LXXXIII.

[26] While in his earlier, legal-philosophical writings (*De Uno*, *De Constantia*, 1719–1721, published together in the '*Universal Right*'), such a theme emerges mainly from his reflections on the problem of nature's law, Vico confirms this view also when he moves towards a broader study of human institutions in his most famous work, *The New Science* (1725, 1744). One of the main themes of this book – which took all of Vico's efforts since 1723 up to his death, twenty-one years later – is the attempt of showing how history reveals a constant effort to certify and develop the relational structure of human beings.

1998).[27] Such a 'shift to barbarity' can have different faces: it might assume the form of a loss of rational capability or, on the other hand, the development of a (supposed-to-be) self-sufficient rationality. In the latter situation human reason, unable to recognise its condition of limitedness, induces to act 'as though it was in God's viewpoint' and therefore to behave as having an almighty power on nature as well as on other people.[28]

This explicit reminder to a religious dimension – the image of original sin – is indeed a philosophical consideration: 'pretending to be God' embodies the loss of sense of limit, and consequently, the loss of perception of that dimension of 'reciprocity' which binds each human being in sharing a common humanity. The denial of such a commonality, with the result of treating the 'other' as an 'object', is more than just a hypothesis, as sadly history seems to confirm.

Drawing from Vico's considerations, it appears that each person is constantly challenged with an individual responsibility, which has a parallel social projection: acting within or without dialogue and mutuality. Such a choice has both theoretical (recognizing that dimension as a quality inherent to 'being human') and practical (behaving according to this consciousness) implications: so, with this regard, Vico shows the possibility of connecting knowledge and ethics.[29]

Along this line, Vico attacks the theory of a 'utilitarian' and artificial origin of society (so clearly argued, for instance, by Hobbes), by claiming that the presence and the need exchanging utilities would not be the 'cause' of society, but more correctly, one of the 'arguments' around which human beings experiment their capability of creating organisational schemes within a social framework.[30] Vico's reasoning shows that most of all, an exchange of utilities (be it even in the form of a hypothetical social contract aimed at 'creating' a state as it happens in the Hobbesian view) relies upon communicational capability and on the actual possibility of mutuality: therefore, it presupposes and takes profit by sociability, instead of 'creating' it artificially (Vico, 1744, VIII *axiom*).

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[27] Eric Voegelin read Vico's reflections on this point as a critic to the modern 'hybris of self-salvation' as a mirror of a fallaciously optimistic attitude towards the ability of mankind to know and produce stable forms of 'order'.

[28] Rises and falls – Vico refers to the remarkable example of the Roman Empire – are present, both as historical evidence and future possibility. Such a reflection clearly appears in the concluding chapters of his New Science (1744). A very interesting reading about this point can be found in Galeazzi (1993).

[29] The modern tradition, most especially after David Hume's lesson, tends instead to state a fixed separation between knowledge and ethics. For a critique to such a separation, and a recognition of its progressive fall, see Putnam (2002).

[30] See Vico, *De Uno Universi Juris Principio et Fine Uno*, chapters XLVI–XLVII.

Thanks to such an argumentative path, Vico distances himself from the individualistic and utilitarian anthropological model that had become a dominating vision in his time: such a critique goes to the heart of modern nature law's theories, whose contractualistic approach is rooted in the premise of a state of nature in which human beings are individualistic and self-sufficient, and, therefore, unable to remain in such a condition without falling into a state of conflict. From here, the exponents of the so-called Nature Law's school, argued the need of artificially creating the state, without which a social order would be impossible (Hobbes) or constantly lacking defence in case of violation of natural rights (Locke). Attacking the premise of individualistic anthropology, therefore, hits one of the pillars on which the whole modern justification of the state (meant also as the ultimate and exclusive grant of legal order) has been grounded.

The Role of *Pudor* (Shame) in the Birth of Human Societies: Naturality of Law as Mirror of an Originary Societal Dimension

The *New Science*, again, offers one of the most interesting images provided by Vico to explain his view about the origin of society. In a willingly mythological language, such an image is clearly designed around a typical commonplace of his time (a hypothetical barbaric status of non-sociality – only apparently close to the Hobbesian state of nature – in which human beings are led by their instincts and desires, with rational skills reduced to perceptions and calculations of immediate utilities). Nevertheless, the narration shows the specificity of the Italian philosopher's perspective, since it tends to offer an 'alternative version' to the topical image of a hypothetical 'state of nature', which formed, along with the idea of a 'social contract' – a common premise of the nature law theories in the 17th and 18th centuries. Vico narrates that a sudden event broke the *status quo* of those human beings who were living as 'big beasts', fully driven by passions and instincts: a lightning strike. Such a terrifying, overwhelming experience did not cause an emotion of 'fear' in those beings: this is, in fact, where the emotion of *pudor* (shame) emerges. By witnessing the presence of something that escapes their power and their capability of explanation, those beings 'understood' that they were not 'absolute'[31] and,

[31] The language adopted by Vico evokes the idea of a myth, whose feature is to hold together the memory of something remote and the image of contents that are still able to tell something to present times. As in the Platonic dialogues, myth – although assuming a cloudy language and imprecise references – is the expression of an ancient wisdom, able to disclose the eyes to the view of something originary: therefore, it can never fully express and explain its own meaning, and rather requires a constant interpretation and actualisation.

therefore, they felt ashamed. That feeling of shame provided the shift to a more conscious attitude, revealing the possibility of an act of self-consciousness (which implies the ability of seeing oneself from a different point of view, of entering a sort of self-dialectic): those beings, this way, realised that they were limited, subdued to laws they cannot control, and they also understood that their being limited was a shared commonality.

A single event – whose overwhelming power violently showed the weakness and limitedness of the human condition – disclosed to those beings the perception both of divinity (a higher, incommensurable presence) and of their humanity (a common dimension of vulnerability, the sheer condition of being creatures) (Vico, 1744, II, I). As we can see, the 'divine' element opens to a dimension that is structurally beyond human capabilities and powers, while the 'human' is characterized by the rational perception of such a limitedness as a common, 'natural' feature.[32]

Following Vico's narration, such a perception was (and can always be) able to invite human beings to a theoretical and a behavioural breakthrough: in fact, the perception of a higher presence acts as an advice of not claiming to be 'absolute', lacking of any limit; the parallel perception of a common humanity reveals that to act as though other persons were objects – the language of violence and abuse of power – is a denial of this commonality.

It is not surprising that Vico connects this perception with the contextual birth of religion (in terms of worship but also in terms of a religious sense) and marriage, since these 'institutions' symbolise the 'formalised' consequence of those perceptions activated by the event-lightning: the first, in fact, witnesses the need of recognising the presence of a 'divine' which exceeds the capacities and powers of the human condition, while the second is the most personal and widespread example of a non-occasional relationship of mutuality, in which each member of the couple (formally and publicly) accepts the other and offers herself/himself as a gift.[33] Vico's view confirms, once again, that being 'human' is characterised by a double dimension: the perception of limitedness and the perception of an inherent reciprocity (in this being limited).

The emotion of *pudor* offers also a very interesting insight about how Vico outlines the relationship between emotions and rationality: contrary to the 'Car-

[32] Human beings are limited: but the perception of it shows also the possibility of transcending – although imperfectly – such a dimension. Being human means – claims Vico, with Augustine's words – being a "finite who tends to infinity".

[33] Vico defined family as *prima societas* (first society): this underlines its historical, ethical and logical priority to the state.

tesian' separation between reason and feelings which is one of modernity's typical trademarks (Nussbaum, 2001),[34] Vico puts emphasis on the importance of emotions and fantasy in both human knowledge and behaviour. In the narration of the 'lightning strike', shame (*pudor*) emerges as a peculiar conceptual figure. It plays, in fact both the role of limitation (preventing from self-absolutized attitudes) and the role of a propulsive factor, able to promote an ethical and theoretical breakthrough. This dynamism originates, in fact, ethical and theoretical virtues: *virtus ethica* and *virtus dianoetica* emerge in fact as a result of the dynamic originated by *pudor*. As Zanetti observes, the way in which Vico outlines both fear and shame (a sheer fear the unknown, and a sheer perception of shame for behaving as 'unlimited') is quite different from the Hobbesian fear of the other human beings: those emotions do not produce, in Vico's argumentations, closure, they indeed produce self-reflection and reciprocity (Zanetti, 2007, pp. 477–487; Zanetti, 2002). Shame – as reminder of human fragility – produces an opening to the Other and to the others: therefore, they are – as Vico states, recalling Socrates – "the colors of virtue".

Trying to turn this narrative language into philosophical concepts, it is possible to notice that *pudor* works as a very peculiar type of limit. The role played by the latter concept in Vico's scheme is very interesting, since it is not just a barrier that prevents any crossing, nor a mere obstacle to reaching some (physical or metaphysical) destination. Limit works also as a 'motor', because acknowledging its presence leads to a higher consciousness of our 'self' (Illetterati, 1996). Moreover, such a recognition produces a partial transcendence of limitedness: there is a clear conceptual difference, in facts, between being limited but unable to understand it, and understanding that limitedness is a characteristic of the human condition.[35]

Limit plays also an important ethical role, as I mentioned: it shows that anytime someone behaves as unlimited, absolute (which happens, for instance, anytime someone considers other beings as 'objects', subdued to his/her will and power), that person is reproducing a very specific but common type of ethical violation. Its structure, according to Vico, resembles the one of the original sin:

[34] Recent studies by Martha Nussbaum, in the field of moral philosophy, show how the emotional side is not necessarily opposite or extraneous to rationality.

[35] We can now perhaps better understand why Vico's anthropology is grounded on Augustine's definition of man as a "*finitum quo tendit ad infinitum*": a finite who tends to the infinite (See Vico, G.B. *Universal Right*, *Synopsis*, p. 1. Vico's definition, more precisely is "*nosse, velle, posse finitum quod tendit ad infinitum*" (finite knowledge, will and possibility which tends to the infinity). A reflection about the nature of man as 'synole' of finite and infinity has been recently developed by the Italian philosopher of law Sergio Cotta. See Cotta (1991).

denying the nature of creatures, the common nature of our similar beings, while pretending to have a 'power' that no human being can legitimately claim to have.

Some may object, at this point, that there is no evidence of a 'fallen humanity' as the one that Vico describes in the 'pre-lightning' situation, neither of such an awakening: the evidence, nevertheless – as Galeazzi (1993) explains – is given by all the times in which humanity fell into barbarity for forgetting the sense of limit. Therefore, the 'fall into' and the 'awakening from' barbarity are there as historical examples and not as a mere hypothesis.

Critique to the Abstract Idea of Nature Law Developed in the Nature Law's School and to the State-Centered Vision of Modern Theories of Politics

In the *New Science*, Vico argues in favour of a very peculiar conception of natural law, open to evolve, in its manifestations, along history. Nature's law is "eternal but runs in time" (Vico, 1725, II, IV), as the Philosopher puts it: eternal in its idea, but historical in its manifestations (Vico, 1744, IV). Such a conception of law reveals a double face: it reveals some lasting and universal(isable) principles, but it is also rooted, 'living' and contextual(isable) in history.

A central argument in Vico's philosophy is the continuous attempt to balance – and coordinate within a common conceptual frame – the reasons of history (*philologia*) and philosophy. As I already mentioned, his study on nature's law was, since his 'discovery' of Grotius, focused on the co-implication between humanity, society and law: according to the philosopher's theory, law can be seen – through the whole course of history – as the token of a social organisation which is originally embodied in the human condition.

If, as previously argued, law is, according to Vico, the 'instrument' which has been specifically designed for organising, fostering and protecting the relational structure of mankind, it is clear that law is 'natural' and 'lasting' in its co-implication with humanity, but it is also 'historical' and 'contextual', since laws – as practical and historical manifestations – are a human product and therefore are informed by the understanding of those who concretely conceive and apply them.

Nature's law, according to this view, cannot be seen (dogmatically) as a self-evident code of detailed rational prescriptions, but neither (sceptically) as the mere reflection of contextually dominating values and interests: nature's law embodies some fundamental principles (to hurt nobody, to give one's own, to live honestly) – which are wide and able to orient several specific rules but can never be 'translated' into fixed and exhaustive (historical) norms. There is in fact a problematic

tension between the ideals that law seeks to embody and pursue (justice, equity, mutuality) and the possibility of concretely adapting these ideals to reality. This idea of natural law recalls the problematic emerging of rational and relational structures from historically contextualised institutions and practices: therefore, although 'running in time', law reveals the presence of structures and ideals which can never be fully identified with the norms and institutions that emerge from each context.[36]

Most especially in his *Universal Right* but also in the *New Science*, Vico's efforts were aimed at letting emerge, from laws, habits and historical institutions, some 'reasons' able to 'transcend' the historical context and to show contents which are common to human beings because they are deeply rooted in a common humanity (Bellofiore, 1954, 1972). Here's where Vico's context-sensitivity does not fall into relativism: he strongly defends the presence of values and principles that, although born in a specific context – with a 'bottom-up' process – are common to all humanity, beyond differences (but without any need of ignoring differences, as well). This was, in my opinion, one of Vico's strongest efforts: trying to let emerge 'reasons' from history without abstracting those ideas from the reference with history itself and from real life, and this is also one of Vico's most important legacies, since it strongly invites not to give up on the search for common points among a world of complex diversities. Moreover, Vico shows that this specific goal is strictly connected to the 'essence' of law.

The idea of law that emerges from Vico's reflection does not express a fixed, static image of order, nor the simple manifestation of a struggle for power: law endorses a dynamic and relational idea of order in which each person is personally and relationally involved (and hold responsible for his/her own personal contribution).

We can now understand why Vico criticised the 'abstract' theories of nature's law sustained by the modern advocates of Nature's Law School (in particular Hobbes, Spinoza, Pufendorf, Selden, and in certain terms also Locke), which are all 'constructed' around the theorem of a hypothetical state of nature which requires – due to its unsustainable condition – an artificial creation (thanks to the social

[36] Such a continuous tension and dynamism also shows that – in Vico's view – Justice (as well as Truth) expresses a human aspiration but also (and more importantly) an opening to Transcendence (meant in religious, Christian terms). Law would be, then, an 'expedient' thanks to which the Divine Providence let human beings preserve their relational and rational nature, and to cultivate – along with the aspiration to justice – an opening to the Principle and the End of Justice, which is God. Such a thesis is the architrave of Vico's *De Uno Universi Juris Principio et Fine Uno*. See, for a recent translation in English, Vico (2003).

contract) of the state. Such a hypothesis ignores, first of all, how history itself proves the sustainability of a social condition, and, therefore, the 'naturality' of rules as means of social organization. Most of all, such an idea reflects a vision in which law is a 'product' of the state (and, therefore, an act of authority) and the state is the owner and only grant of social order (Lenman and Parker, 1979). Vico's perspective is at the opposite: the state is one of the possible outcomes (so, nor the principle, nor the end of legal order!) of a dynamic and relational order which pre-exists to the state itself, and which does not need to be artificially created.

In Vico's view, the space of law appears wherever there is the need of ruling relations and social organizations: therefore, the author of the *New Science* shows that, between the individual and the state, there are many intermediate 'communities', in which ethics, practices, habits (and, ultimately, forms of law) are shaped through dialogue, discussion, sharing and organization of utilities. According to this perspective, Vico also attacks the idea – that in Modernity has become dominant – that law's fundamental (or 'genetic') element is based on an act of authority: from family to wider social organizations, society is organized through a complex web of interacting and complementary institutions, whose extensive range would be contained within the state. Moreover, fostering, granting and protecting a safe space for that smaller web of relational structures would be the state's justification and limit.

It becomes clear, at this point, that Vico sought to undermine the whole construction of the modern theories of state, whose focus on a tension between the state and atomised individuals became one of the strongest philosophical justifications to a static and rationalistic idea of social order, granted by legal forms, whose producer and 'owner' would be the state.[37]

[37] It is interesting to compare a sentence from Vico's *De Uno* with one from Hobbes' *De Cive*: Vico writes that "with out the Divine Providence in the world there would be nothing but mistake, bestiality, violence, fierceness, blood and dirtiness; and perhaps, or even doubtless, today there would be no humanity left on the wide mass of a horrid and dumb Earth" (*The First New Science*, 476, my translation). Hobbes instead argues that "Out of this state, every man hath such a Right to all, as yet he can enjoy nothing; in it, each one securely enjoyes his limited Right; Out of it, any man may rightly spoyle, or kill one another; in it, none but one. Out of it we are protected by our own forces; in it, by the power of all. Out of it no man is sure of the fruit of his labours; in it, all men are. Lastly, out of it, there is a Dominion of Passions, war, fear, poverty, slovinlinesse, solitude, barbarisme, ignorance, cruelty. In it, the Dominion of reason, peace, security, riches, decency, society, elegancy, sciences, and benevolence" (*De Cive*, X, 1). The role that Vico tributes to a provident God belongs, in the Hobbesian view, to the state: the secularization of God and the absolutization of the state – as two connected outcomes of modernity – seem to be here fully theorised.

Further Implications

The overall legal philosophy of Giambattista Vico, following the above-mentioned alternative path, leads to some further implications. I will try to briefly summarize them.

(I). The relationship between law, social institutions and intersubjective bonds is constitutive and also operates as a limit and legitimising factor for institutions and norms: Vico's natural law configures law as the very limit to the unfolding of authority as a mere form of power. This legal doctrine does not appear to be constituted to be a means of legitimising political power; on the contrary, Vico's objective seems rather to be directed towards a reflection on the justification and the limit of law and political institutions.

(II). Law and sociality are manifested and 'live', therefore, well beyond the state dimension alone, the main 'political figure' of modernity. Vico's political conception recognised the existence and the legal status (understood as legitimacy but also as a space for autonomy and for the construction and experimentation of legal regularity) of different 'political', 'communitarian' and 'intermediate' forms: family, kinship relations, commercial relations, community, state. The state-individual 'dialectic', typical of modern legal doctrines, is thus broken down in favour of a complex and polycentric conception of legal sociality. For this reason, the recipient of Vico's legal reflections is not a hypothetical legislator, but society in its complex and intersecting components.

(III). Vico's analysis of the various forms of law, starting from the most archaic and moving on to those closest to his time, is not limited to a historical reconstruction but is aimed at finding, beyond the various contextual manifestations, the principle of legality as it manifests itself in concrete experience. Legal forms extend to a plurality of manifestations that, in their various historical forms, express the regulatory and relational dimension of law: Vico's attention is focused on a multiplicity of profiles, such as norms, the instruments used to settle disputes, negotiations and agreements, customs and, in general, the legal projections of customs.

(IV). The link that Vico sees between law and natural human sociability does not lead the author to underestimate how, in experience, conflict is more than a possibility: on the contrary, it is closely intertwined with law as an instrument designed not to 'abandon' the regulation of social life to mere balances of power and force. Following this line of thought, it emerges that 'relationship' and 'reciprocity' act both as a *principle of* and a *limit to* law itself, and this binds the legal dimension: its manifestations should therefore be evaluated in light of their ability to *enable, promote* and *protect* relationships of mutuality and equity between people.

(V). Vico maintains that in order to be authentic and not a 'monstrous legality', the law must always contain a reference to a *ratio*. This is closely linked to the fundamental principles of natural law (*neminem laedere*, *honeste vivere*, *suum cuique tribuere*) which, although inviolable, cannot be translated into a set of stable rules that are valid in all conditions. What emerges is an idea of order (social, institutional, legal) that is dynamic and open to complexity.

(VI). This also explains the attention that Vico paid to methodological aspects of law that were particularly 'sensitive' – especially for the time – to the theme of the interpretation and the 'living dimension' of law, including the principle of equity, and, on a methodological level, the re-evaluation he proposes of rhetoric, as well as of the *prudentia* and *sapientia* of classical memory, virtues not reducible to the 'legal geometries' so sought after by his contemporaries.

Vico's 'Discarded Paradigm' as a Topical Heritage for our Times

Many of the themes around which Vico developed both his critique to the modern understanding and his personal perspective seem to be still topical in many sectors of the contemporary debate: rediscovering therefore this 'discarded image' might respond to more than an 'archaeological' interest, since it might help reconnecting with a heritage which still belongs to the patrimony of Western philosophy (but not only to that, intellectual patrimonies can and should be shared).

Moreover, such a rediscovery may offer, in contact with the issues emerging from the contemporary debate, some important and still valid philosophical coordinates – as it is typical of a 'classical' perspective: classical, in fact, is the feature of durable ideas and notions, able to resist distance and time.

In a moment in which the idea of the 'state' itself seems to have fallen in a consolidated crisis, and in which the increasingly higher disappointment towards the idea of 'legal order' tends to delegitimate the tools which have been traditionally used to grant it, philosophical coordinates are much needed: when a whole system of thinking is at stake, its conceptual premises are involved as well, therefore it is on these premises that, in my opinion, we should concentrate our attention.

Some critical issues which have emerged in the contemporary debate on criminal justice, for instance, openly distanced themselves from the state-centered, formalistic vision of law which has widely characterized both the theory and the practice of justice in penal matters: the provocative questions and proposals raised within the increasingly influential *Restorative Justice* movement call for a deep and whole-encompassing rethinking of the way 'justice' is thought, understood, and practiced.

Such search for a new paradigm requires, nevertheless, as Howard Zehr (2005, p. 180) remarks, "a well-articulated theory, combined with a consistent grammar and a 'physics' of application". The modern model of law and justice was consistent with a certain theory of knowledge and with a certain anthropological model: these elements reflected a very specific idea of 'order' around which the whole idea of law – and moreover of legal system – was designed. The failures, and the alienating outcomes of the state-centered and formalistic developments of Western legal systems, in which the importance of persons and communities is peripheral, help us feel the 'nostalgy' of something we had apparently forgotten, or left aside: the centrality of persons as individuals and relational subjects (Karp, 2000, pp. 153–173).[38]

This is the level of premises, this is where a 'paradigm shift' finds its foundations, hopefully solid enough to sustain its further developments. This is where a dialogue with Vico and the humanistic heritage that his philosophy preserved could reveal its precious contribution, since the anti-foundational and pragmatistic attitude of much of our contemporary philosophy is itself too feeble and situational for such a purpose.

Vico's thought connects us with a vision of justice which honors human beings as relational creatures, able to dialogically search the 'reasons' and the 'tools' that help maintaining such a condition and renewing its historical manifestations according to the needs, the issues and the problems that contextually emerge in each time. In this search, Vico also warns not to forget that history is a constellation of human attempts and mistakes – as well as of fallacious dreams of self-salvation – and that on this path the chances of entering a journey towards decadence (sometimes masked by the dream of progress) are more than just a possibility. The conclusion of the last edition of the *New Science* leaves this option quite open, but, in any case, leaves also the interpretive possibility of considering it evitable, if humanity is able to (re)awaken to the perception of its structural limitedness.

In this regard, however, a question arises spontaneously: at the historical-philosophical crossroads where the West witnessed the definitive affirmation of the modern mentality, what was the fate of that *other path* indicated by Vico? Just a few years after the death of our author, the jurist Emanuele Duni, who openly referred to Vico's teachings and tried to preserve his legacy, as we previously mentioned, expressed himself in these words: "The very high meditations of such an unparalleled man of great talent (…) were abandoned rather than savoured by

[38] The important contribution of 'Sociological Communitarianism' in the Anglo-Saxon debate follows this direction.

scholars; yet in the darkness in which they remained almost buried, they did not fail to pass on rays of splendid light" (Duni, 1760, p. 4).

So why should we return to this crossroads, we ask ourselves again: perhaps to explore the contours of a *discarded vision*? It is not a question of cultivating anachronistic nostalgia for an impossible return to the past, but rather of considering an alternative way of thinking: historically it resulted the voice of a minority, a 'loser' in the scenario of the evolution of the Western culture. Yet, it is still capable of showing different ways of thinking, that is, other 'possible worlds' for the adventure of human thought. In this sense, therefore, returning to Vico's peculiar philosophy, in the 300th anniversary of the publication of the first *New Science*, can be seen also as a renewed invitation (so important for the Academic culture) to cultivate new and courageous paths, also when they imply the ability to rediscover heritages from the past and to revitalize them into the challenges of the present.

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Federalism and Secession: Recent Secessionist Tensions in Catalonia and Lessons we can Learn in Spain from the Canadian Federal Experience

• **Abstract** •

Secessionist tensions in Quebec recently put in serious risk the continuity of Canada's territorial integrity. Nevertheless, the clever doctrine of the Canadian Supreme Court was particularly useful in order to resolve this problem. Many lessons may be learned in the European Union from this risky Canadian experience, especially in countries such as Spain, with similar secessionist tensions. The Catalan experience shows many similarities. The so-called 'right to decide', has great expressive force. Behind this idea there is a large dose of political marketing, demagogy and also hidden problems and challenges for modern federalism.

Keywords: Secession, Federalism, Canada, Quebec, Spain, Catalonia.

Historical Introduction

Canada is an excellent and great example of the interaction of different cultural traditions because of the long history of coexistence and struggle between the First Nations and the French and English cultures.

John Cabot travelled around Canada in 1497, and Jacques Cartier arrived in Prince Edward Island and Quebec in 1534 and explored the Gulf of Saint Lawrence on his second voyage to Canada between 1535 and 1536. He gave the area the name Kanata, which means city or territory in Iroquois. Wars against the Huguenots diverted French interest in the area. Samuel Champlain arrived in Canada in 1603 and established permanent French settlements such as Port Royal, found-

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ed in 1605, and Quebec in 1608. However, the Treaty of Utrecht (1713) marked the beginning of the decline of French power, and the Treaty of Paris (1763) put an end to it. According to Voltaire, it wasn't worth so much blood for a few acres of snow. The Treaty of Paris allowed the permanent settlement of 75,000 French in the St. Lawrence Valley because of the difficulty of evacuating them and, perhaps, because it was thought that they would be easy to assimilate. The error of this prediction was soon verified (Conrad, 2012, pp. 34 and 79; Black, 2014, p. 7).

In the years to come, the living conditions of the French minority would vary according to the political climate. The Royal Proclamation of George III (1763) forbade the access of Catholics to public employment, but the Act of Quebec (1774) allowed the use of French as an official language, recognised the religious freedom of Catholics and the right of the Church to collect tithes, allowed Catholics to hold public office and restored French civil law. This legal change was a consequence of political pragmatism in the context of the War of Independence of the British colonies in North America (Coyne and Valpy, 1998, pp. 9 and 11; Francis et al., 2004, pp. 160–161; Lacoursière et al., 2015, pp. 163–164 and 170; Linteau, 2014, p. 41).

The Constitutional Act of 1791 divided the remaining British territories into North America between, Upper Canada, (Ontario), anglophone and Protestant, and Lower Canada, (Quebec), francophone and Catholic. These territories were united by the Act of Union, passed by the British Parliament in July 1840, and proclaimed in Montreal on February 10, 1841.

The British North America Act of 1867, passed by the Parliament of London, will create the modern Canadian Confederation, initially divided into only 4 provinces: Ontario, Quebec, New Brunswick and New Scotland. This new legislation, now in force, was supported by Macdonald and Cartier, the leaders of the anglophone and francophone communities, respectively. There were many reasons for this gentlemen's agreement, such as consolidating an area of economic and commercial exchange, or controlling US expansionism. There was no other reason, such as a possible rejection of British imperialism. It was a law made by the Parliament of Westminster in London, with Canadian consent, to facilitate better administration of these territories. The Imperial Parliament in London could make laws for Canada, and the British Government would continue to appoint the Canadian Governor and refuse to approve or reserve laws passed by the Canadian Parliament, and the decisions of the Canadian courts could be appealed to the Metropolitan Tribunals (Black, 1975, p. 5; Bonenfant, 1969, p. 15; Brooks, 1996, p. 125; Conrad, 2012, pp. 149–150; Lacoursière et al., 2015, pp. 325–328; Morton, 2006, pp. 94–98).

Canada became an independent actor in international law with the Balfour Declaration of 1926 and the Westminster Statute of 1930, which limited the abil-

ity of the British Parliament to pass laws enforceable in Canada. However, in the absence of an internal agreement in Canada on constitutional amendments, the formal competence in this matter will be maintained until the Constitutional Act of 1982. This act denies Quebec the right to veto constitutional amendments and limits the ability of the Quebec legislature to legislate in relation to the French language (Cook, 1989, p. 503; Thomson, 2010, pp. 97–98).

The Beginning of Secessionist Tensions in Canada: The Referendum of May 20 1980, the *Patriation* of the Constitution, and the Failure of the Meech Lake and Charlottetown Accords

The arrival to power of the *Parti Québécois*, Quebec Party, in the 1976 elections had the final result of an increase in secessionist tension. It was evident the incompatibility between Pierre Trudeau and René Lévesque. The Quebec Party proposed a sovereign association which included (McRoberts, 1993, pp. 300–301; Smiley, 1980, p. 244):

1. The configuration of a customs union, which implied the non-erection of barriers which would hinder trade between both parties.
2. Freedom of movement of people and capital.
3. To maintain the dollar as a single common currency, although with separate central banks, which would require coordination of monetary policies.
4. Coordination in the management of railway and air transport lines, especially Canadian National and Air Canadian, respectively.
5. Quebec would continue to be part of NATO and the North American Aerospace Defense Command.

The referendum question was particularly dense: "The Government of Quebec has made public its proposal to negotiate a new agreement with the rest of Canada, based on the equality of nations; this agreement would enable Quebec to acquire the exclusive power to make its laws, levy its taxes and establish relations abroad – in other words, sovereignty – and at the same time to maintain with Canada an economic association including a common currency; any change in political status resulting from these negotiations will only be implemented with popular approval through another referendum; on these terms, do you give the Government of Quebec the mandate to negotiate the proposed agreement between Quebec and Canada?".[1]

[1] French version: "Le Gouvernement du Québec a fait connaître sa proposition d'en arriver, avec le reste du Canada, à une nouvelle entente fondée sur le principe de l'égalité des peuples; cette entente permettrait au Québec d'acquérir le pouvoir exclusif de faire ses lois, de percevoir ses im-

A successful result in the referendum would only enable the Government of Quebec to negotiate said agreement or economic association proposal, but any change in the Quebec provincial statute would have to be submitted to a second referendum to be held later, so full access to the *independence* would be framed in a later stage, within the framework of the gradualist procedure politically adopted.

From the federal ranks, it was noted during the campaign that, despite the deliberately ambiguous wording of the question, the real dilemma was choosing between remaining within the Federation, or independence. Federalist announced the impracticality of an intermediate solution, such as the intended *economic association*, which would never be assumed by the rest of the country in the terms in which it had been proposed (Simeon and Robinson, 1990, p. 252).

The final result was *clear*, the "No" obtained the 59.5% of the votes, ant the "Yes" only the 40.5% (Torres Gutiérrez, 2019, 2024).

After the referendum, it was open the constitutional reform process promised by Pierre Trudeau and his Minister of Justice, Jean Chrétien. The aim was to seek a better fit for Quebec in Canada. The intention was to introduce a formula for amending the Constitution, which would allow to modified its text in Canada, without the intervention of the Parliament of London, and to introduce some additional modifications, the most important of these would be the development of a Charter of Rights and Freedoms, limiting Quebec's ability to legislate on linguistic issues (Morton, 2006, p. 331).

The Supreme Court of Canada, on September 28, 1981, in the *Patriation Reference*,[2] pointed out a *constitutional convention*: it should have the support of a *substantial number of the provinces* (by 6 votes to 3). It was not necessary the unanimity of all provinces, but it was not possible a unilateral decision of the federal authorities. After long political conversations, and agreement was reached between the anglophone provinces in order to pass a new Constitution, the amending formula, and a Charter of Rights and Freedoms. This solution did not obtain the *approval* of Quebec authorities. On April 17, 1982, the Queen proclaimed the Constitution Act. The Supreme Court, on December 6, 1982, rejected the existence of an alleged prerogative of *provincial veto* by Quebec, in the *Quebec Veto Reference*.[3]

pôts et d'établir ses relations extérieures, ce qui est la souveraineté, et, en même temps, de maintenir avec le Canada une association économique comportant l'utilisation de la même monnaie; aucun changement de statut politique résultant de ces négociations ne sera réalisé sans l'accord de la population lors d'un autre référendum; en conséquence, accordez-vous au Gouvernement du Québec le mandat de négocier l'entente proposée entre le Québec et le Canada?"

[2] *Resolution to amend the Constitution*, [1981] 1 S.C.R. 753.

[3] *Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 S.C.R. 793.

The Supreme Court will deny the existence of an alleged *constitutional convention*, supported by the so-called duality principle of Canada, (the original federal pact between the Anglophone and Francophone communities), which should require the consent of Quebec for any constitutional reform which affected its legislative powers, or its constitutional status.

The constitutional reform of 1982 was criticized from Quebec, because even having all the requirements from the point of view of its formal legality, it would nevertheless suffer from a defect in legitimacy, since in a federal model it should have had the consent of all the parties involved in the founding pact. Since 1867, Quebec had participated in all the constitutional reform procedures, and some of them could not be carried out, because consensus could not be achieved.

The effort to bring Quebec into constitutional consensus began. But the Agreements of Meech Lake (1987) and Charlottetown (1992), recognizing Quebec as a 'distinct society', didn't obtain the green light.

Playing with Fiire: The Referendum of 1995

The Quebec authorities called a second referendum on October 30, 1995. In English, the question on the ballot paper was: "Do you agree that Quebec should become sovereign, after having made a formal offer to Canada for a new economic and political partnership, within the scope of the Bill respecting the future of Quebec and the Agreement signed on 12 June 1995?".[4]

It was a long and cumbersome question, which included a reference to the formulation of an offer of a new economic and political association with Canada, something that could be seen as a ploy, to make the undecided population believe that secession would not be traumatic and that reaching the association agreement would be relatively easy, which was not at all true, especially when no attempt had even been made to open negotiation prior to the referendum.

How could it be acceptable that 25% of the population living in the Beautiful Province wanted to break up the country by secession, only to return later and hold 50% of the decision-making power in the country's joint institutions, including a veto on some of the most strategic political issues? In reality, they wanted to obtain a larger number of votes, thereby disguising the inadequacy of the secessionist vote to achieve their goal (Dion, 1999, pp. 38–39).

[4] French version: "Acceptez-vous que le Québec devienne souverain, après avoir offert formellement au Canadaa un nouveau partenariat économique et politique, dans le cadre du projet de loi sur l'avenir du Québec et de l'entente signée le 12 juin 1995?" https://www.sqrc.gouv.qc.ca/documents/positions-historiques/positions-du-qc/part3/Document30_en.pdf

The more than foreseeable rejection by Canada after the plebiscite would make secession inevitable, given the failure of the negotiations, and this would have consequences as irreversible as they were undesirable for those voters who went to the polls for the plebiscite and for those for whom this condition was essential in deciding the meaning of their vote.

It looked like a game in which one of the players asks the question, makes all the rules of the game and ignores them when it suits him. If the player loses, he loses unfairly, and the game is repeated over and over again until he wins. At that point, the game ends and any attempt to start again is declared illegal (Scheinberg and Decarie, 1998, p. 84).

The final result was decided by a narrow margin of 49.42% for the "Yes" side and 50.58% for the "No" side. Never before had Canada been so close to the abyss. A "Yes" victory would have had unforeseen consequences (Hogg, 1997, p. 20):

1. An inexhaustible source of uncertainty about the legal rules of the game to be applied in such sensitive areas as trade, taxation or the recognition of citizenship.
2. A very pessimistic economic outlook, as the climate of political instability would discourage investment, devalue the Canadian dollar and could even undermine confidence in the payment of public debt by causing a significant increase in interest rates.

   It would also mean the interruption of federal transfers. Quebec is one of the most indebted provinces and its sovereign debt rating could be downgraded. A foreseeable increase in Quebec's public deficit should be accompanied by cuts in public spending and increased fiscal pressure. A possible population exodus, particularly in the Montreal area, would deprive Quebec of important human capital with higher levels of wealth and education, and could trigger an exodus of commercial firms.

   This Canadian music sounds familiar in Catalonia. It was alarmingly evident in the Catalan crisis at the end of 2017. It was not necessary to verify the effective secession of this territory, and the consequence was the exodus of several thousand companies that moved their headquarters outside this Spanish autonomous community, including the main banks based in Catalonia, for fear of being left out of the European Central Bank's umbrella.
3. It would be a source of political instability, with consequences that would not necessarily be good.

In addition, there are other consequences to be considered in the event of Quebec seceding. It would split the rest of Canada in two, leaving the Maritime provinces virtually isolated from the rest of the country and posing a challenge to

the movement of people and goods between the two halves. How could this be solved? Perhaps by creating a corridor between the two sectors, allowing the free movement of people and goods between Quebec and the rest of Canada? This potential corridor would face the double challenge of being wide enough (it has been proposed to be between 30 and 50 kilometres, for example) and of its route (along the border with the United States, for example). Would this solution be efficient? Or would it raise many unknowns and correlative risks of conflict? (McRoberts, 1995, p. 413).

The Doctrine of the Supreme Court and its Consequences, the Clarity Act

The Supreme Court of Canada will answer these 3 questions on August 20, 1998, in its *Reference re Secession of Quebec*:[5]

1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?
2. Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to selfdetermination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?
3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

The Supreme Court's answer is based not only on the written text of Canada's Magna Carta, but also on what it calls the unwritten rules, because it will not limit itself to a mere literal reading of the Constitution. The Supreme Court will engage in construction based on a set of principles that go beyond the literal tenor of the Constitution and form the firm foundation upon which the entire Canadian constitutional system rests. These constitutional principles are federalism, democracy, the principle of constitutionality and the rule of law, and the protection of minorities (Leclair, 1999, p. 22; Monahan, 1999, p. 75; Young, 1998, p. 15):

[5] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

1. Federalism is seen as the best formula for integrating diversity. It creates mutual obligations between the provinces and the federation. It was the legal response to the underlying political and cultural realities that existed at the time of the creation of the Confederation. The division of powers between the federation and the provinces was the legal recognition of the diversity of the original members of the Confederation. For the Supreme Court, federalism recognises the diversity of the components of the Confederation and the autonomy of the provincial governments. It allows for political participation by allocating power to the level of government deemed most appropriate to achieve social goals, taking into account this diversity.
2. Democracy is also a founding principle of Canadian federalism. While it is true that democracy is based on majority rule, this principle must be linked to that of federalism. There can be different federal/provincial majorities without one being more legitimate than the other. The need to build federal and provincial majorities involves commitments, negotiations and deliberations. No one has the truth.
3. The principle of constitutionality and the rule of law also has important consequences. The will of the majority of a province must fit into the constitutional rules and mechanisms of the Federation as a whole. The will of the majority of a province alone is not sufficient to justify a right to unilateral secession.
4. The protection of minorities is a key concept in Canadian federalism. Their rights must be protected, especially in the event of secession. The Canadian Constitution is silent on the right to secede. However, secession requires a constitutional amendment that must be approved through the constitutional reform process. Unilateral secession is not possible without prior negotiation, as it would be incompatible with constitutional obligations. Any secession should be supported by the democratic will clearly expressed in a referendum.

A referendum with a clear and unambiguous result would be an important political signal. Quebec could launch a process of constitutional amendment to achieve secession by constitutional means. This would entail the obligation of all parties to come to the negotiating table. The Supreme Court rejected the obligation of other provinces to agree to secession, but also the absence of any obligation on the part of the other provinces and the federal government.

There would be no real negotiation if Quebec could dictate the rules and conditions of secession. The Canadian constitutional order cannot remain indifferent to the clear expression by a majority of Quebecers of their desire to no longer be

part of the federation. Secession cannot be unilateral. The mere effectiveness of a possible *de facto* secession does not make it legal. Under international law, Quebec has no right to self-determination because it is not an oppressed people.

To avoid the negative consequences of an unclear referendum, the Canadian Parliament passed the Clarity Act in 2000. This Act gives the House of Commons the power to decide whether a question is clear before it is put to a vote. The House of Commons would have the power to decide that the answer was clear. All provinces and First Nations must participate in the negotiations. The House of Commons can overturn a decision made in a referendum if it believes that one of the principles of the Clarity Act has been violated. The secession of a province would require an amendment to the Constitution of Canada (Spiliotopoulos, 2005).

Some Lessons for Spain, from the Canadian Experience

The emergence of strong secessionist tensions in the last quarter of the twentieth century and the holding of referendums in 1980 and 1995 threatened to break a long tradition of coexistence between Quebec and the rest of Canada within the same constitutional framework. The narrow victory of the "No" side in the second referendum and the ambiguity of the question put to the citizens compel us to seek an adequate legal response to the magnitude of the problem.

The Supreme Court's reference of August 20, 1998 is an example of the search for flexible formulas that go beyond a mere and ironclad adherence to the literal tenor of the Constitution. The Supreme Court of Canada has sought to find solutions that go beyond the literal wording of the Constitution, offering original answers based on jurisprudential wisdom rather than narrow legalistic interpretations. The Court's position is based on its own original and intelligent elaboration of a new theory of the constitutional principles to be taken into account: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities (Bérard and Beaulac, 2017, p. 116).

The democratic principle cannot be used as a battering ram against the principles of federalism and the rule of law, nor against individual rights, especially those of minorities. At the same time, however, the Canadian constitutional order cannot remain indifferent to a clear expression of the will of the majority of Quebec voters if they do not wish to continue to be part of the federation, in which case a constitutional obligation to negotiate in good faith arises for all parties involved, because there is much at stake. At the same time, a solution consisting in the unilateral secession of a province is not acceptable (Newman, 1999, pp. 86–87).

The Clarity Act is the response of the federal authorities to the need to provide a political (and not judicial) solution in establishing the rules of the game to be followed when it is necessary to recognise the existence of a clear will of the population of a Canadian province to proceed with its secession. It is a fully constitutional norm, since it is dictated within the framework of the powers of the federal government. In a federal state model, the different spheres of decision-making do not operate in watertight compartments. An eventual principle of Canadian indivisibility has never been constitutionally contemplated, either before or after 1982. The question will be whether there is at least a clear will to do so. The two previous referendums, in 1980 and 1995, failed to provide even a minimal guarantee (Monahan, 2000, p. 108).

It is the clear expression of the will of the people, the ultimate source of legitimacy in democratic societies. The Clarity Act, without being complete or perfect, will serve to rid the country of the ghost of the French-English divide that has haunted Canada for 40 years and had haunted it for the previous two hundred years (Black, 2014, p. 956).

Behind the Clarity Act of 2000 is a certain legislative technique of deliberately ambiguous normative construction that has had positive effects. It has served to cool and redirect a problem that seemed to have a very difficult solution. Its political success has been evident, not only because it has decisively calmed pre-existing tensions, as we have already noted, but also because it has served to focus the debate on the question of a clearer recognition of Quebec's role within the Canadian federation itself (Bakvis et al., 2009, p. 259). It is not the best option to try to seek protection in the grey areas left by the *Reference re Secession of Quebec*, in order to try to take advantage of one's own interests. On the other hand, any attempt at partisan manipulation of the rules of the game, to obtain some type of advantage, is not the best way to try to solve the problem in the long term, especially if what is sought is a solution to it that is fair, stable and lasting (Bérard and Beaulac, 2017, pp. 124–125).

Canadian federalism is a formula to consider, not only because it can be a valid response to territorial particularisms, but also because it protects different ways of life and expresses a desire to live together. In contrast to the values and solutions associated with this mutual recognition, we find assimilationism and separatist tensions. Neither of these two formulas seems to us to be a panacea, since assimilationism, whose maximum exponent is found in the Durham report, has proved impossible to achieve in practice, since the tensions between the French and English communities are serious enough to be resolved by this rapid means. On the other hand, secessionism is not the answer either, because while it may be effective in breaking the traditional *de facto* (and *de jure*) ties between the two

communities, it does not provide a satisfactory solution to the pluralism that exists in Quebec society (Laselva, 1996, p. 132).

After the rise of sovereignty debates in the 80s and 90s of the 20th century, we have witnessed a decline in the first decades of the 21st century. Nevertheless, there is a strong nationalist sentiment in Quebec. Much of the responsibility for this reorientation of the sovereignty phenomenon lies with the jurisprudence of the Supreme Court of Canada, which, while denying Quebec the right to unilateral secession, has come to recognise the legitimacy of a possible secessionist desire if it is supported by a sufficiently clear majority and if it is expressed in relation to a clear question. In this case, all political actors involved would be obliged to negotiate in good faith.

We should question the possibility of applying the Canadian experience to Spain, since both are composite states. Canada was created by aggregation. The Spanish autonomous state, on the other hand, is created by decentralisation or devolution. In both cases, Canadian and Spanish, their constitutions do not contain explicit inviolability clauses, so they are reformable, although not in the same way. The Canadian provinces have constituent power, which means that they are legitimised to initiate constitutional reform procedures. In Spain, however, the Autonomous Communities do not have similar powers (López Aguilar, 1999, p. 24).

Furthermore, the Spanish Constitution contains a clause that does not exist in Canada, and that is the affirmation of the indissolubility of the nation, the common and indivisible homeland of all Spaniards (Article 2 of the Spanish Constitution). The existence of this constitutional provision on territorial integrity can close the door to any attempt at secession, or at least make it extremely difficult to carry out, because although this constitutional clause can be revised, the reform process is particularly difficult because it follows the path of rigid reform laid down in Article 168 of the Spanish Constitution.

In Canada, there is no explicit constitutional provision for calling a plebiscite, so there is no a priori obstacle to it. On the contrary, the regulation of referendums in the Spanish Constitution is exhaustive. The two referendums held in Canada were tolerated by the federal authorities, so they were neither suppressed nor were there any attempts to cleverly disguise them as participatory processes (Díaz Noci, 2018).

The Supreme Court of Canada, in 1998, explicitly ruled out the unilateral route, recognising the lack of foundations for a possible protection of secession based on the principle of self-determination of oppressed peoples. It would be sarcastic if prosperous societies such as Quebec (or even Catalonia and the Basque Country) could fall into this category (López Basaguren, 2013, p. 93). There was not a single country in the whole world that recognised the birth of the Catalan

Republic [sic], on October 27, 2017. Let us not forget, moreover, that the Canadian Supreme Court's own ruling of 1998 would open the debate on the possibility of modifying Quebec's borders in the event of secession, in order to protect the important minorities that do not want independence. And Quebec also has its own *Tabarnia* (the important area around Barcelona that does not want independence), because if Quebec has the right to leave, there would also be a part of the population that should have the right to stay, and the same would have to be resolved in relation to Catalonia (Díaz Noci, 2018).

It is not possible to use Comparative Law *a la carte*. It is not possible to forget the existence of limits that affect the ability of the majority to act. These limits are imposed because it is necessary to protect the rights of the minority, excluding the possibility of unilateral secession. The question and the answer must be clear (Castellà Andre, 2014, p. 236).

The new paradigm configured by those countries that allow the referendum on the independence of a territory. It is based on the need to adapt the referendum to the constitutional order of the state in which it is held. The procedure must be agreed with the state authorities. And the clarity of the question put must be guaranteed (López Basaguren, 2013, p. 87; Castellà Andreu, 2014, pp. 227–240).

On September 16, 1995, on the eve of the second secession referendum, *The Economist* published a devastating editorial on the economic consequences of Quebec's secession. The editorialist wondered whether Quebec alone would be able to maintain its credit index and access financial markets on the same terms, if it continued to pay its debts at higher interest rates. Capital could migrate to other regions, raising questions such as: Would a new currency be viable? How would the trade deficit be financed? Many corporate headquarters would move from Montreal to Toronto. The celebration of independence could bring a painful twist to the austerity belt (Brooks, 1996, p. 140). Catalonia's declaration of independence on October 10, 2017 was accompanied by a stampede of several thousand companies moving their headquarters from Catalonia to other regions of Spain. Catalonia was left without the headquarters of a single listed bank with a presence on the IBEX. If independence were to take effect, it would lead to an automatic exit from the European Union and the end of the European Central Bank's umbrella.

At what interest rates would Catalonia's public debt be financed? The anxiety felt by businesses in Catalonia at the end of 2017 seems to recall something that had already happened in Canada, where the economic splendour of Montreal has relinquished its position in favour of Toronto.

The aforementioned editorial in *The Economist* also wondered whether Quebec itself could be expected to offer a fair deal to its own minorities. What would

happen to Spanish speakers in Catalonia? Would they be discriminated against or treated equally? What would happen if a large part of Catalonia preferred to remain part of Spain?

In both the Basque Country and Catalonia, secessionist movements have emerged in recent years, based on a so-called 'right to decide'. This idea is based on the supposed right of the respective electorates of these autonomous communities to decide on their future. This expression, the 'right to decide', has great power. There is a large dose of political marketing behind this idea. The so-called 'right to decide', which we are trying to present as a supposedly unquestionable right in a democratic state, is nothing more than a political claim that is neither accepted in international law nor recognised in any democratic system in the world. There's no existing right behind this expression. There is no 'right to decide', understood as a right to unilaterally determine the legal status of a territory or a community within a State (López Basaguren, 2013, pp. 98–100).

Catalonia has no autonomous capacity for institutional participation in the European Union if it is not within the framework of its membership of Spain. Catalonia outside Spain should apply to join the European Union and start negotiating the various chapters of a sectoral nature. If a secession process were requested, Catalan citizens, by ceasing to be Spanish, would *ipso facto* lose their legal benefits as Europeans. For the citizens, it would mean a return to borders and visas.

Spain's quotas in the European institutions would be reduced: Spain would also have to renegotiate its position in the European Union. Unanimity for the accession of new member states is a requirement explicitly laid down in the European Treaties. A possible – and quite plausible – Spanish rejection of Catalonia's accession to the EU would completely paralyse its candidacy.

Economically, the exclusion of the Catalan banking system from the financial umbrella of the European Central Bank would lead to an immediate devaluation of the Catalan currency, which would increase inflation and a general impoverishment of the society of the new Catalan state. An independent Catalonia would not remain in the Eurozone because it would not be part of the EU and the Euro is the currency of the EU. It would not be in the monetary union at least until it is admitted to the Union, which requires the unanimous vote of all Member States, including Spain. The main banks of Catalonia, Caixabank and Sabadell, have decided to move their headquarters outside Catalonia, precisely to guarantee the shield of the European Bank. Catalonia should renegotiate trade agreements with all the countries of the world. What would happen to the Catalan public debt and pensions? Too many questions, too many problems.

Conclusion

The emergence of strong secessionist tensions in Canada in the last quarter of the 20th century, and the holding of referendums in 1980 and 1995, came close to breaking a long tradition of coexistence within the same constitutional framework of Quebec with the rest of Canada. The victory of the "No" vote, by a narrow margin in the second referendum, together with the ambiguity of the question submitted to the citizens, forced the search for a legal response appropriate to the magnitude of the problem that was looming on the horizon.

The Supreme Court's opinion of August 20, 1998, is an example of how to seek flexible formulas that transcend mere adherence to the literal wording of the Constitution. The Supreme Court of Canada tried to reach solutions that go beyond the literal tenor of the Constitution of Canada, offering original answers, rooted in jurisprudential wisdom, rather than in narrow legalistic interpretations, attached to the literal tenor of the norm, as can be deduced from its assertions on the need for a clear majority on a clear question, and the constitutional obligation to negotiate, based on an original and intelligent elaboration of a new theory of the constitutional principles that must be taken into consideration: federalism, democracy, constitutionalism and the rule of law, and respect for minorities.

The democratic principle cannot be used as a battering ram against the principles of federalism and the rule of law, nor against individual rights, especially those of minorities. But at the same time, the Canadian constitutional order cannot remain indifferent to a clear expression of the majority of Quebec voters who do not wish to remain part of the Federation, in which case a constitutional obligation to negotiate in good faith arises for all parties involved, since they have a great deal at stake. A solution consisting of the unilateral secession of a province would be ruled out at the same time.

The Canadian experience demonstrates how much risk is to play with fire. In Catalonia, secessionist attempts have crystallized in recent years, which have tried to seek their basis in a so-called 'right to decide'. It is an expression, that of the 'right to decide', which has a great expressive force.

It should not be forgotten that behind all this there is a large dose of political marketing, because the simple expression of ideas or complex issues is usually wrong, something that would happen with the aforementioned reference to the so-called 'right to decide', which is presented as a supposed unquestionable right in a democratic state, when in reality it is nothing more than a political claim that is neither accepted in International Law, nor recognized in any democratic system in the world, that is to say, behind this expression, it is presented to us as

unquestionable, which in reality is a non-existent right (López Basaguren, 2013, pp. 98–100).

There is no 'right to decide' that entails a right to unilaterally determine the legal status of a territory or a community within a State, nor to its secession to become an independent State, since there is no alleged right in that sense, which is of incontestable acceptance, and allowed to be exercised outside the law.

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