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Defragmentation of (Private) Law Through the Proportionality Test. A Review Essay on Ondřejek's Monograph 'Defragmentation of Law: Reconstruction of Contemporary Law as a System'

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Abstract

National legal systems are facing fragmentation, a process that significantly challenges the legal certainty and coherence of law. In this context, my essay reviews Pavel Ondřejek's new book 'Defragmentation of Law: Reconstruction of Contemporary Law as a System', which examines methods to reduce fragmentation while achieving law's unity. After an introduction of the monograph, I critically examine Ondřejek's claim that the proportionality test used in constitutional law enhances the unity of the legal system. While I agree with the claim, I find it too weak in its scope. Therefore, I present three arguments to support my thesis that the proportionality test, traditionally confined to constitutional law, should be extended to private law to address legal fragmentation more effectively. This extension would enhance the coherence and consistency of private law, reaching the broader goals of normative coherentism as presented in Ondřejek's monograph.

Keywords: Proportionality test; Private law; Defragmentation; Normative coherentism

Introduction

I have divided my essay into two parts.[1] In the first one, I shortly summarize the monograph *'Defragmentation of Law'* and evaluate it. The second part of my contribution focuses on the proportionality test in private law, a topic neglected by the monograph.

1. Summary and Evaluation of the Monograph

Law is fragmented, states the new monograph *Defragmentation of Law* of Pavel Ondřejek. The legal system has gaps, legal rules clash, and legal principles collide. Such fragmentation appears at different levels, from inconsistencies within a single statute to collisions between general principles and values in a legal system. Ondřejek defines fragmentation as an undesirable weakening of ties between legal branches, sources of law, and institutions.[2] Fragmentation complicates the application of law and causes legal uncertainty. As such, it must be decreased.[3]

Accepting such premises raises an important question: how can we avoid the fragmentation? How to overcome gaps in legislation, normative conflicts, and legal uncertainty prevailing in our legal systems?[4] By normative coherentism, answers Ondřejek. *Defragmentation of Law* is an original book that does not focus solely on the description of fragmentation. It is primarily concerned with how to reduce the fragmentation of the legal system and strengthen its unity. Ondřejek's crucial argument is that de-fragmentation—the reinforcement of legal unity — can be reached through adequate legal reasoning and proper law making. To this end, the monograph introduces a new approach to law, which Ondřejek calls normative coherentism.[5]

Defragmenatation of Law draws inspiration from the works of Mads Ardenas and Eirik Bjorge, who describe the issue of fragmentation in international law, where it is often linked to the lack of a unified legislative authority or a central adjudicating body. Ondřejek argues that fragmentation should not be examined solely within the context of international law, and it is a notable feature of Ondřejek's work that it innovatively applies the concept of fragmentation to national law. The book uses the theoretical framework of Robert Alexy, particularly his dual nature thesis (thesis about the real and ideal dimension of law) and principles theory. In the real dimension, the legal system suffers from imperfections and inconsistencies as it is a product of political compromises. At the same time, legal system asserts the claim to correctness, which means, in the context of the monograph, striving for coherency, unification, and rationality. Concerning principles, Ondřejek aligns with Alexy's view that principles are optimisation requirements, meaning they should be fulfilled to the greatest extent possible within the factual and legal constraints of a particular

[1] The creation of this article was supported by the Charles University Grant Agency (project no. 185023). The author thanks the participants and lecturers at the Summer School on Law and Logic organized by the European University Institute for inspiration for the second part of the essay.

[2] Pavel Ondřejek, *Defragmentation of Law: Reconstruction of Contemporary Law as a System* (Intersentia 2023).

[3] Ibid 35, 121, 149.

[4] Ibid 35.

[5] Ibid 149.

case.[6] Methodologically, conflicts between principles should be resolved through the proportionality test rather than mere subsumption.

The book significantly contributes to existing discussions both in terms of questioned raised and methods of answering them. The monograph consistently connects seemingly unrelated phenomena with an interdisciplinary approach in order to achieve one clear goal — de-fragmentation. Specifically, the monograph discusses fragmentation in connection with three main topics: the legal system, legal argumentation (including proportionality test), and legal pluralism. Thus, Ondřejek synthesizes and originally processes his previous research on argumentation with the proportionality test, which he comprehensively described in his dissertation thesis,[7] with his work on legal systems, which he comprehensively elaborated in his habilitation thesis.[8] The book integrates Alexy's non-positivist conception of law with systems theory, from which it derives normative conclusions for the methodology of law's application. All this to achieve de-fragmentation and to introduce normative coherentism.

Normative coherentism strives for coherency and unity, for a legal system free of contradictory rules as well as free of conflicts between legal principles or values.[9] Its requirements address both legislation and application of law. Concerning legislation, normative coherentism imposes three criteria on the enactment of laws: normative-systemic, institutional, and procedural.[10] The normative-systemic criterion asserts that legal norms must be coherent with the existing legal order and not contradict higher laws or the established legal order, including consistent use of terminology. The other two requirements are formal; they pertain to the legislative process, ensuring that relevant stakeholders participate in the legislative process (institutional requirement) and that they have a sufficient timeframe to genuinely influence the proposed laws (procedural requirement).[11]

Concerning the application of law, the monograph claims that the unity of a legal system shall be achieved by argumentation. The second chapter outlines three types of arguments to achieve defragmentation: argument of elimination of contradictions, arguments of consistency and arguments based on conforming interpretation. In the third chapter, the monograph claims that the proportionality test can reduce the fragmentation of a legal system when it is applied to justify decisions of fundamental rights conflicts.

In the following part of my contribution, I will propose a possible elaboration of *Fragmentation of Law*. I claim that the monograph overlooks the broader potential of the proportionality test in sub-constitutional law, such as private law, despite laying a solid foundation for its widespread use and despite the clear goal of the book. In particular, I find it problematic that the monograph confines the proportionality test only to constitutional law despite having

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[6] Ibid 60, 88.

[7] Pavel Ondřejek, *Princip proporcionality a jeho role při interpretaci základních práv a svobod* [Proportionality Principle and its Role by Interpretation of Fundamental Rights and Liberties] (Leges 2012).

[8] Pavel Ondřejek, *Koncepce práva jako systému* [A Conception of Law as a System] (Wolters Kluwer 2020).

[9] Ondřejek (n 2) 149.

[10] Ibid 157, 159.

[11] Ibid 161.

much more of an ambitious aim — de-fragmentation of the legal system in general.[12] The rest of this essay addresses the question whether the proportionality test could and should extend beyond constitutional law. I advocate for its application in private law.

2. Proportionality Beyond Constitutional Law

2.1 Introduction

Is such a question, i.e., whether to use the proportionality test to apply private law, even relevant? I believe it has fundamental importance, especially given the aim of the Ondřejek's monograph. According to normative coherentism, the proportionality test represents an essential tool for strengthening the unity of law.[13] As Ondřejek claims, arguments based on the proportionality test ensure the relationship between conflicting values or principles; the test preserves these conflicting values to the greatest extent possible. Moreover, proportionality serves as a neutral and universally applicable analytical framework for the application of law, with a variable intensity of review.[14] Within the realm of fragmented law, the proportionality test reinforces coherence and unity of the law as it ensures elementary transparency, predictability, and justifiability. If the proportionality test could be extended beyond constitutional law, from the standpoint of normative coherentism, it would be a significant step in the direction indicated by Ondřejek in *Defragmentation of Law*, a step of normative coherentism towards de-fragmentation.

2.2 Narrowing the Focus – Proportionality Without Constitutional Infusion

Before going further, let me narrow the scope of my essay. Firstly, it is essential to clarify what I do not mean when I discuss the application of the principle of proportionality in private law. In agreement with the monograph *Defragmentation of Law*, I distance myself from the concepts of 'total constitution' and 'constitutionalization of private law'.[15] This means that I do not propose to seek a human rights dimension in all private law relationships, to transform these relations into a matter of public law, and to deal with them irrespective of the applicable private law norms. Just like Ondřejek, I believe it is crucial to reflect the legislatures' will as expressed in sub-constitutional law, considering the democratic legitimacy of the legislature and the crucial value of legal certainty. I also refrain from discussing the topic of horizontal effects of fundamental rights, which has been discussed in length by Ondřejek in his monograph and other texts.[16]

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[12] Ibid 86.

[13] Ondřejek (n 2) 119.

[14] Ibid 113.

[15] Mattias Kumm, 'Who Is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law' (2006) 7 German Law Journal 341.

[16] Pavel Ondřejek, 'A Structural Approach to the Effects of Fundamental Rights on Legal Transactions in Private Law' (2017) 13 European Constitutional Law Review 281.

In the rest of my essay, I focus solely on the cases without a constitutional aspect.[17] Thus, I address a question not explicitly tackled by Ondřejek as I pose the question whether the proportionality test can be employed in purely private law relationships as a universal methodological tool for applying principles of private law. In simple words, I focus solely on the sub-constitutional level and my primary concern are private law principles.

The typical case to which my analysis applies is a case with an indeterminate private law rule where two colliding private law principles apply. [18] Using the words of Alexy, I am concerned with the

> 'perspective of a participant, namely, a judge who is to decide a doubtful case, that is, a case that falls within the open area of preset authoritative material alone.'[19]

I focus on the judge who needs to strike a balance between competing reasons, each of which is by itself a good reason for a decision and only fails to lead directly to a definitive decision because of the other reasons; as Alexy claims, reasons like that are usually principles or supported by principles – private law principles given the scope of this essay.[20]

2.3 The Current Discussion on Proportionality Test in Private Law

In the last thirty years, scholars in Europe, Canada, and even the United States have discussed the role of proportionality beyond the bounds of constitutional law, particularly in private law.[21] As I will show below, a significant portion of scholars both acknowledge that

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[17] Similarly, Zhong Xing Tan, 'The Proportionality Puzzle in Contract Law: A Challenge for Private Law Theory?' (2020) 33 Canadian Journal of Law & Jurisprudence 243: 'The use of proportionality language in general contract doctrine is distinct from the invocation of a public law-proportionality analysis in the constitutionalised private law context.'

[18] To orient my approach within the illustrative analytical framework of Bauer, my essay examines proportionality as 'an evaluative standard for private law' and 'Genuine private law proportionality' in contrast to 'Constitutionally infused Proportionality'. For details, see Franz Bauer, 'Proportionality in Private Law: An Analytical Framework' in Franz Bauer and Ben Köhler (eds), *Proportionality in private law* (Mohr Siebeck 2023) 25.

[19] Robert Alexy, *The Argument from Injustice: A Reply to Legal Positivism* (Oxford University Press 2010) 72.

[20] Ibid.

[21] The topic is most often discussed in German legal theory, recently in monograph edited by Bauer and Köhler: Franz Bauer and Ben Köhler (eds), *Proportionality in Private Law* (Mohr Siebeck 2023). From the older work, see a dissertation from Steffen Heinrich Dey, *Der Grundsatz Der Verhältnismässigkeit Im Kündigungsrecht* (P Lang 1989), habilitation from Hans Hanau, *Der Grundsatz der Verhältnismäßigkeit als Schranke privater Gestaltungsmacht: zu Herleitung und Struktur einer Angemessenheitskontrolle von Verfassungs wegen* (Mohr Siebeck 2004) or Marcus Bieder, *Das ungeschriebene Verhältnismäßigkeitsprinzip als Schranke privater Rechtsausübung* (Beck 2007). Kähler introduces a critique of proportionality in private law in Larenz Kähler, 'Raum für Maßlosigkeit. Zu den Grenzen des Verhältnismäßigkeitsgrundsatzes im Privatrecht' in Matthias Jestaedt (ed), *Verhältnismäßigkeit* (Mohr Siebeck 2021). For discussion outside Germany, see Caroline Cauffman, 'The Principle of Proportionality and European Contract Law' in Pietro Sirena and Jacobien W Rutgers (eds), *Rules and principles in European contract law* (Intersentia 2015); Duncan Kennedy,

proportionality applies beyond constitutional law and claim it should apply within private law.

Unsurprisingly, most of the debates take place in Germany, proportionality's home destination. German authors are generally supportive of applying proportionality in private law. Interestingly, Köhler points out that the roots of proportionality can be traced not only to 19th century administrative law, as is often acknowledged, but also to 19th century private law.[22] Besides this brief historical overview, Köhler acknowledges that proportionality, despite being mostly elaborated in constitutional law, has left its "natural habitat" and needs to be integrated into the private law. German Civil Law scholar Stürner claims that proportionality serves to balance different interests and principles in contract law;[23] for instance, proportionality helps to assess (un)reciprocity of performance, contract penalties, or abuse of rights.[24] Stürner understands proportionality to be a formal tool that can be used to balance optimisation requirements in contract law, i.e., to balance private law principles or interests of private parties.[25] Also Hanau and Dey support the application of proportionality in private law.[26]

The debate spills beyond Germany. According to C. Cauffman, proportionality is a key principle in European contract law as it plays a crucial role in balancing the rights and obligations of the contracting parties. Cauffman presents both an empirical thesis suggesting that the principle of proportionality is indeed applied in European private contract law, particularly the balancing step of proportionality, which involves a weighing and balancing of interests. Additionally, Cauffman puts forward a normative thesis advocating that the principle should be applied. Cauffman claims that the test must be applied in its entirety, encompassing all three sub-steps.[27] D. Kennedy acknowledges, with scepticism,[28] that private law theory in Europe has entered a phase of balancing/proportionality.[29]

Private law proportionality extends the continent. For instance, Canadian scholars recognize the applicability of the proportionality test in employment law. The proportionality test

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'A Transnational Genealogy of Proportionality in Private Law' in Roger Brownsword (ed), *The foundations of European private law* (Hart Publishing 2011) ; Tan (n 17).

[22] Ben Köhler, 'Proportionality in Private Law: A Primer' in Franz Bauer and Ben Köhler (eds), *Proportionality in private law* (Mohr Siebeck 2023) 7. Even more surprisingly, D. Kennedy claims that proportionality has its roots in early 1900s American Jurisprudence: Kennedy (n 21) 195.

[23] Michael Stürner, *Der Grundsatz der Verhältnismäßigkeit im Schuldvertragsrecht: zur Dogmatik einer privatrechtsimmanenten Begrenzung von vertraglichen Rechten und Pflichten* (Mohr Siebeck 2010) 356.

[24] Ibid 385, 392, 431.

[25] Ibid 356.

[26] Hanau (n 21) 121. Concerning Dey, see Dey (n 21) : '(…) proportionality (is) a general legal principle reflected in civil and constitutional law which applies when two legal goods conflict.'

[27] Cauffman (n 21) 24.

[28] According to Kennedy, the move to proportionality represents the simultaneous de-rationalisation and politicisation of legal technique. See Kennedy (n 21) 187.

[29] Ibid 212.

serves to evaluate cases concerning termination of a working contract[30] or an invasion of employee's privacy. As such, it is explicitly used by the Canadian courts.[31] Similar to Cauffman, the Canadian authors Davidov and Shenker make two claims about the proportionality test in private law: an empirical and a normative one. First, they acknowledge that courts use the test in private law. Second, they claim the court must do so.[32] Because the three-stage structure of the proportionality test ensures a balance between competing interests, the Canadian scholars advocate for the full application of the proportionality test. Besides striking a balance, the three-stage test shall ensure coherency, determinacy, and predictability in labour law.[33] Similarly, in British contract law, Tan highlights the application of the proportionality test in cases involving contractual penalties, compensation for damages, and raising the so-called illegality defence. According to Tan, using the proportionality test in civil law is anti-formal and anti-ideological.[34] She supports using the proportionality test in its the three-stage variant structure which could rationalise the case law.[35]

There are some authors advocating for proportionality in private law, so far so good. Despite its popularity and importance, the proportionality in private law has stood on thin ice so far. No solid theoretical and philosophical foundation has been provided to justify why the civil courts should apply proportionality test. In the remaining part of my contribution, I will support the thesis that the proportionality test can and should be applied to strike a balance between colliding private law principles. I will present three conceptually and theoretically grounded arguments to support this thesis which have not been properly discussed in the abovementioned literature. These are:

1. Argument from the structure of principles (so called analytical defence of proportionality),[36]
2. Argument from the normative coherentism, and
3. Argument from the right to justification (so called normative defence of proportionality).[37]

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[30] Pnina Alon-Shenker and Guy Davidov, 'Applying the Principle of Proportionality in Employment and Labour Law Contexts' (2014) 59 McGill Law Journal 375, 383.

[31] Ibid 386.

[32] Ibid 406.

[33] Ibid 419.

[34] Tan (n 17) 235–236.

[35] Ibid 224-232. The abovementioned scholars are divided on whether courts should implement the three-step proportionality test in private law disputes. Tan, along with Cauffman, Shenker, and Davidov, advocates for the full application of the test. However, authors like the abovementioned Stürner disagree, arguing that only the final stage, proportionality in the strict sense, should be used. While I endorse the three-step thesis—particularly supported by analytical defense—a detailed discussion of this debate falls outside the scope of my essay.

[36] Matthias Klatt, 'Proportionality and Justification' in Ester Herlin-Karnell and others (eds), *Constitutionalism justified: Rainer Forst in discourse* (Oxford University Press 2020) 161.

[37] Ibid.

The common feature of the arguments is that they are independent of particular private law norms (e.g., the argument from the structure of principles relies on the universal structure of principles, and not on particular legal principles prevailing in a certain legal system, the argument from the right to justification relies on the universal right to justification).[38]

2.4 Argument from the structure of principles

The first argument makes clear that the proportionality test both can and must be applied when two private law principles collide, and it does so from an analytical perspective. This argument is based on a relation between a structure of principles and proportionality. In summary, the argument can be put as follows: because private law principles are optimisation requirements, they shall be applied by the proportionality test. The argument from the structure of principles is what M. Klatt calls an 'analytical defence', a defence of proportionality which relies on the theory of principles.[39]

R. Alexy differentiates rules and principles. Rules are definitive commands, whereas principles are prima facie commands. Rules stipulate something determinately, whereas principles, as optimisation requirements, stipulate that something be realized to the greatest extent given the factual and legal possibilities. [40] Principles often clash, leading to different possible outcomes. For example, in cases of defamation, the principles of free speech and personal protection may conflict. Free speech might suggest dismissing the case, whereas personal protection could lead to awarding damages. In such cases, judges can't simply apply these principles directly; they must balance them to find a correct decision.

As Alexy puts it, the nature of principles determines their application. He argues that the proportionality test, which includes evaluating the suitability, necessity, and proportionality (in a strict sense), is the necessary way to decide how much each of the colliding principles should apply in a particular case:

'The nature of principles as optimisation requirements leads straightaway to a necessary connection between principles and proportionality. The principle of proportionality consists of three sub-principles: the principles of suitability, of necessity and of proportionality in the narrower sense. All three sub-principles express the idea of optimisation.'[41]

Thus, Alexy concludes,

'one who accepts the character of constitutional rights as principles must accept the principle of proportionality.'[42]

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[38] The reason for that is that this essay operates on the level of what Bauer calls evaluative standard for private law. The inquiry of this essay is independent of the fact whether a legislature prescribed some kind of proportionality requirement in a particular legal code (as is often so in cases of self-defence etc.) For more details, see Bauer's analytical framework Bauer (n 18) 25.

[39] Klatt (n 36) 161.

[40] Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press 2010) 47-48.

[41] Robert Alexy, 'The Absolute and the Relative Dimension of Constitutional Rights' (2016) Oxford Journal of Legal Studies 31.

[42] Ibid 36.

Although Alexy usually focuses on fundamental rights, it would be wrong to think that Alexy's analytical defence is restricted to fundamental rights only. The opposite is true.

When we apply private law, we are also applying principles, which collide as they are to be realized to the maximum possible extent. Both constitutional and private law principles are optimisation requirements, and they therefore share the attribute that mandates the application of the proportionality test. That is why, solely on the basis of their structure, the private law principles require the proportionality test for their own application.

The argument from the structure of principles provides an analytical basis for applying the proportionality test in private law. It shows that the test is not just a tool for applying constitutional rights, but also a general principle for balancing conflicting optimisation commands, regardless of their content or the branch the commands belong to.

2.5 Argument From Normative Coherentism

The second argument for applying the proportionality test in private law stems from normative coherentism, as developed by Ondřejek in his *Defragmentation of Law*.

Ondřejek emphasizes that the law is characterized by conflicts and plurality of values. In the chapter dedicated to fragmentation, he elaborates that the legal order is marked by contradictions among norms, principles, and values. He also suggests that the requirement for coherence should be broadly understood, encompassing teleological and axiological coherence—that is, a coherence of principles, purposes, and values laying behind concrete rules.[43]

Examined through this lens, private law reveals a remarkable similarity to constitutional law in the sphere of conflicting interests, values, and principles. This clash is not confined to extreme cases like self-defence or distress. The principle of legal autonomy, for instance, often finds itself at odds with the protection of the weaker contractual party (e.g., when a bank lends money to small entrepreneur). Similarly, the provisions governing limitations periods reflect the principle that the law favours the vigilant, which stands in opposition to the principle that agreements must be kept (after some time, the promise needs not be kept anymore). Legal systems also frequently impose statutory restrictions on property rights, making one property right stand against another (e.g., the right of passage over another's property). Another example of conflicting principles is the concept of usucaption, which embodies the tension between the principle 'the laws serve the vigilant' and the protection of property rights (i.e., after several years of using someone's property, one becomes the owner).

A sceptic might question the applicability of the proportionality test in private law based on the distinction between sub-constitutional and constitutional law. Simply put, the sceptic might claim that there is nothing to balance in private law; private law's comprehensive codifications, crafted with legislative intent, renders balancing unnecessary. However, this argument overlooks the existence of hard cases, where actions are not clearly prohibited or permitted. Proportionality becomes crucial in these grey areas. As has been demonstrated above, the apparent certainty of private law regulations masks underlying complexities, such as conflict of principles, contradictory rules, legal gaps, new legislation, and interpretative

[43] Ondřejek (n 2) 83.

disputes.[44] These factors align private law with human rights disputes, as both involve conflicts of principles or values, rather than solely the interpretation of specific provisions.

How, then, should such situations be resolved in private law?

As Ondřejek states, the proportionality test preserves conflicting values to the greatest extent possible, ensuring a relationship between values or principles through arguments based on the test. Moreover, proportionality can serve as a common analytical framework for both private and public law, which is neutral, universally applicable, and with a variable intensity of review. In cases of uncertainty, the proportionality test ensures at least elementary predictability, reviewability, and justifiability (see below). Therefore, if two principles collide in a private law matter and a clear solution to the case is lacking, we should strengthen the unity of the law and reduce its fragmentation by employing the proportionality test.

2.6. Argument From the Right to Justification

This argument is based on law's ideal dimension and has two-fold structure.[45] First, I will establish a right to justification. Based on Klatt and Alexy, I claim that right to justification extends constitutional law as it originates from our discursive nature as humans and the general claim to correctness of every legal act. Second, I will describe a link between justification and proportionality test. As a result, I will introduce the proportionality test as a justification tool that is to be used to justify the correctness of private law decisions.

2.6.1 Right to Justification and Claim to Correctness

Normative coherentism holds that the law assert a claim to correctness.[46] Besides the general legal norms, such a claim is asserted by every official deciding in a legal system. An official issuing a decision implicitly asserts that the legal act is both substantively and procedurally correct. [47] Correctness of the legal act simply means that the law is being applied correctly.[48] Even when applying indeterminate rules and colliding principles, the decision asserts to be correct.[49]

Correctness is inherently linked to justification. The claim to correctness carries with it a commitment to give proper reasons for the decision. Alexy articulates this, stating:

'The claim to correctness implies a claim to justifiability.'[50]

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[44] Ibid 45.

[45] Klatt (n 36).

[46] Ondřejek (n 2) 155.

[47] Robert Alexy, *Law's Ideal Dimension* (Oxford University Press 2021) 293.

[48] Alexy (n 19) 38-39.

[49] Ibid 72.

[50] Ibid 78 or Alexy (n 47) 293. Alexy describes a procedural conception of correctness where justification and its criteria guarantee a correctness of legal decision. See Robert Alexy, *Recht, Vernunft, Diskurs: Studien zur Rechtsphilosophie* (2. Auflage, Suhrkamp Taschenbuch Verlag 2016) 95-9, 136-137 or Matthias Klatt, 'Robert Alexy's Philosophy of Law as System' in Matthias Klatt (ed), *Institutionalized reason: the jurisprudence of Robert Alexy* (Oxford University Press 2012) 15.

The right to justification thus serves as a direct counterpart to the claim to correctness. Whenever humans engage in communication or action, including legal officials, they participate in a Brandomian 'game of giving and asking for reasons'.[51] Every action carries an implicit commitment to provide reasons.[52] Klatt grounds the right to justification in an 'anthropological-existentialist basis', recognizing humans as 'discursive beings that are capable of and in need of reasons'.[53]

Consequently, any legal decision, whether grounded in civil or constitutional law, asserts its claim to both correctness and justifiability.

2.6.2 From Justification to Proportionality and Beyond Constitutional Law

I established that the legal decision is need of justification.

Klatt bases his normative defence of proportionality on the idea of Space of Reasons. He portrays the proportionality test as a structure of justification that enhances 'transparency, inclusiveness, and general quality of reasoning'.[54] The proportionality test, being a tool for internal justification, requires the reasoning official to elucidate the premises of the decision and to externally justify them.[55] As an internal justification tool, the proportionality test requires the reasoning official to make explicit the decision's premises and provide external justifications for them. Similarly to Alexy, even Klatt seems to make his normative defence more general:

'On an even more basic level, the proportionality test can be interpreted as a formal rule which serves to establish the space of reasons which is inhabited in common by human beings as justificatory beings. That way, the proportionality test is not a specific feature of

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[51] Klatt (n 36) 162.

[52] Robert Brandom, 'Action, Norms, and Practical Reasoning' (1998) 32 Noûs 127.

[53] Klatt (n 36) 165.

[54] Ibid 175.

[55] A decision is internally justified when it follows from its premises. A decision is externally justified when its premises are correct, i.e., justified with further (external) reasons. In case of proportionality test, being internally justified means that the decision follows from the propositions about the three sub-steps, i.e., propositions about suitability, propositions about necessity and propositions about abstract weight, intensity of interference/fulfilment and reliability. Externally justification means that these propositions (premises) are further justified. The distinction is usually mentioned with regards to legal syllogism already by R. Alexy who bases the distinction on J. Wroblewski. See Robert Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification* (Oxford University Press 2010) 221-331; Jerzy Wróblewski, *The Judicial Application of Law* (Springer Science, Business Media 1992) 178. Only recently M. Klatt has elaborated the distinction in connection with proportionality test. The distinction shows that the proportionality test both requires and depends on a theory of legal argumentation. Klatt accepts Alexy's discourse theory of legal argumentation and plausibly claims that external justification is a special case of moral reasoning restricted mainly by the text of the constitution, doctrine, and precedents. For more details, see Klatt (n 36) 178-180 or Tomáš Koref, 'Test proporcionality jako nástroj zdůvodňování, nikoli nalézání rozhodnutí' [Proportionality Test as an Instrument of Justification, not Discovery] (2023) 162 Právník 1156-1175

rights reasoning, but bears upon more fundamental characteristics of a shared practice of reasoning in general.'[56]

I consider Klatt's remarkable defence of the proportionality test useful for the application of private law principles. Given that:

1. a judge can be easily tasked with striking a balance between two competing private law principles,[57]
2. private law principles are optimisation requirements,[58]
3. the final decision of the judge will assert a claim to correctness and justifiability,[59] and
4. the addressees, as discursive beings, have the right to justification,[60]

there is a normative argument for the judge to use such a tool that will structure the space of reasons and enhance the transparency, inclusiveness, and general quality of reasoning. As I mentioned elsewhere, the proportionality test (i) brings hidden premises to light, (ii) expresses the relationships between premises, and (iii) demonstrates the need for further (external) justification of premises.[61] The argument from the right to justification is even stronger in cases where interpretation and its methodology provide no assistance or only an indeterminate outcome. In such cases, the proportionality test might even be the only option.

Conclusion

In this essay, I have introduced the monograph *Defragmentation of Law* as a novel and inspiring approach to counter the fragmentation of national law. Building on the book's main ideas, I have expanded the normative coherentism (as described in the monograph) to support the central argument – the possibility to develop tools for achieving de-fragmentation. In particular, I have proposed to apply the proportionality test beyond constitutional law. Three arguments were introduced to support this claim: the argument from the structure of principles, argument from normative coherentism, and argument from the right to justification.

The analytical argument from the structure of principles was based on Alexy's principles theory. Private law principles are not optimisation requirements any less than fundamental rights. Thus, should two or more principles of private law apply in a particular case, the proportionality test determines the extent of their application in that specific situation. The argument from normative coherentism aligns with Ondřejek's approach to law, which seeks to reduce fragmentation and strengthen the unity of the legal order. The proportionality test, as a universal and neutral method applicable across different branches of law, contributes

[56] Klatt (n 36) 176.

[57] Alexy (n 19) 72.

[58] Alexy (n 41) 36.

[59] Alexy (n 47) 293.

[60] Klatt (n 36).

[61] Koref (n 55) 1156.

significantly to this goal, and should therefore be used even in private law. According to the third argument, proportionality helps to satisfy right to justification and claim to correctness and should therefore be used to meet these requirements applicable in private law decision-making.

In addition to these arguments, I have also shown that the private law proportionality test is already being discussed by number of scholars as well as being used in many jurisdictions, including the United Kingdom, Canada, and Germany. This suggests that the test is a widely accepted method for resolving legal disputes.

In conclusion, I believe that the proportionality test is a valuable tool that should be used in private law. It is a necessary tool for resolving conflicts between competing private law principles, and it is consistent with the normative coherentism of Ondřejek's monograph.

Discussion paper

Towards New Legal Pluralism
A Review Essay on Ondřejek's Monograph Defragmentation of Law: Reconstruction of Contemporary Law as a System

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Abstract

The aim of this article is to explore the theoretical aspects of fragmentation law and legal pluralism. As this is a review essay, the argumentation ties into Pavel Ondřejek's 'Defragmentation of Law. Reconstruction of Contemporary Law as a System' (Intersentia, 2023). His views are based on systemic and positivist theories of law and are inspired by Luhman. I confront these perspectives with sociological arguments on legal pluralism. Furthermore, I analyze the methodology of Ondřejek's unique take on its integrative potential. Lastly, this essay looks to give alternative explanations to the causal effects as to why there is an ongoing fragmentation of law from an empirical perspective. By analyzing a number of sociological surveys on how people understand and interact with the law, I look to give more depth and background to the phenomena and theories presented by Pavel Ondřejek.

Keywords: Legal pluralism, fragmentation of law, complexity of law, legal emancipation, legal awareness, legal literacy, integrative potential

Introduction

The monograph „*Defragmentation of Law*" by Pavel Ondřejek sets out to accomplish the treacherous task of defining and solving the complex puzzle of the fragmentation of law.[1] This book has two main aims. To find the sources of the systematic erosion of the body of law within the contemporary legal system and to identify potential unifying effects that could counteract these tendencies.

The first chapter deals with defining the object of the study. It gives its readers an overview of the discourse which is going to be explored. This monograph characterizes the fragmentation of law as a situation where the growing complexity of social arrangements and, in turn, also of the legal regulations weakens the links among the individual legal institutions, branches of law, *and sources of law.*[2]

According to the author, there are two main sources of fragmentation within international law which also directly influence the national law:

1. The growing complexity and comprehensiveness of statutory regulation and the emphasis on specialization within the legal system.
2. Having an overlap between national and international judicial institutions and potential clashes between national and international laws.

This definition and the causes are indeed acceptable and supported by a plethora of quality international sources. It is questionable though, whether the following hypotheses could be applicable universally to the fragmentation of national legal systems as Ondřejek suggests.[3]

1. Is the growing complexity of the law truly a problem?

The author contributes the first cause of fragmentation to the increasing complexity of social relations within the society. He argues that this, in turn, creates the need for the onslaught of statutory novelizations, and as a byproduct, the law becomes needlessly specialized. Ondřejek supports this by using the statistical analysis of Cvrček. [4] It should be pointed out, that even though Cvrček uses robust datasets and computation to analyze his data, Ondřejek doesn't give a second thought to its further interpretation and the limits, which is a little bit of a shame, considering this data is the fundamental cornerstone of the argument. Cvrček himself has had quite a negative outlook on the pace of novelizations in the recent past, consistently criticizing it in his works.[5]

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[1] Email: jan.pokorny@prf.cuni.cz, This article was created as a part of the fulfillment of the *Specific research project for students of Charles University (SVV) No. 260 622 "Technological Progress and Societal Transformations of Law as Challenges for Exploring Fundamental Legal Questions."*

[2] Pavel Ondřejek, *Defragmentation of law: reconstruction of contemporary law as a system* (Intersentia, 2023) 5.

[3] Ibid 13, 15.

[4] Ibid 22.

[5] František Cvrček, 'Právní informatika a lingvistika' [Legal Informatics and Linguistics] (2016) 6 Jurisprudence 49; František Cvrček, 'Základní kvantitativní parametry českého právního řádu' [Quantitative parametrization of the legal system] (2006) 145 Právník 434. A counterargument to this would be that the numerous novelizations are simply necessary to help regulate the increasing pace of technological and societal advances and there is no other adequate instrument to do so.

According to the hypothesis above, the body of law, in general, has been getting more complex and thus fragmented. Logically, this should result in an average citizen, having an inadequate understanding of the regulations. That could very well translate into a lesser ability to deal with legal problems by himself.

In relation to that, Cvrček mentions the lack of sociological research on whether the hypertrophy of the law is an issue, as a clear limiting factor.[6] Another limitation of Cvrček's research is the fact that we don't know whether the growing complexity of the law truly translates into inadequate legal literacy and ability to solve legal problems in an average citizen. For that matter, there are some studies worth exploring that can partially clarify that. However, their numbers are limited and were conducted at different time periods.[7]

The EU citizens´ low levels of legal literacy hypotheses are supported by a few statistical surveys, even though they are very few far and between. According to the 2013 Flash Eurobarometer, approx. 50-60% of aggregated EU citizens feel *"not very well informed:* or *"not informed at all"*.[8] That is in line with OECD's findings.[9] In the matter of legal emancipation, the situation is different.[10] Although doctrinal research tends to lead to sceptical conclusions because it ties legal emancipation directly to the low average values of legal literacy, questionnaire research in Europe has yielded rather contradictory findings.

In particular, we can examine some of the available statistics in detail. In the study *How People Understand and Interact with the Law*, the researchers examined the legal literacy and emancipation of citizens in England and Wales and found a relatively positive coefficient of confidence in the fair resolution of legal problems in multiple areas. This suggests that the average person would feel slightly positive about resolving a legal problem if it was something important to deal with.[11] At the same time, it can be said that in the area of consumer disputes, a substantial portion of respondents (approximately 60%) report fairly good knowledge and abilities to resolve these matters and satisfaction with the outcomes of

[6] Cvrček, 'Základní kvantitativní parametry českého právního řádu' (n 5) 434.

[7] Jan Pokorný, 'Zbývá v době fragmentace a pluralismu nějaké místo na dobro?' [In an age of fragmentation and pluralism, is there any room left for good in the law?] in Marta Tothová and Dominik Šoltys (eds), *Právo a ideál dobra a spravodlivosti: Pocta Pavlovi Holländerovi k 70. Narozeninám* [Law and Ideals of Goodness and Justice: A Tribute to 70th Birthday of Pavel Holländer] (Univerzita Pavla Josefa Šafaříka, Právnická fakulta, 2023) 305-309.

[8] Directorate-General for Communication, *Flash Eurobarometer 385: Justice in the EU* (2015) Questions 2.1-2.5 in dataset A. <https://data.europa.eu/data/datasets/s1104_385?locale=en> accessed 23 November 2023.

[9] OECD/Open Society Foundations, *Legal Needs Surveys and Access to Justice*. (Paris, OECD Publishing, 2019) <https://doi.org/10.1787/g2g9a36c-en> accessed 23 November 2023.

[10] Legal literacy is tied to the knowledge of the law, while legal emancipation represents the ability to understand and apply the law.

[11] Pascoe Pleasence and Nigel Balmer and Catrina J Denvir, *How people understand and interact with the law* (PPSR, 2015) 123 <https://www.thelegaleducationfoundation.org/wp-content/uploads/2015/12/HPUIL_report.pdf> accessed 23 November 2023.

their resolutions in the past.[12] Corresponding data emerge in the survey on the population of the European Union *Les citoyens et l'accès à la justice.*[13]

Pleasence *et al.* also found that technological advances can significantly improve the legal emancipation of the inhabitants. The respondents who researched their problems using standard internet services such as Google had a much higher chance of resolving them successfully.[14] It is an open-ended question whether this trend will further increase with the emergence and rising proficiency of A.I. engines, such as the ChatGPT. Considering that legal A.I. engines are being developed at this moment, they could potentially give the citizens better tools to research and deal with their legal problems. Here, it is, however, necessary to mention that there are notable limitations within the research design of the conducted studies, which the authors themselves acknowledge. Even though the statistical numbers support the hypothesis that internet access improves the ability to solve legal problems, there is a bias as lower-income class inhabitants may not have any or limited access to internet services. The respondents who were able to use the internet to consult their issues probably belonged to the middle or higher income class, who then had different education and lifestyle which disrupts the questionnaire's sampling.

These surveys' findings cannot be generalized globally and directly apply only to certain territories and kinds of problems. Nevertheless, it sufficiently illustrates that even though the complexity of the legal norms has been increasing, the citizens are quite capable of solving legal problems with or without additional help. The survey from the United Kingdom (UK) illustrates this in a detailed fashion by studying numerous contexts and situations. In the EU the data is sourced narrowly, mostly in relation to consumer issues, but generally, it can be said that it follows similar trends and is roughly similar.

Now, looking at the hypotheses about the fragmentation of law from this point of view, it is possible to argue that even though the number of legal norms and the complexity of the legal system is increasing, it may not have any meaningful impact on the ability of the regular citizen to solve legal problems. After all, it is one of the basic legal principles that the laws should reflect the natural behaviour of people so that they don't need to study it in order to function in the everyday world. The laws should be there only to prevent or solve conflicts.

2. Is the law getting fragmented equally among jurisdictions?

Further observing Ondřejek's definition of fragmentation and its causes, as well as the ensuing discussion, it can be argued that they are formulated too broadly. While reading between the lines, it is apparent, that these statements are meant to be applicable in general.[15] It is necessary to point out that these hypotheses should apply predominantly to specific

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[12] Ibid 162.

[13] Rosario Spadaro, *Eurobaromèttre special 195/vague 60.0. Les Citoyens de L'union Européenne Et L'accès à La Justice* [Special Eurobarometr. The Citizens of the European Union and the Access to Justice] (The european opinion research group, 2004) 8-26. <https://docplayer.fr/176396513-Les-citoyens-de-l-union-europeene-et-l-acces-a-la-justice.html> accessed 23 November 2023.

[14] Pleasence and Balmer and Denvir (n 11) 133-159.

[15] Ondřejek (n 2) 13-15.

states of the continental legal culture. More precisely the central European countries. It is largely up to the specific conditions in each state as to how extensively its law might be fragmented and what the parameters of this individual fragmentation could be. There are several reasons for this.

First off, the extensiveness of national law fragmentation is indirectly dependent on the variable of the sheer economic and military power of the given state. The stronger states have more say in the creation and application of international regulations. That stems simply from the fact that they have stronger representation in international organizations that contribute to the body of international law as well as the organs that are responsible for its application. An example of this can be the European Parliament, where the number of seats corresponding to each state is calculated by an algorithm primarily based on its population.[16] The importance of power balance is especially apparent, with the UN's Security Council's permanent members who have the veto right. It effectively renders any UN enforcement measures useless if they displease any of the permanent members. On top of that, superpowers such as the United States of America (USA), the Russian Federation, and China are often found blatantly disregarding international laws and institutions as their position simply allows it.

In 2017, based on a thorough study of European Court of Human Rights (ECHR) decisions, Council of Europe documents, and interviews with Council of Europe staff, Trochev, and Roter concluded that Russian courts, and especially the state administration, violate fundamental human rights and freedoms depending on their particular political interests in a given case. According to them, the Russian Federation has a similar attitude toward respecting and enforcing the ECHR decisions.[17]

A similar thing can be said for the USA, deciding to adhere to international treaties concerning human rights depending on political whims and their military aims. That much is obvious if we look at the cases of the use of chemical weapons in the Vietnam War or the legality of the operation of the Guantanamo Bay facility.[18]

Simply put, the superpowers don't adhere to the same rules as far as the European understanding of international law goes. They can freely limit the extent, to which their

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[16] For the overview of historical and contemporary calculations see: Linda L Fowler and Pieter L Polhuis and Scott C Paine, 'Changing Patterns of Voting Strength in the European Parliament' (1983) 15 Comparative politics 159; Madeleine O Hosli,'Voting strength in the European Parliament: The influence of national and of partisan actors' (1997) 31 European journal of political research 351; Janusz Łyko and Ewa Łyko, 'The Composition of the European Parliament During the 2019–2024 Term in Light of Legal Provisions and the Rules of Fair Distribution' in Bilgin Huseyin Mehmet and Danis Hakan and Demi Ender (eds), *Eurasian Economic Perspectives: Proceedings of the 26th and 27th Eurasia Business and Economics Society Conferences, edited by Mehmet Huseyin Bilgin, et al.* (Springer International Publishing AG, 2020) 363-374.

[17] Alexei Trochev, 'The Russian Constitutional Court and the Strasbourg Court: Judicial Pragmatism in a Dual State' in Lauri Mälksoo and Wolfgang Benedek (eds), *Russia and the European Court of Human Rights: The Strasbourg Effect* (Cambridge University Press, 2017) 125-149; Petra Roter, 'Russia in the Council of Europe: Participation à la carte. Russia and the European Court of Human Rights' in Lauri Mälksoo and Wolfgang Benedek (eds), *Russia and the European Court of Human Rights: The Strasbourg Effect* (Cambridge University Press, 2017) 26–56.

[18] See Edward S Herman and Noam Chomsky, *Manufacturing consent: the political economy of the mass media: with a new introduction by the authors* (Pantheon Books, 2002) 31 of the introduction.

judicial institutions might be fragmented by simply not respecting international institutions' decisions. In that case, the aforementioned hypotheses can be applied to these states only in a limited capacity and thus cannot be used universally.

3. The notion of legal pluralism and its theoretical character

In chapter 4, this monograph provides a very nice comprehensive overview of the main doctrinal theories concerning legal pluralism. From the get-go, it is apparent that the author's outlook on the systemic nature of law is heavily inspired by Luhman.[19] In his previous work, he describes the body of law as a relatively autonomous legal system, which interacts with other systems within the society.[20] This theme continues throughout this monograph as he very diligently separates law and legal institutes from social systems and influences. The same is apparent here as his view of legal pluralism is heavily based on the legal positivist outlook.

Ondřejek differs between two variants:

1. The narrow conception of legal pluralism, where legal pluralism is understood as an overlap of official legal systems and judicial institutions.
2. Normative pluralism, a situation where the state officially accepts or tolerates legal norms from non-state sources such as *lex mercatoria*, *religious systems* etc.[21]

Ondřejek argues, that the narrow conception is based on legal positivist pluralism, while the second one belongs to the sociological category. Typically, these are the two widely recognized forms of legal pluralism. The positivist conception is traditionally accepted. Griffiths started the discussion in his works by calling it the weak form of legal pluralism. The positivist approach to legal pluralism is based on a concept constructed around the term "focal norm" or "grundnorm". It is a narrower conception that understands legal pluralism as a state where in a certain territory or for a certain subject, multiple legal systems apply, each having its own normative focus.[22] Kysela as well as Ondřejek (in his previous works) prefer this conception.[23] As Ondřejek rightly points out, Benda-Beckmann and Turner, as well as Berman, among others, also recognize this.[24]

From a sociological point of view. It can be argued that both these types of legal pluralism should be subsumed under the positivist conception. Moreover, Ondřejek's normative

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[19] Niklas Luhman, 'The Unity of The Legal System' in Gunther Teubner (ed), *Autopoietic law a new approach to law and society* (Reprint, W. de Gruyter, 2011) 12-36.

[20] Pavel Ondřejek, *Koncepce práva jako systému* [A Conception of Law as a System] (Wolters Kluwer, 2020).

[21] Ondřejek (n 2) 142.

[22] John Griffiths, 'What is legal pluralism?' (1986) 18 *The Journal of Legal Pluralism and Unofficial Law* 1, 7; Ondřejek (n 20) 194.

[23] Jan Kysela, 'Měnící se struktura právního řádu a jeho atributy' [The Changing Structure of Legal Order and Its Attributes] (2009) Eric Stein Working Paper 1, 3-6;
Ondřejek (n 20) 194.

[24] Keebet Benda-Beckmann and Bertram Turner, 'Legal pluralism, social theory, and the state' (2018) 50 Journal of legal pluralism and unofficial law 255, 263; Paul Schiff Berman, *Global legal pluralism: a jurisprudence of law beyond borders* (Cambridge University Press, 2012).

positivism does not fully reflect how non-state systems and the positive law interact. As one of the examples of normative pluralism, Ondřejek mentions the institution of the Muslim Arbitration tribunal.[25] Griffiths, however, does subsume the recognition of Islamic law under the weak, positivist conception of legal pluralism.[26] In that regard, if we stay faithful to Griffiths' classification, we have to conclude that Ondřejek describes two slightly different variants of legal pluralism; both fundamentally based on legal positivist philosophy.

A second argument can be made from a doctrinal as well as a sociological point of view. A prevalent number of authors within the discourse work with the idea of sociological legal pluralism.[27] It stems from Ehrlich´s conception of "living law", where the legal norms are spontaneously created and followed by society.[28] Griffiths then built on this conception with the notion of strong legal pluralism. The kind of legal norms that are fully autonomous of the state and do not need any kind of acceptance or tolerance to be considered law.[29] This conception has been upheld by a multitude of authors including the ones that Ondřejek cites as the proponents of the narrower positivist legal pluralism.[30] It is peculiar, to say the least, that even though Ondřejek clearly concedes that "*legal pluralism is an attribute of a social field and not of law*"[31], he goes on to completely discard the truly sociological part of legal pluralism, which is the cornerstone of the traditional foundation of this conception.[32] Without it, the discourse simply becomes an exercise in conflict resolution between different official legal systems.

On the other hand, the author makes a compelling counterargument to this by mentioning *lex mercatoria*, *lex digitalis*, and the possibility of the use of religious law before arbitration tribunals among certain jurisdictions such as the UK.[33] These are relatively unofficial sources of the law, that can be used only in case the parties explicitly agree to it. The applicable content of these regulations and their use is strictly limited by the state's public law. To their fullest extent, these quasi-codified norms and religious systems can only be used before an arbitration court. In that case, the parties are limited by the scope of possible situations they can bring before it.[34] If the necessary conditions are met though, then even some of

[25] Ondřejek (n 2) 142.

[26] Griffiths (n 22) 1, 7.

[27] Tamanaha gives a nice overview of the socio-legal scholars: Marc Galanter, Sally Frank Moore, Peter Fitzpatrick, Roger Cotterrell, Gunther Teubner, Boaventura de Sousa Santos, Sally Engle Merry, Masaji Chiba. Brian Z Tamanaha, 'A non-essentialist version of legal pluralism' (2000) 27 Journal of Law and society 296.

[28] Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (L M Walter tr, Routledge, 2001).

[29] Griffiths (n 22) 1, 7.

[30] Benda-Beckmann, Turner (n 24) 255, 263; Berman (n 24).

[31] Ondřejek (n 2) 147.

[32] For a comprehensive analysis see. Tamanaha (n 27) 312-321.

[33] Ondřejek (n 2) 143-144.

[34] Compare for example: article 1, section 1 (b) of the Arbitration Act 1996 c. 23 (of England); section 2 (2) of the Act no. 216/1994 Coll., o rozhodčím řízení a o výkonu rozhodčích nálezů [arbitration act of the Czech Republic]; section 2060 of the Code Civil.

the procedural norms of the said quasi-codified systems are applicable.[35] These are the cases when alternative dispute resolution deals with property rights, civil obligations, and to a limited extent family law disputes. Since the parties must agree on the source of law which shall govern their mutual obligations, it means, that applicability of these norms is a matter of contractual obligations rather than legal pluralism. This possibility also has to be explicitly allowed by the state law. That is obviously in stark contrast, with the sociological school of legal pluralism which considers certain non-state legal norms to be at the same level or even above the state's public law depending on the circumstances.[36]

At this point, the discussion has to boil down to the omnipresent question: What is law?[37] Ondřejek clearly follows Hart's thought as he clearly requires the recognition by the state as one of the key components for any norm be pronounced a source of law.[38] However, there is an interesting argument to be made. When the states weaken or just choose to look away, communities that essentially replace the failing state's law and order may emerge.

Ondřejek cites the work of Tamanaha who includes quasi-legal and private law-making activities into legal pluralism.[39] Within this discourse, Santos refers to politically dynamic South American states that see frequent changes in governance. There, gangs or communities regularly maintain law and order by themselves.[40] Berman mentions an example concerning such a situation in Kosovo, where the postwar cultural clashes between Serbian and Albanian communities had made it nearly impossible to draft legislation that would have been accepted by all the communities.[41]

Ondřejek must have foreseen the flow of the discourse for he promptly introduces Twining's floodgates argument into the discussion with the comment, that "*the sociological approach to legal pluralism lies in insufficient distinction of the law from other normative systems in society."*[42] *It can be noted, that similarly, Tamanaha criticizes Santos for seeing the law virtually everywhere, even though his own views are heavily based on sociological approaches.*[43] *Twining's rationale is the following: A more traditional concern has been with*

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[35] Essentially, this is a broad statement and the exact framework of how the process before individual arbitration courts is regulated is a question of statutory regulation of each jurisdiction. Nevertheless, it is still valid to say that in general the process is much more lenient and open to modifications by agreement of the parties involved. For more detail, compare Amanda M A Baker, 'Higher Authority: Judicial Review of Religious Arbitration' (2012) 157 Vermont LR 157; *Kovacs v. Kovacs* (1993) Court of Special Appeals of Maryland, 98 Md. App. 289, 633 A.2d 425.

[36] Boaventura S Santos, *Towards a New Legal Common Sense* (3rd edn, Cambridge University Press, 2020) 107-109.

[37] Santos, Tamanaha and Twining arrive at similar crossroads in the discourse at Santos (n 36) 111-112.

[38] Massimo La Torre, 'The Hierarchical Model and H. L. A. Hart's Concept of Law' (2013) Les juristes et la hiérarchie des norms 141; Jiří Boguszak and Jiří Čapek and Aleš Gerloch, *Teorie práva* [Theory of law] (2nd edn, ASPI, 2004) 81; Pavel Maršálek, *Právo a společnost* [Law and Society] (Auditorium, 2008) 191.

[39] Ondřejek (n 2) 125.

[40] Santos (n 36) 121-192.

[41] Berman (n 24) 42; Rosa Brooks Ehrenreich, 'The New Imperialism: Violence, Norms, and the "Rule of Law."' (2003) 101 Michigan law review 2275.

[42] Ondřejek (n 2) 125.

[43] Brian Z Tamanaha, *A general jurisprudence of law and society* (Oxford University Press, 2001) 182.

a version of 'the floodgates argument'. If one opens the door to some examples of non-state law, then we are left with no clear basis for differentiating legal norms from other social norms, legal institutions and practices from other social institutions and practices, legal traditions from religious or other general intellectual traditions and so on.[44]

I propose that the answer to the floodgate's argument is to use the Foucaultian view which means solving the problem by the facticity of brute force. Euphemistically, we could call it the authoritative use of violence by the one who possesses enforcement capabilities. Under this prism, the law could be defined as a binding set of rules, that can be consistently enforced by any social community occupying a certain territory.[45] By this logic, we would then have to accept that law can be any well-formulated, widely known rule that is consistently enforced. In relation to the question of force and central authority, Rothberg makes quite an interesting point. He compares the behaviour of communities in failing states to the behaviour of countries in the system of international law. His findings clearly warn of serious security risks stemming from the lack of enforcement by a central entity.[46] When there is no universal organ capable of attaining order, different groups and communities fight each other, create unions to bolster their strength and engage in political negotiations. In a sense, we could draw a parallel to Thomas Hobbes's natural state of mankind theory of war of all against all.[47]

4. Legal pluralism as a source of integration in law

If we were to evaluate legal pluralism, based on the aforementioned sociological hypotheses, we would probably come to the conclusion, that it is a severely detrimental phenomenon to the unity of the law. The non-state quasi-legal norms may act as a destabilizing element to the principle of legal certainty and the security risks mentioned in Rothberg's theories are certainly plausible. Ondřejek, however, creates an intriguing plot twist when he suggests that legal pluralism can be seen as a source of unity in law and makes well-structured arguments to support this hypothesis and, to an extent, counteract the prevailing doctrine of legal pluralism being a negative entity. His concept relies on higher courts and international courts gradually aligning their legal opinions, which in turn creates greater unity in the system of international law. He notes that it can also help protect individual rights on a national level.[48]

The argument that legal pluralism can help create unity in law can be further strengthened by the fact that there has been an ongoing hybridization of legal cultures. The Anglo-Saxon legal system as a whole is poised to be affected by fragmentation to a much lesser extent thanks to the precedential character of their law. As we discussed above, the continental law's frequent novelizations convoluting and burdening the body of law, are one of its core issues. Precedential law has much more of a dynamic character, being able to effectively

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[44] William Twining, *General jurisprudence: understanding law from a global perspective* (Cambridge University Press, 2009) 369.

[45] Anthony Beck, 'Foucault and Law: the Collapse of Law's Empire' (1996) 16 Oxford Journal of Legal Studies 489.

[46] Nelson Kasfir, 'Two Domestic Anarchy, Security Dilemmas, and Violent Predation: CAUSES OF FAILURE' in Robert Rotberg (ed), *When States Fail: Causes and Consequences* (Princeton University Press, 2004) 60-70.

[47] Thomas Hobbes, *Leviathan* (Open Road Integrated Media, 2020) 79-80.

[48] Ondřejek (n 2) 12.

react to technological and societal changes without being deformed by the onslaught of novelizations. Thanks to the hybridization, the new quasi-precedential character of decisions within the continental system has become the topic of interest as a potential remedy that could help further unify the law.

5. Methodology

The author chose a methodology that is customary for traditional legal scholars. It leans heavily on structural, and analytical approaches. A major part of the work is argued from the legal positivist perspective. That creates an interesting and unusual twist and possibly even tension in some chapters as the topics of fragmentation and legal pluralism have been originally researched from sociological and historical angles. The research is predominantly qualitative with the author choosing specific legal cases and historical events to demonstrate his arguments.

As far as the qualitative methods are concerned, the strong point of the book is certainly its comparative approach. The author fluently uses a comparative analysis of court cases and statutory regulations from numerous jurisdictions to synthesize the answers to his research questions.

The monograph contains a few empirical elements as it is possible to find references to topical, relevant statistics. They are used mostly as a supportive element to the complex doctrinal arguments, rather than being a significant point of analysis and argumentation.

Conclusion

With respect to the case studies Ondřejek provided on the integrative potential of legal pluralism, it is necessary to question the replicability of the highlighted processes. The significance of this research depends on whether these were just rare occurrences and statistical anomalies, or if there is truly causality.[49] Without a bulk of data that would reveal the tendencies of different courts and how inclined they are on average to be influenced by other courts' decisions, we cannot say with any certainty that the suggested "avalanche effect" could be a realistic statistical possibility. On the other hand, there is a quality counterargument that needs to be mentioned. Because of how the process of adopting foreign high court decisions works in practice, it is acceptable to consider that a decision of excellent quality might at any time be just a few steps away from being widely adopted, inspiring other courts to follow its argumentation. This is with reference to the fact that a multitude of states simply choose to ignore international treaties and courts, as was discussed in the review of the introductory chapter, which causes a great deal of legal uncertainty.

That of course does not take anything away from the originality, this monograph brings with these two following aspects:

1. The author uses a legal positivist approach to deal with a relatively legal-sociology-oriented discourse while respecting its sociological core. There certainly had been scholars that debated whether the nature of legal pluralism

[49] Ondřejek (n 2) 129-135.

is a rather sociological or a positivist construct, but the discussion typically hadn't offered much in terms of novelty. The authors picked their preferred interpretation of legal pluralism and interacted with the discourse in line with it. Then proceeded to disregard the parts that would not fit their view. The fact, that Ondřejek respects the core sociological foundation of legal pluralism but applies a positivist approach to its study creates a new and unusual take that nudges the discussion forward and offers new, refreshing perspectives.

2. The argument that legal pluralism is not just an erosive, degrading element and a danger to any stable legal order, but also a source of integrative potential. An impulse that may overall improve the substantive and procedural standards of human rights among European jurisdictions.

Overall, this work provides its readers with a great number of international academic sources that have been frequently cited in the latest publications and deals very well with the challenging topic of fragmentation of law in a logical and meaningful way. Without any doubt, it provides new, refreshing views on discussed matters and is a must-read for any scholar interested in the fragmentation of national law.

Discussion paper

Fixing the Crumbling Legal System. A Reply to the Comments of Tomáš Koref and Jan Pokorný.

Pavel Ondřejek

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Abstract

The article further elaborates on some ideas presented in the book 'Defragmentation of Law. Reconstruction of Contemporary Law as a System' (Intersentia, 2023). In response to the comments of Tomáš Koref, it is argued that balancing between rights and principles in private law legal relations takes place at two levels – statutory and constitutional. In response to Jan Pokorný's comments, the consequences of breaching rules of international law are discussed, emphasising the negative consequences in the form of reputational costs. Finally, law is described as a non-optimal system in which its systemic nature is crucial for the achievement of its purposes, one of the most important of which is the stabilisation of the normative expectations of its addressees.

Keywords: fragmentation of law, legal pluralism, principle of proportionality, normative coherentism, systemic nature of law, legal principles, horizontal effects of human rights

Introduction

In my book *Defragmentation of Law. Reconstruction of Contemporary Law as a System*,[1] my aim was to provide a general overview of the increasing complexity of contemporary law, which may ultimately lead to its fragmentation, and, more importantly, to show how the system can be restored in such situations. This is, of course, a complex problem, and the book by no means attempts to provide an exhaustive analysis of all the phenomena that undermine the coherence of law, nor does it offer a panacea for all the problems of disintegrating law.

The first discussion of the arguments presented in the book took place at a seminar organised by the Czech Association for the Philosophy of Law and Social Philosophy (Czech section of the IVR) on 6 October 2002, and I am very pleased that I was able to engage in a discussion with the members of the Czech IVR and in particular with two young scholars, Tomáš Koref and Jan Pokorný, who in their comments on my book opened up a number of issues for discussion and touched on aspects of the book that are related to their long-term research.

Their critical comments and their pointing out of weaknesses in the book's argumentation were much appreciated and made me realise that some of the ideas in the book needed to be explained further and, in particular, placed in the context of my previous writings. These explanations certainly could (or rather should) already have been mentioned in the book itself, but since they were not, I would very much like to elaborate on them in this short rejoinder.

1. A Reply to Tomáš Koref's Article "Defragmentation of (Private) Law Through Proportionality Test"

After an excellent introductory summary of the arguments presented in the book, Tomáš Koref moves on to his own critique, which is based on the following ideas: if the book seeks a comprehensive view of the requirement of coherence of the legal order and postulates the argument of normative coherentism, the question is why is the discussion of the principle of proportionality limited to the constitutional law argumentation? Instead, it would be appropriate to focus on the role of the proportionality principle in general, for which, according to Koref, there are three important reasons: 1) the principle of proportionality is always applicable when there is a conflict between legal principles, and legal principles are commonly found among all branches of law, not only in constitutional law; 2) the principle of proportionality promotes normative coherentism in law, again in various branches of law; and 3) the principle of proportionality is a tool for the justification of decisions and in certain cases can provide more convincing justification than traditional methods of interpretation.[2]

First of all, I would like to stress that we are not in dispute on the basic issue: proportionality is clearly applied in different branches of law. In my earlier paper on the principle of proportionality in law-making, I emphasised the thesis that the specific method of

[1] Pavel Ondřejek, *Defragmentation of Law. Reconstruction of Contemporary Law as a System* (Intersentia 2023).

[2] Tomáš Koref, "Defragmentation of (Private) Law Through Proportionality Test". A Review Essay on Ondřejek's Monograph "Defragmentation of Law: Reconstruction of Contemporary Law as a System" (2024) 4 Ratio Publica 9-14, chs 2.3 – 2.5.

proportionality is a manifestation of the more general idea of seeking proportionality in our actions, which applies not only to law as a social artefact but to all human activities in general.[3] Koref focuses on private law in his contribution, but many other manifestations of proportionality in law can be mentioned - a typical example is the proportionality of punishment (or more generally of sanctions in law),[4] or proportionality in elections (the principle of proportional representation).[5] The different manifestations of proportionality in law also have their terminological implications, when one speaks of the principle of proportionality, the method of proportionality, the proportionality argument, proportionality, etc.[6] It is true, however, that the meaning of proportionality in private law is a topic that has been insufficiently explored. The implications of the application of proportionality in private law relations are far broader than the book's basic idea about the need to defragment contemporary law.

Nevertheless, it is important to mention where I agree and disagree with Koref's account of the relevance of proportionality in private law. We both support the thesis that total constitutionalism, i.e. the transfer of conflict resolution from the statutory to the constitutional level, is not the right answer. It weakens specific sectoral legal principles and, if we follow the consequences of total constitutionalism, the question arises: What is the need for statutory regulation at all? The difference between our approaches lies in the fact that even in private law cases I take into account their constitutional dimension, which usually (although not necessarily) arises. When these questions about the constitutional dimension of private law cases arise, they necessarily lead to a discussion about the horizontal effects of human rights and the role of proportionality in constitutional and sub-constitutional law. In other words, I do not advocate an artificial separation of the constitutional and sub-constitutional levels of decision-making.[7] I shall illustrate how my approach differs from Kumm's theory of total constitutionalism with an example.

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[3] Pavel Ondřejek, 'Zákonodárce a princip proporcionality' [The Legislator and the Principle of Proportionality] in Pavel Šturma and Pavel Ondřejek (eds), *Ochrana lidských práv: úloha parlamentů a soudů* [Human Rights Protection: the Role of Parliaments and Courts], Vol. 13 (Studie z lidských práv [Studies in Human Rights], Faculty of Law, Charles University 2020) 33.

[4] Eg Jesper Ryberg, *The Ethics of Proportionate Punishment: A Critical Investigation* (Kluwer Academic Publishers 2004).

[5] Eg Marek Antoš and Filip Horák, 'Proportionality Means Proportionality. Czech Constitutional Court, 2 February 2021, Pl. ÚS 44/17' (2021) 17 EuConst 538.

[6] These terminological issues are not the subject of Koref's or Pokorný's discussions, so I will not elaborate on them here. I would refer to recent Czech and Slovak publications on proportionality in law, which also note the broader implications of proportionality for the legal order as a whole – Zdeněk Červínek, *Metoda proporcionality v praxi Ústavního soudu* [Proportionality Method in the Praxis of the Constitutional Court] (Leges 2021) 13; Tomáš Ľalík, *Obmedzovanie ľudských práv a test proporcionality: teória a prax* [Limitations of Human Rights and Proportionality Test: Theory and Practice] (Wolters Kluwer 2023).

[7] A strong argument for the interplay between constitutional and sub-constitutional regulation in the construction of fundamental rights is made in a collective monograph by Gregoire Webber, Paul Yowell, Richard Ekins, Maris Köpcke, Bradley Miller and Francisco Urbina - Gregoire Webber and others, *Legislated Rights. Securing Human Rights through Legislation* (Cambridge University Press 2018). In Czech scholarly literature, this idea is developed by Martin Abel: Martin Madej, *Meze základních práv v České republice* [Limitations of Fundamental Rights in the Czech Republic] (Leges 2019).

In 2017, I described a then topical case of bank customers' complaints about credit account fees, which had been dealt with not only in the Czech Republic, but also in Germany and the UK, for example.[8] The case was simply about whether banks can charge fees to customers for maintaining accounts, even though there is no special consideration on the part of the bank associated with the actual maintenance of the accounts. The claimants – the banks' customers – argued that these were in fact "fees for nothing", which violated the implemented EU Consumer Law Directive.[9]

In Germany, the litigation was conducted exclusively under private law and the court of last instance was the Federal Supreme Court there. In its view, the fees constituted a secondary arrangement which, unlike the main contractual arrangements, was subject to review. It was the fact that the fees for the maintenance of the loan accounts were not matched by any consideration from the bank that led the German Federal Supreme Court to regard the bank charges as unlawful.[10]

In the Czech Republic, for procedural reasons, it was not possible to lodge appeals against court decisions in disputes over the legality of bank charges. The reason was the small value of the disputed amount. In the absence of class actions in the Czech Republic, the court of first instance ruled in individual cases and the only way to challenge its decision was to lodge a constitutional complaint. However, that presupposed finding a constitutional dimension to the case, which the complainant saw in subordinating consumer protection to the constitutional principle of substantive equality and correcting the autonomy of the will with the principle of equity and justice.[11]

Thus, the Constitutional Court stepped in, feeling the need to unify the case law of courts of the first instance, some of which considered bank charges to be illegal, others not. The Constitutional Court first had to recognise that the case had a constitutional dimension in order to rule on the merits. It then ruled that the regulation of bank charges did not violate the Constitution (considering bank charges, in addition to interests, to be sources of profit for the banks arising from the entering into the loan agreement). Therefore, the Constitutional Court dismissed the constitutional complaint.[12]

If we look at the case from the point of view of the applicable law, we can distinguish between the statutory and constitutional levels. Moreover, at both the statutory and constitutional levels, there are legal principles and values that play a role in this case. As described above, these principles and values are interrelated (for example, the constitutional value of liberty

[8] Pavel Ondřejek, 'A Structural Approach to the Effects of Fundamental Rights on Legal Transactions in Private Law' (2017) 13 EuConst 281–304.

[9] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, for more details see Ondřejek (n 8) 291.

[10] Ondřejek (n 8) 290. Putting aside for the moment the critical views that it is possible to isolate the main and ancillary arrangements in the case of fees which are in fact the "price" for banking services – see also the UK Supreme Court reasoning in *Office of Fair Trading v. Abbey National plc & Others* [2009] UKSC 6.

[11] Judgment of the Constitutional Court of 10 April 2014, Case No III ÚS 3725/13 (bank charges), paragraph 7 of the reasoning of the judgment.

[12] Judgment of the Constitutional Court of 10 April 2014, Case No III ÚS 3725/13 (bank charges). For more detailed English summary of the judgement see Ondřejek (n 8) 293–294.

and the principle of autonomy of the will, or the private law principle of contractual justice and the principle of substantive equality in constitutional law). As I indicated above, I think it is important to mention that both statutory and constitutional rules have a role to play in this case. In dealing with conflicting rules, the first key point that arises from the plurality and irreducibility of values in contemporary liberal democracies is the need for proportionality between principles or between values, since neither of them form an a priori hierarchy. If we were to regard a particular principle or value as fundamental, there would be no proportionality, because that fundamental value would act as a Dworkinian trump card in disputes. The second key point, on which I agree with Koref, is that the application of laws is not merely a projection of the application of constitutional rules and principles. If this were not the case, the thesis of total constitutionalism would apply and balancing conflicting constitutional rights and principles would be sufficient to resolve the case at hand.

From both of the above mentioned premises, it follows that balancing takes place at two levels – statutory and constitutional. The binding nature of laws requires that the statutory level be taken seriously when dealing with hard cases, while the higher legal force of the Constitution and the special status of fundamental rights and freedoms (as well as conflicting public interests protected by the Constitution) in legal orders require that the constitutional level of litigation be also taken seriously. Together with Koref, I consider it important to carry out a balancing of abstract principles in private law as well, but this balancing will, in my view, be influenced by the context of balancing similar principles at the constitutional level. This context may affect the outcome of balancing between fundamental rights and public interests, however clearly it does not predict it. Thus, it is possible, for example, that the balancing of freedom of contract and contractual justice in a given case will be somewhat different than the balancing of the value of liberty and substantive equality in constitutional law. In dealing with hard cases, it is possible for constitutional principles and values to "radiate" at the level of individual statutes.[13] Since the dispute is primarily fought on the level of statutory regulation, such a radiation may take the form of a constitutionally conforming interpretation of statutory concepts or a reinterpretation of the results of balancing in private law with respect to an important institution or argument occurring in constitutional law.[14]

2. A Reply to Jan Pokorný's Article

In his commentary on the book *Defragmentation of Law*, Jan Pokorný focuses on three issues: the question of the consequences of the increasing complexity of law, situations of fragmented law in different jurisdictions and, finally, the issue of legal pluralism and its potential as a source of integration of law. I will address these issues in turn.

[13] The well-known thesis of the radiation of fundamental rights and freedoms into the entire legal order follows from the judgment of the German Federal Constitutional Court of 15 January 1958 in the Lüth case (BVerfGE 7, 198). For an English commentary on this case, see e.g., Robert Alexy, 'Constitutional Rights, Balancing, and Rationality' (2003) 16 Ratio Juris 132–134.

[14] Pavel Ondřejek, *Koncepce práva jako systému* [A Conception of Law as a System] (Wolters Kluwer 2020) 188.

Pokorný begins by reflecting on the consequences of the increasing complexity of law. Although there is no dispute that the volume of legal regulation is increasing,[15] the real question lies in the implications of this complexity in relation to the addressees of the law.

Pokorný argues that "we don't know whether the growing complexity of the law truly translates into inadequate legal literacy and ability to solve legal problems in an average citizen."[16] This fact is illustrated by studies showing, for example, that approximately 50-60% of EU citizens feel themselves as not very well or even not informed at all about law. According to another study, around 60% of EU citizens have fairly good knowledge and abilities to resolve their legal problems. He concludes with the interesting observation that it is an open-ended question whether higher chances of solving conflicts will further increase with the proliferation of AI engines like ChatGPT.[17]

I do not intend to dispute the studies mentioned above. On the contrary, I believe that these statistics actually support my own argument rather than contradict it. If 50-60% of people do not feel well informed about the law, and at the same time at least 40% of people do not even know who to contact when dealing with complex legal problems, this is, in my opinion, a rather high number in view of the requirement of law as a universal system of rules that should be, as Hans Kelsen also argues, "by and large" recognised by their addressees.[18] While it is likely that even a simpler law would not be fully understood by all addressees, I believe that the claim that the number of addressees who feel well informed about their legal rights decreases with the increasing complexity of the legal system is consistent with practical experience, while the opposite position (i.e. that the level of knowledge of the law does not change with increasing complexity) is, in my opinion, strongly counter-intuitive. My focus on reducing the complexity of the law by strengthening the coherence of legal rules and principles could therefore have a rather positive effect on the overall level of legal literacy.

Regarding the role of computer information systems, I agree with the opinion of the Czech professor of legal theory Karel Beran, an expert in the field of legal informatics, who, even before the spread of more advanced artificial intelligence tools, stated the following on the issue of using legal information systems in teaching law:

> *Commercial providers of legal information systems, in an effort to make searching as convenient as possible, offer their users one-line full-text search engines – similar to those used by Google. The algorithms are then applied to the predefined search, which should, as far as possible, lead the user to what he or she is looking for, without the user having to know what he or she is looking for and why he or she is looking for it. If a future lawyer*

[15] Here he also relies on the analysis of quantitative parameters of Czech law published by František Cvrček (František Cvrček, 'Základní kvantitativní parametry českého právního řádu [Fundamental Quantitative Parameters of the Czech Legal System]' (2006) 155 Právník 434.

[16] Jan Pokorný, "A Review Essay on Ondřejek's Monograph Defragmentation of Law: Reconstruction of Contemporary Law as a System" (2024) 4 Ratio Publica 21.

[17] Ibid, p. 22.

[18] Hans Kelsen, *Pure Theory of Law* (University of California Press 1967) 212.

> *becomes accustomed to this method, it inevitably leads to his or her dependence on the legal information system, unable to orient oneself and define one's query.*[19]

The second comment addresses the issue of de facto inequality between states.[20] Pokorný highlights that certain states fail to adhere to international human rights law as well as judgements made by human rights courts or quasi-judicial bodies. I fully agree with the claim that in these situations conflicts arising from the different requirements of international, supranational and national law do not arise in practice. On the other hand, however, it is important to focus on the consequences of non-compliance with the most important rules of international law, such as those arising from international human rights law.

In the book, edited by the Czech professor of constitutional law Jan Kysela, my co-authors and I addressed the more general question of the changing authority of contemporary states.[21] We identified phenomena that weaken contemporary states, but also others that strengthen them. The analysis of the selected cases showed that although states still have the final say on the enforcement of international law on their territory, in case of international human rights law the possibility to defy the rules is regularly associated with criticism from other states. And even powerful states are not exempt from this criticism.

An example is the violation of the right to contact a consular officer, which is enshrined in Article 36 of the Vienna Convention on Consular Relations, when a foreigner is in detention in another state as a result of a criminal charge. In the United States, perhaps the most famous case was that of a Mexican citizen José Ernesto Medellín convicted of murder who was denied contact with the Mexican embassy by the US authorities.[22] Simultaneously, Mexico was litigating with the United States before the International Court of Justice, which ruled that the United States has an obligation to allow contact between persons deprived of their liberty who are citizens of a third State and the relevant consular officials.[23]

However, the outcome of the case was not favourable to the convicted Mexican citizen. The U.S. courts refused to give international treaties a direct effect in U.S. law, nor did they recognise the obligation to implement the judgments of international tribunals or other

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[19] Karel Beran, 'Proč potřebujeme právně teoretický přístup v právní vědě? Co má teorie, filosofie a sociologie práva vlastně vůbec společného a v čem se liší.' [Why Do We Need a Legal Theoretical Approach in Legal Science? What Do Theory, Philosophy and Sociology of Law Have Actually in Common and How Do They Differ] in Záboj Horák and Petra Skřejpková (eds), *Pocta Jiřímu Rajmundu Treterovi* [Essays in Honor of Jiří Rajmund Tretera] (Leges 2020) 58–59.

[20] For discussions concerning the sovereign equity and its limits, see Lora Anne Viola and Duncan Snidal and Michael Zürn, 'Sovereign (In)Equality in the Evolution of the International System' in Stephan Leibfried and others (eds), *The Oxford Handbook of Transformations of the State* (OUP 2015) 221–236.

[21] Jan Kysela (ed), *State as a Giant with Feet of Clay* (Peter Lang 2014). For a more comprehensive discussion of the transformation of contemporary states, see Stephan Leibfried and others (eds), *The Oxford Handbook of Transformations of the State* (OUP 2015).

[22] I dealt with this case in more detail in the chapter of the above-mentioned book edited by Jan Kysela: Pavel Ondřejek, 'International law limits on state power' in Jan Kysela (ed), *State as a Giant with Feet of Clay* (Peter Lang 2014) 51–54.

[23] Judgment of the International Court of Justice of 31 March 2004 in Mexico v. United States of America (Avena and other Mexican nationals), <http://www.icj-cij.org/docket/files/128/8188.pdf>.

international bodies.[24] The appeal on the grounds of violation of the procedural guarantees of the convicted person was thus unsuccessful. At the international law level, the U.S. also refused to respect the Avena judgment and to provide convicted aliens with contact with consular officials. However, this has again put pressure on the US judicial system, on top of the imposition of the death penalty on juvenile offenders.[25] Although this pressure was not direct, as no specific judicial decision was enforced, indirect pressure and criticism led to decisions that reversed the practice of the imposition of the death penalty upon juvenile offenders.[26]

It is possible to document many examples where human rights violations have led to pressure for changes in legislation or state practice. Reference can be made, for example, to the regulation of procedural safeguards in the case of targeted sanctions imposed by the UN or other international law bodies, which arose in response to criticism of the practice of making it impossible to review a person's listing on a sanctions list. Again, it was this criticism, pointing to inadequate safeguards for persons suspected of terrorism, that became the vehicle for changes in legal regulation and practice.[27]

My last comment concerns the detailed comments on the chapter on the integrative potential of legal pluralism. In the book *Defragmentation of Law*, I argued that "legal pluralism need not necessarily be a phenomenon disrupting the traditional conception of law and weakening the law of states. In contrast, as legal systems (both official and unofficial) rest on certain fundamental principles and protect similar values, such as life, health, property, freedom, equality, dignity, etc., it can be claimed that legal pluralism can also have an integration potential. This integration potential is based on the above-described foundation of law (consisting of universal principles, values, recognised doctrines and also public interests). Although this foundation is not completely identical in all legal systems, it is much more stable and some of its individual components (e.g., separation of powers, limitation of public authority by law, guarantees of fundamental rights, etc.) are often referred to as a universally valid background of the law."[28]

First of all, Pokorný assesses my approach as "positivist", both in the case of the narrower conception of legal pluralism outlined above and in the situation of normative pluralism resulting from the recognition of non-state law (*lex mercatoria*, *lex sportiva*, *lex digitalis*, etc.). According to this broader conception, normative pluralism, in order to be recognized as law, must also follow from the common social fact of recognition.

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[24] Judgment of the U.S. Supreme Court of 25 March 2008 in Medellín v. Texas, 128 U.S. 1346 (2008).

[25] Ondřejek (n 22) 54.

[26] In the judgment of 17 May 2010, Graham v. Florida, 560 U.S. 48 (2010), the Supreme Court of the United States of America declared unconstitutional the imposition of a life sentence without parole for offenses other than voluntary manslaughter committed by a juvenile offender. For details on this case, see Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (CUP 2012) 89.

[27] Sanctions imposed on Russian representatives and companies by states and international organisations after February 2022 in connection with the ongoing aggression against Ukraine are an even more striking recent example.

[28] Ondřejek (n 1) 185.

Pokorný claims that sociological pluralism with broader conception of law exists and finds its support by many scholars.[29] According to him, the main problem of my conception of legal pluralism is the fact that I deliberately refuse to recognise certain social norms as law, unless they have a pedigree following from the state. He continues: "when the states weaken or just look away there can emerge communities that essentially replace failing states law and order."[30]

As for the problem of recognizing the social norms as law, in the book *Defragmentation of Law* I cited the "floodgate argument" against the broadening the scope of the non-state law.[31] According to this argument, law loses its specific character when every habitual behaviour is denoted as law.[32] Regarding the problem of states with severely limited statehood, I would stress that my book does not specifically address this issue.[33] At the same time, and perhaps more importantly, it may be questioned, whether the states may simply "look away" without any consequences and without potentially being held liable for failing to protect and promote certain human right protected either by international agreements or as peremptory norms in international law.[34]

Although the system of international law does not have the same features of effective enforcement as systems of domestic law, there is a growing recognition of the hierarchy of norms in international law, as well as the status of certain norms as peremptory (or jus cogens).[35] As I have shown above in the cases of Medellín and Avena, disrespect for human rights creates strong pressures on states (even including politically powerful states). As Isabelle Trujillo points out, violation of the soft law rule in international law comes with

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[29] An example is Isabel Trujillo's argument that 'we must not forget that the prevalence of state law is only a chapter in the history of law, not the longest one, and probably not the last one.' Isabel Trujillo, 'Introduction: Why (Ever) Define Law and How to Do It' in Christoph Bezemek and Nicoletta Ladavac (eds), *The Force of Law Reaffirmed. Frederick Schauer Meets the Critics* (Springer 2016) 1–2.

[30] Pokorný (n 16), p. 26.

[31] Ondřejek (n 1) 125 citing William Twining, *General Jurisprudence. Understanding Law from a Global Perspective* (CUP 2009) 369.

[32] As Frederick Schauer rightly pointed out, 'however much we wish to broaden our understanding of law to include soft law, non-state law, and other institution that fall under the legal pluralist umbrella, we should be careful not to broaden our understanding of law so much that we lose sight of the fact that law still exists as a differentiated institution on numerous sociological, methodological, and informational dimensions.' – see Frederick Schauer, 'Incomplete Responses' in Christoph Bezemek and Nicoletta Ladavac (eds), *The Force of Law Reaffirmed. Frederick Schauer Meets the Critics* (Springer 2016) 163.

[33] Here, I believe that a comprehensive discussion of the various forms of limitation of state power is beyond the scope of this paper. I agree with Risse, who argues that a 'consolidated and fully sovereign state' is an ideal, and also that there are hardly any states 'which lack any authority over their territories and have completely lost the monopoly on the means of violence.' Thomas Risse, 'Limited Statehood. A Critical Perspective' in Stephan Leibfried and others (eds), *The Oxford Handbook of Transformations of the State* (OUP 2015) 153.

[34] Dinah Shelton, 'Normative Hierarchy in International Law' (2006) 100 AJIL 291–323; Andrea Bianchi, 'Human Rights and the Magic of Jus Cogens' (2008) 19 EJIL 491–508; Erika de Wet, 'Jus Cogens nad Obligations Erga Omnes' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 541–561.

[35] de Wet (n 34) 560.

a reputational cost. "A loss of reputation is then a really big cost for the states because they become less credible in the context of international cooperation."[36]

3. Law as Non-optimal System

In the book *Defragmentation of Law*, I concluded that the systemic nature of law is crucial for achieving its purposes, one of the most important of which is to stabilise the normative expectations of its addressees. The systemic nature of law is therefore a value in itself, as is justice or equality before the law.[37]

Critical comments by Tomáš Koref and Jan Pokorný highlighted some of the many problems with attempting to outline law as a system. Indeed, the external observer of the functioning of the law must agree with Michael Sampford that we are more likely to observe the disorder of the law rather than legal order.[38] So although law is a non-optimal system, it is still important, in my view, to emphasise the value of its systematicity, although this value is certainly not a trump card that always prevails. Thus, in particular cases, we may find stronger arguments for choosing the ad hoc solution (in the case of rule-making, this reason may be a strong democratic support; in the case of judicial decision-making, arguments may be based on individual justice in a given case, which may require an exception to a universally applied general rule). Thus, a key feature of the normative coherentism presented in the book *Defragmentation of Law* is to highlight the argument for the coherence of law and its systemic character in the processes of law making, legal interpretation, and application of law.

If we accept that law can either be approached as a system, whereby legal acts are situated within that system, or approached in a deliberately different way which denies its systemic character, then the question arises: Are there any relevant arguments for denying the systemic character of law?

[36] Trujillo (n 29) 12.

[37] Ondřejek (n 1) 187.

[38] Michael Sampford, *The Disorder of Law. A Critique of Legal Theory* (Basil Blackwell 1989).

Discussion paper

Human Rights: Utilitarianism vs Egoism

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Abstract

Utilitarian ethics and rational egoism are competing consequentialist theories. Utilitarianism is an attractive theory because it minimizes the value-normative component and maximizes the empirical component of moral thinking. But egoism accomplishes this methodological advantage even better. Interestingly, egoism can turn traditional utilitarian argumentative techniques against utilitarianism. If someone prefers utilitarian ethics to rational egoism, they should explain why they do so. How is utilitarianism better than egoism? Don't be afraid of egoism. If we can justify human rights in terms of rational egoism, this means that human rights are burdened with minimal value-normative assumptions. If this is the case, this is good news.

Key words: utilitarian ethics, rational egoism, human rights

Introduction

Some detective stories work on the assumption that criminals tend to return to the scene of the crime. I return to Martin Hapla's book on the relationship between utilitarianism and human rights.[1] In my previous text I tried to reconstruct the methodology on which Hapla's book is built.[2] I have argued that Hapla's utilitarian project is rather explanatory than justificatory in its nature with respect to human rights. The aim of explanatory theories is a better understanding of something, while the aim of justificatory theories is the rational acceptance of something.[3] In his book, Hapla is not trying to convince human rights skeptics to accept human rights because they are good from the utilitarian point of view. Such a project would be aimed at persuading skeptics among utilitarians to change their minds about human rights. Hapla is informed by the current reality of Western liberal society. He assumes that his readers already accept the moral validity of human rights. At the same time, he does not expect his readers to be utilitarians. This is a reasonable approach, because most people in our society accept human rights but reject utilitarianism.

Hapla's book carefully explains that the popular understanding of utilitarianism is just a poor caricature of true utilitarianism. He then explains that utilitarianism is not contrary to human rights. Finally, he also explains that the utilitarian justification of human rights has distinct advantages over the justifications provided by competing ethical theories. In effect, this means that Hapla's project is justificatory with respect to utilitarianism itself. On the one hand, it rehabilitates utilitarian moral thinking as such. On the other hand, it recommends utilitarian ethics because it supposedly provides a better justification for human rights than competing theories. Thus, Hapla explains that human rights are best combined with utilitarianism (the explanatory project). And he does it in favor of the acceptance of utilitarianism (the justification of utilitarianism).

I formulated my reconstruction of Hapla's methodology in three theses: (A1) *The straw man thesis:* The criticism that utilitarian conclusions contradict moral intuitions, or human rights, is grounded in the false assumption that utilitarianism ignores morally relevant facts, especially about human nature. (A2) *The translation thesis:* The criticism that utilitarianism ignores morally significant values overlooks the fact that utilitarianism reflects these values in terms of empirical facts. (A3) *The empirical explanation thesis:* Utilitarianism seeks to minimize normative and/or value ideology and maximize the work with empirical facts. This analysis of the facts, when done correctly, can ultimately explain why we prefer a particular ideology in the first place.

The purpose of my new text is to argue for three additional theses: (B1) *The defensive analogy thesis:* Rational egoism uses defensive arguments against its critics that are analogous to utilitarian defensive arguments. (B2) *The empirical reflection thesis:* The criticism that

[1] Matin Hapla, Utilitarismus a filozofie lidských práv (Leges 2022)

[2] Tomáš Sobek, 'Utilitaristická teorie lidských práv jako explanační projekt' (2023) 11 Právník 1035

[3] I present here a stipulative definition of the terms "justification" and "explanation" only for the purposes of my text. That is, it is not an attempt to capture their standard or prevailing meaning. I do this only to point out that Hapla is an apologist for utilitarian ethics, not an apologist for human rights. The aim of Hapla's project is not to convince the reader to accept human rights. Its aim is to persuade the reader to accept utilitarianism as both the correct theory of normative ethics and the best justification for human rights.

rational egoism ignores the value of equality overlooks the fact that rational egoism reflects this value in terms of empirical facts. (B3) *The thesis of normative minimalism:* Rational egoism satisfies the requirement for normative minimalism even better than utilitarian ethics. At first glance, it is clear that the three new theses are linked to the three original theses. However, there is an important difference. The original theses were formulated in favor of utilitarian ethics, while the new theses are formulated in favor of rational egoism. The point is that rational egoism can be defended in the similar way that Hapla defends utilitarianism. And perhaps even better. Personally, I do not subscribe to egoism. I will only try to show that this normative theory, unpopular as it is, should not be ignored.

All three new theses have practical implications for Hapla's utilitarian project. Thesis (B1) implies: If Hapla accepts the utilitarian defensive strategy against critics of utilitarianism, he should not reject the analogous defensive strategy when it is employed by rational egoism. Thesis (B2) implies: If Hapla accepts how utilitarianism translates values into the empirical domain, he should not reject when rational egoism does the same (and even more consequently).

Thesis (B3) implies: If Hapla accepts utilitarianism because it is normatively parsimonious, *a fortiori* he should accept rational egoism because it is even more parsimonious. The combination of the three new theses leads to the question: If we accept Hapla's methodological starting point, should we prefer utilitarian ethics or rational egoism?

I will discuss the theses in reverse order, i.e. (B3)-(B2)-(B1).

1. Thesis of normative minimalism

Hapla's methodological motivation is partly reminiscent of so-called logical empiricism, which is historically associated especially with the Vienna Circle.[4] Hapla has much more confidence in empirical knowledge than in normative and value knowledge. Empirical judgments are subject to methods of objective verification or falsification. At least in principle, in the case of disagreement, one can systematically examine who is wrong on a given empirical question. While we also provide some justification for our value and moral judgments, we ultimately ground our justifications in our personal intuitions, which can be controversial. Hapla, like the classical utilitarians, rejects the idea that moral thought is grounded in long lists of independent value or normative intuitions. Indeed, such an approach easily degenerates into epistemic subjectivism.[5] References to intuitions have some argumentative merit only when they are shared. But individuals often disagree about their value and moral intuitions.

Hapla subscribes to a hedonistic utilitarianism. He prefers hedonism as a theory of well-being, especially because it reduces value intuitions to a minimum. From the point of view

[4] See e.g. Karl Sigmund, Exact Thinking in Demented Times: The Vienna Circle and the Epic Quest for the Foundations of Science (Basic Books 2017)

[5] It is one thing whether there are objective moral facts. The other is whether there are objective methods of knowledge of such facts. Compare e.g.: Jeremy Waldron, Law and Disagreement (Oxford 1999) ch. 8

of hedonism, we recognize only two values, pleasure and pain. The hedonist takes it as self-evident that pleasure is good and pain is bad. But even if we combine hedonism with consequentialism, we will have at least two competing theories on offer: rational egoism and utilitarian ethics. Both normative theories call for the action that has the best hedonistic outcome in the long run.[6] Their difference lies in which pleasures and pains are to be counted in the hedonistic calculus. Rational egoism demands that the agent count only his pleasures and only his pains. Utilitarian ethics requires the agent to count the pleasures and pains of all beings who can experience these mental states.[7] Utilitarians are proceeding from the so-called neutrality principle: Every pleasure and every pain should be counted as equally valuable, regardless of the bearer. And this normative principle makes the difference between the two theories.

Importantly, the rational egoist rejects the principle of neutrality as an independent normative principle. Hedonism as such does not imply that we should count every pleasure and every pain as equally valuable, regardless of the bearer. Pleasure and pain are mental states. Everyone experiences only his or her own mental states.[8] Everyone experiences only his or her own pleasure and his or her own pain. The individual takes it intuitively for granted that pleasure is good and pain is bad because he or she immediately experiences his or her pleasure as good and his or her pain as bad. Pleasure in itself is good only for the one who experiences it. And pain is bad in itself only for the one who experiences it. It is true that people can be empathetic. But empathy gives only instrumental value to other people's feelings. When I am empathetic to the feelings of others, someone else's pleasure is good for me only because it causes my pleasure. And someone else's pain is bad for me only because it causes my pain. Hedonism as such does not imply the principle of neutrality. When utilitarians accept the principle of neutrality, they add something extra normative to hedonism. Rational egoism seems to be a more normatively parsimonious theory than utilitarian ethics.[9] Not to mention that the principle of neutrality is not self-evident. Pleasure is good because I experience it as good. Pain is bad because I experience it as bad. It is certainly not self-evident that I should give the pleasures and pains I do not experience the same weight as the pleasures and pains I do experience. Normative theories should recognize the empirical fact that individuals are separate persons with respect to their mental states.[10]

Rational egoism is often objected to as being arbitrary: „*Suppose I claim that I ought to*

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[6] This means the highest aggregate pleasure after subtracting the aggregate pain.

[7] In the literature we sometimes encounter the following distinction: Egoism is individualistic hedonism, while utilitarianism is universalistic hedonism. See e.g. Fred Feldman, Introductory Ethics (Englewood Cliffs 1979) p. 82

[8] Pleasure and pain can be understood as physiological ("natural") states of the brain, but at the cost that it is no longer intuitively self-evident that pleasure is good and pain is bad.

[9] Derek Parfit points out that rational egoism is not normatively the simplest theory. A theory that demands that an agent maximize only his or her present utility is even simpler. See Derek Parfit, Reasons and Persons (Oxford University Press 1984) ch. 45

[10] „It would be contrary to Common Sense to deny that the distinction between any one individual and any other is real and fundamental, and that consequently "I" am concerned with the quality of my existence as an individual in a sense, fundamentally important, in which I am not concerned with the quality of the existence of other individuals." See Henry Sidgwick, The Methods of Ethics (Macmillan 1907) p. 498

maximize the welfare of blue-eyed people, but not of other people. Unless I can explain why blue-eyed people are to be preferred, my claim looks arbitrary, in the sense that I have given no reason for the different treatments. As a rational egoist, I claim that I ought to maximize the welfare of one person (myself). Unless I can explain why I should be preferred, my claim looks equally arbitrary."[11] We are considering a hedonistic version of rational egoism, and so the answer to this objection is easy. As a rational egoist, I claim that I should maximize my pleasure and minimize my pain because I experience only my pleasure as good and only my pain as bad. Other people's pleasure or pain has at most an instrumental value for me, because they are not my mental states. The arbitrariness objection wrongly assumes that the neutrality principle is a hedonistic default. Utilitarian ethics, compared to rational egoism, includes this extra principle. Utilitarians accept it as a normative axiom of their ethical thought. But this means that rational egoism fits Hapla's demand for normative minimalism even better than utilitarian ethics. So the normative minimalism thesis (B3) is true.

2. The empirical reflection thesis

It seems that a distinctive feature and advantage of utilitarianism is its normative minimalism. At the fundamental level, it makes do with only one moral norm of action: the so-called principle of utility. If the utilitarian uses any other moral norms, their correctness is derived from the principle of utility. Another advantage of utilitarianism is its analytical clarity: „*Assuming a clear understanding of the crucial notions of alternative actions, outcomes, value, and well-being, utilitarianism is a precise moral theory which, given appropriate empirical information, has clear implications for all moral choice situations.*"[12] The centrepiece of the utilitarian's work is the discovery of empirical information relevant to the utilitarian's evaluation. Utilitarians usually dislike artificial hypothetical examples that abstract from situational contexts, because utilitarian evaluation is sensitive to empirical input. The typical utilitarian response to such examples is to request the addition of relevant information. If one side of the utilitarian coin is normative minimalism, then the other side is empirical inclusiveness. The better informed we are, the better we can estimate and weigh the consequences of our actions.

In my first text I illustrated this fact on the topic of legal certainty. I compared human rights and utilitarian thinking. A human rights theorist will argue, for example, that legal certainty is an important value because it embodies respect for the human capacity to plan and organize one's future. This means respect for the individual's capacity to be an autonomous agent and, consequently, for his or her human dignity.[13] The utilitarian will argue that a law that is blind to the rational capacities of its addressees cannot function as an efficient system for maximizing total utility. Unpredictable law erodes expectations, people lose trust in the system, and they also lose the incentive to try, plan, and invest. The utilitarian will argue that

[11] Robert Shaver, 'Egoism' (First published Nov 4, 2002; Substantive revision Jan 9, 2023) Stanford Encyclopedia of Philosophy <https://plato.stanford.edu/entries/egoism/>.

[12] Krister Bykvist, Utilitarianism: a guide for the perplexed (Continuum 2010) p. 22

[13] See e.g. Lon Luvois Fuller, The Morality of Law (Yale University Press 1969) p. 162; Isabel Lifante-Vidal, 'Is legal certainty a formal value?' (2020) 11 (3) Jurisprudence 456, p. 459

a law that is blind to the rational capacities of its addressees cannot function as an efficient system for maximizing general utility. Unpredictable law frustrates expectations, people lose trust in the system, and they also lose their motivation to try, plan, and invest. Life turns into mere survival, society does not prosper, the overall benefit is not what it could have been. The utilitarian thus understands the rational agency of individuals not as an intrinsic value, but as an empirical fact that is morally relevant because it is an important factor in maximizing general utility. The moral significance of legal certainty can be explained by a human rights value (human dignity) or a corresponding empirical fact (people have the ability to plan and organize their own future) in combination with the principle of utility. The criticism that utilitarianism ignores morally significant values overlooks the fact that utilitarianism reflects these values in terms of empirical facts. Moral significance is given to them by the principle of utility.

Now let us similarly compare utilitarianism with rational egoism. As mentioned above, these two theories differ in their conception of the principle of utility. Rational egoism demands that the agent count only his pleasure and only his pain. Utilitarians proceed from the principle of neutrality: We should count every pleasure and every pain as of equal worth, regardless of the bearer. So the principle of neutrality is an egalitarian principle. Utilitarian ethics demands that the agent take into account the pleasure and pain of all beings who can experience these mental states. The utilitarian accepts the principle of neutrality, so he or she assumes a priori that equality is an intrinsic value. This is the unjustified (axiomatic) starting point of his or her ethical theory.

The rational egoist has good reason to recognize the value of legal certainty because legal certainty allows him to develop and exercise his or her capacity to plan and invest. But that is not all. It is useful for the egoist that these guarantees also benefit others, because it is advantageous for him to live in a society of effective cooperation. The rational egoist personally benefits from living in a prosperous society and therefore has good reason to support the general institutional mechanisms that enable social prosperity. The egoist does not recognize equality as an intrinsic value, but this does not mean that he or she is indifferent to the value of equality. He or she has good reason to recognize equality with respect to guarantees of legal certainty because this system is beneficial to him or her in the long run. This means that rational egoism goes one step further than utilitarianism. It reflects in terms of empirical facts not only the value of legal certainty, but also the value of equality. The egoist is ready to recognize equality as an instrumental value when he or she assesses, on the basis of empirical facts, that a regime of equality pays off for him or her. We now come to (B2). *The thesis of empirical reflection*: the criticism that rational egoism ignores the value of equality overlooks the fact that rational egoism reflects this value in terms of empirical facts.

The utilitarian can point out that there is a significant difference between his or her approach and the egoistic approach to the value of equality. The utilitarian recognizes equality already at the fundamental level of the hedonic calculus and does so unconditionally. The principle of neutrality is the egalitarian foundation of utilitarian thinking. The rational egoist recognizes equality only when he or she assesses that it is profitable for him or her. He or she can do it at the fundamental level of the hedonic calculus or at the level of social

institutions.[14] The utilitarian can criticize the egoist's instrumental approach to the value of equality. Whenever the egoist assesses, in the light of empirical facts, that inequality rather than equality is personally worthwhile for him or her, he or she willingly abandons the demand for equality. But such a critique doesn't sound very credible, since utilitarianism takes a similar instrumental approach to most values (including the value of equality when considered at other than a fundamental hedonic level). For the utilitarian, any value judgment that goes beyond mere hedonism and the principle of neutrality is conditioned in relation to maximizing general utility. This is a consequence of the methodological requirement to minimize value-normative inputs and maximize empirical inputs. The greater the proportion of the empirical component, the more contingent the evaluation. Rational egoism is continuous in its methodology with utilitarian ethics, but its approach is even more radical.

3. The defensive analogy thesis

In his book, Martin Hapla repeatedly emphasizes that the utilitarian goal is not to maximize utility within a local framework. He uses the so-called transplantation dilemma to illustrate this point. Five patients are dying in the hospital. Each of them urgently needs a different organ for transplant. A perfectly healthy person who would be a suitable donor has just fallen asleep in the waiting room. The critic argues that the utilitarian right course of action is to kill this man and save the five patients in question with the help of his organs. Subsequently, he claims that this utilitarian conclusion is contrary to moral intuitions. It also contradicts the human right to life. Hapla responds that this conclusion is in fact not even correct from the point of view of utilitarian ethics, because it does not take into account all the consequences that can be expected in the future. In particular, the erosion of trust in a health care system that would allow such a practice. Who would go to a hospital where they were at risk of such sacrifice for the benefit of someone else?[15]

In the context of consequentialist reasoning, Hapla's strategy of defense is classic. It consists in revealing, after careful consideration of all the long-term effects of the alleged utilitarianism demand, that it is not in fact a utilitarian demand. The critique of utilitarianism is then dismissed as a textbook example of the straw man fallacy. Hapla's project assumes that utilitarianism provides the same, or at least very similar, results as human rights theory. This assumption cannot be proved in general. However, Hapla has repeatedly confirmed its plausibility by successfully employing the classic defensive strategy. Why is it so successful? Because critics of utilitarianism repeatedly forget that the demands of utilitarianism are not based only on local utility maximization, but on an overall consideration of all long-term effects. This means that we have to take into account a lot of empirical facts. Of course, it is not impossible that critics of utilitarianism will present some example of a true claim of utilitarianism that is contrary to the best ethical theory of human rights, so that the classical defense strategy fails. But so far it seems to be working pretty reliably.

[14] When a rational egoist recognizes equality already at the level of the hedonic calculus, it means that he or she accepts the principle of neutrality for prudential reasons.

[15] Hapla (n 1) p. 41

A critic can argue that utilitarianism takes an instrumental approach to human rights and therefore cannot guarantee their unconditional validity. When, all things considered, we conclude that human rights enforcement is not the best way to maximize general utility in the long run, we have a good utilitarian reason to abandon human rights. This objection is well founded. But the utilitarian will reply that the moral validity of human rights is not dogma. Human rights are not to be revered as something sacred. Human rights are not intrinsic values. They are valuable because they are socially useful. It is not rational to stubbornly support certain social institutions when we have available alternative institutions that are more socially useful.

We will now show that rational egoism has arguments against its critics that are analogous to the defensive argumentative strategy of utilitarianism. To illustrate this point, consider the following example: „*A man is the treasurer of a large pension fund. He is entrusted with the job of keeping track of and investing the money deposited by the workers. When a worker retires, the worker is entitled to draw a weekly sum from the fund. Suppose the treasurer discovers that it will be possible for him to use all the money for his own selfish pleasure without being caught. Perhaps he wants to buy a large yacht and sail to a South Sea island, there to live out his days in idleness, indulgence, procreation, and, in a word, enjoyment. Since there is no extradition treaty between the South Sea island and the United States, he can get away with it. Let us also suppose that if the treasurer does abscond with the funds, hundreds of old people will be deprived of their pensions. They will be heartbroken to discover that instead of living comfortably on the money they had put into the pension fund, they will have to suffer the pain and indignity of poverty.*"[16]

A critic of egoism will argue that stealing money from the pension fund is an egoistically right but immoral action. It is an immoral action because it abuses the trust of the workers and causes them harm. But it is egoistically right for the treasurer because it pays off for him. However, a rational egoist can employ the classic defense strategy. He will argue that all things considered, we conclude that such an action is not right even from the point of view of rational egoism: „*One way of establishing this claim is to show that agent utility has been improperly calculated. For example, even though there is (ex hypothesi) no extradition treaty between the South Sea island and the United States, the treasurer isn't safe until he arrives on the island. There is always a nonzero probability that he will be apprehended before he leaves the jurisdiction of the United States, in which case he will (or may) be indicted, tried, convicted, and punished (possibly severely). There is also a nonzero probability that family and friends of the victimized pensioners will track the treasurer down and return him to the United States (or worse, torture and kill him). There is also a nonzero probability that, when word gets out among the islanders about what the new resident did to become wealthy, they will take the law into their own hands and "punish" him (perhaps hoping, thereby, to appease the United States). When these probabilities (and others) are taken into account, the egoist says, the act of stealing the money no longer maximizes agent utility; and if it no longer maximizes agent utility, then it is not right, according to egoism.*"[17] A utilitarian may argue that rational egoism can somehow

[16] Feldman (n 7) p. 95

[17] Keith Burgess-Jackson, 'How to Defend a Normative Ethical Theory' (2021) 11 (2) Open Journal of Philosophy 229, p. 239.

justify why it is wrong for the treasurer to steal money from the pension fund, but it uses the wrong reasons. Stealing money is wrong not primarily because it does not maximize the treasurer's personal utility, but because it does not maximize the general utility.[18] But an analogous objection can be used against the utilitarian: Sacrificing an individual's life to save five other people is wrong not primarily because it does not maximize general utility, but because it causes harm to the person sacrificed.

Now we can formulate (B1). *The defensive analogy thesis:* Rational egoism uses defensive arguments against its critics that are analogous to utilitarian defensive arguments. Consequently, egoism is also subject to analogous counterarguments. If Hapla accepts a utilitarian defensive strategy against critics of utilitarianism, he should not reject an analogous defensive strategy when employed by rational egoism.[19] Rational egoism is a structurally similar normative theory to utilitarian ethics, so it should come as no surprise that it uses similar argumentative moves. Sophisticated versions of utilitarianism and rational egoism are also likely to converge on similar conclusions about the rightness of action. Therefore, Hapla should justify why he prefers utilitarian game over egoistic game.

Conclusion

Martin Hapla evaluates ethical theories according to meta-theoretical criteria. He prefers simple, clear, transparent and parsimonious theories. He wants to minimize the value-normative component and maximize the empirical component of moral thinking. He concluded that these criteria are best met by utilitarian ethics. The difficulty is that the same criteria are even better met by rational egoism. Hapla may argue that rational egoism *per se* is not an ethical theory.[20] I don't think it matters whether rational egoism *per se* is an ethical theory. More importantly, it is a normative theory that has a potential to justify moral obligations as well as human rights. In light of egoism, it can be justified that it is rational to take on such commitments. In this sense, it is a competing theory to utilitarian ethics.[21] If Hapla wants to insist on utilitarianism, he must explain why utilitarianism is a better theory of right action and justification of human rights than rational egoism. But this is not an easy task. Indeed, even the brilliant Henry Sidgwick in his heroic *The Methods of Ethics* (1874) did not manage it. I confess to gloating over this. Hapla delights in frustrating his critics by easily deflecting their classic objections to utilitarianism with an equally classic strategy

[18] A non-utilitarian might formulate the objection as follows: Stealing money is wrong not primarily because it does not maximize the treasurer's personal utility, but because it harms the workers.

[19] Burgess-Jackson rightly demands that we give the egoist the same leeway to use the classical defense strategy that we grant the utilitarian. See Keith Burgess-Jackson, 'Taking Egoism Seriously' (2013) 16 Ethical Theory and Moral Practice 529, p. 532

[20] „Rational egoism claims that an act is rational if, only if, and because it has at least as much expected benefit for the agent as any alternative act. Rational egoism is not a theory about what is ethical." Viz Brad Hooker, 'Egoism, Partiality and Impartiality' In Roger Crisp (ed), The Oxford Handbook of the History of Ethics (Oxford University Press 2013) p. 716

[21] If Hapla believes it matters, the discussion can be reoriented from rational egoism to ethical egoism. In my view, however, ethical egoism is a dubious normative position. Either it collapses into rational egoism, or it is difficult to explain what its ethical nature consists in.

of defense.[22] It is a predictable game. I imagine he would be frustrated by a rational egotist in a similar vein. Martin would present him with hypothetical examples to illustrate that egoism is contrary to moral common sense. An egoist would smilingly retort that he has not considered all the relevant empirical facts.

More positively: Don't be afraid of egoism. If we can justify human rights in terms of rational egoism, this means that human rights are burdened with minimal value-normative assumptions. If this is the case, this is good news.

[22] Jiří Baroš, 'Proč nejsem utilitaristou? Vyznání přirozenoprávníka' (2023) 11 Právník 1047; Martin Abel, 'Utilitaristická justifikace lidských práv: čtyři argumenty' (2023) 11 Právník 1062; Martin Turčan, 'Utilitarizmus, ľudské práva a naše morálne intuície' (2023) 11 Právník 1067; Martin Hapla, 'Proč být utilitaristou? O smyslu a zdůvodnění lidských práv' (2023) 11 Právník 1080

Discussion paper

Note on the importance of empowering norms in the Kelsen's late thought

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Abstract

In this paper, I discuss the theory of norms in Kelsen's late thought. I describe the explication of norms as empowered senses of volitional acts directed at the behaviour of the other, identifying an inconsistency in Kelsen's late theory of norms. At one time norm is defined as a subjective sense of a volitional act and at another time as an interpreted sense in accordance with some other external norm. I locate the source of this inconsistency in the incomplete development of Kelsen's doctrine. Next, the paper elaborates on empowering norms, distinguishing between their types. In the last part, I discuss why empowering norms should be understood as primary norms, where the reason is seen in the functional similarity of empowering norms to the basic norm.

Key words: Kelsen, The General Theory of Norms, empowering norms, basic norm, grundnorm, sense of volitional act, theory of norms, norm

Introduction

This paper[1] focuses on the theory of norms in Kelsen's thought after 1960, which includes the second edition of The Pure Theory of the Law,[2] but especially The General Theory of Norms[3]. However, it is particularly concerned with the importance of empowering norms.

I will first briefly introduce the theory of norms as senses[4] of acts of will, then this conception will be problematized by the fact that Kelsen clings, even in his later work, to the distinction between subjective and objective senses of acts of will. Next, the normative function of empowerment will be elaborated, while it will also be shown that and how the basic norm is functionally related to the empowering norms and why it is important for Kelsen's late thought.

1. Norms as senses of acts of will

It is possible to interpret Kelsen's work in such a way that the theory of norms as senses of volitional acts that are directed to the conduct of another has always been held by him, even in the first edition of The Pure Theory of Law. There at least as one of several theories of norms.[5] However, it is standardly assumed that he has explicitly subscribed to this theory since the second edition of The Pure Theory of Law, i.e., since the early 1960s. There he explicitly states:

> Norm is the meaning of an act by which a certain behaviour is commanded, permitted or authorized.[6]

A few lines earlier, he notes that it is an act of the will, and further that this act is directed at the behaviour of another. In addition to acts of the will, as we see in The General Theory of Norms, there are also acts of thought in Kelsen's theory of mind, which is also developed therein. Each of the mental acts has a sense which has its content.

The sense of a mental act of thought is the statement that something is; the sense of a mental act of will, intentionally directed at the behaviour of another, is the norm that one should behave in a certain way.[7] Language, according to Kelsen, serves to express, that is, to disclose mental acts, whereby a certain utterance is a statement if this utterance expresses the content

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[1] I would like to thank both reviewers for their insightful comments on this paper.

[2] Hans Kelsen, *Pure Theory of Law* (2nd edn, University of California Press, 1967).

[3] Hans Kelsen, *General Theory of Norms* (Oxford University Press, 1991).

[4] I use the expression "sense", despite the fact that the expression "meaning" is commonly used in Kelsenian studies, and it is because the paper is published in journal localized in the Czech Republic. The most common Czech translation of the English "sense" better captures that the senses of volitional acts are not in the first place about semantic meanings. Although the theoretical connection between semantic meaning and the sense of a volitional act is an interesting question in itself, this paper does not address it. A reader used to the Kelsenian studies written in English may replace virtually all expressions of "sense" with "meaning".

[5] Cf. for example this quote from Hans Kelsen. *Introduction to the Problems of Legal Theory* (Oxford University Press, 1992) p. 10., i.e. from the first edition of The Pure Theory of Law: "*The norm is itself created by way of legal act whose own meaning comes, in turn, from another norm.*"

[6] Kelsen (n 2) p. 5.

[7] Kelsen (n 3) p. 26.

of a mental act of thought; the same utterance is a norm if it expresses the content of a mental act of will directed towards another. The sense of a mental act is therefore corresponding to the sense of the sentence which formulates the content of that act, and which is understood at one time as a proposition and at another time as a norm, depending on which mental act we have in mind.[8] According to Kelsen, it is better to say that "the norm is a sense" than that "the norm has a sense".[9]

2. Command and Norm

It should be said that the above definition, which understands a norm as a sense of a volitional act intentionally directed at the behaviour of another, is not a complete reconstruction of Kelsen's position. Its addition stems from the conceptual distinction between a command and a norm.

A command is also understood as the sense of a volitional act aimed at the behaviour of another, but it is a sense that is not binding on the other, whose behaviour is the focus of the relevant act of will, and therefore does not create an obligation for the addressee. Bindingness, however, is, according to Kelsen, an essential characteristic of certain commands, which is precisely what makes them norms. Bindingness can be achieved primarily[10] by the person who issues the command being empowered to issue it.[11] Thus, the norm is in a way a qualified command. And from here also follows the relation between the basic norm, as the systematic basis of normativity, and empowerment, which I will discuss later. Up to this point, intuition can be followed along with Kelsen without much difficulty.

Further, however, Kelsen identifies the empowered command with the objective sense of the volitional act in question and the non-empowered command with the subjective sense of the volitional act in question.[12]

The subjectivity of the sense of a volitional act can be understood as that normative qualification of the sense of a volitional act which is created and held by the person who performs the act. This subjective sense may or may not coincide with the so-called objective sense of the volitional act.

Exactly what the objective sense of the norm is in the Kelsen's late doctrine is very problematic to determine, because it seems to be something that should approach the subjective sense from outside[13] and make it a norm. But this making it a norm is only possible if the subjective sense corresponds to this objective sense, and this must already be the case before we compare these senses.

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[8] Ibid, pp. 32-36. Cf. also Michael Hartney's preface to the English translation of The General Theory of Norms. Michael Hartney, 'Introduction: The Final Form of the Pure Theory of Law' in Hans Kelsen, *Všeobecná teorie norem* (Masarykova univerzita, 2000) p. xxxviii.

[9] Ibid, p. 26.

[10] It is possible, according to Kelsen, that normativity can also be achieved in other ways, since he consistently and systematically cites custom as its source. However, I will not address this in this paper.

[11] Ibid, p. 27.

[12] Ibid.

[13] Since it is not a subjective sense, perhaps it does not originate in the inner world of the person commanding.

This correspondence brings with it at least two problems:

(a) If the norm itself is the sense a volitional act that someone in particular must perform, and thus the sense is subjective, on what basis can we determine from where outside the objective sense should come? There seems to be no room for objective sense without considering some eternal being constantly thinking objective senses to which subjective senses correspond or other means of ensuring the persistence of the sense of the volitional act after the act of will by which it was normed has ended.[14]

(b) Who and by what mechanism should evaluate whether the subjective sense corresponds to the objective sense, since we find no such normative mechanism in The General Theory of Norms?

I take it that these problems arise from the first edition of The Pure Theory of the Law and the emphasis therein on a normative-scientific reconstruction of norms, where the sense of an act of volition is interpreted externally, from the perspective of the pure doctrine, rather than internally from the perspective of the realm of *Sollen*, i.e., from the perspective of the norm-maker who performs the relevant volitional act.

As a result, two conceptions of what is norm are interchanged in The General Theory of Norms without any rule. One interpretive, according to which the sense of a volitional act is perhaps the result of interpreting its content so that it corresponds to some objective sense that is epistemically unclearly attainable, and only this interpretation is a norm. The second, which seems to be characteristic of the later stage of Kelsen's thought, according to which the sense of a volitional act is the norm itself, without any interpretation of it being a condition for it to become a norm. In this latter conception, one can proceed to eliminate the category of objective sense as redundant, because only norm correspond to the objective sense. Thus, if the sense is a norm, then it automatically corresponds to objective sense. In other cases, it is not a norm, and the category of objective sense as a theoretical tool adds nothing new.

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[14] I take it that objective sense, if it is to function as the sense of the volitional act of a valid norm, presupposes a mind that contains it, because otherwise it cannot be the sense of a volitional act at all, that is, the sense of an operation that is by definition performed by an actor. I also assume that since the basic norm is fictitious norm (cf. Ibid, p. 256), the mind that makes the fictional act of will that results in the basic norm can also be a fictitious. I thank one of the reviewers who proposes two solutions other than the existence of a being that has persistent objective senses in its mind. 1) The reviewer proposes that there might be an external instead of an eternal being, where I take the core of this proposal to be primarily about avoiding the metaphysics of an eternal being. The problem with this proposed solution, however, is that the distinction between subjective and objective sense disappears at that point, since the sense of the volitional act of an external being will again be "merely" a subjective sense, and there is nothing that gives it the quality that brings validity (objectivity) to subjective senses of volitional acts. 2) The reviewer's second suggestion refers to the solution that the existence of a norm depends on the presence or absence of empowerment by a given normative system. This is an unproblematic proposal from my point of view, but if the empowering norms that ensure the existence of norms in a normative system (i.e. their validity) are themselves to be norms, then they also have to correspond to some objective sense of a volitional act, and the problem returns. From where something like objective sense stems? The inquiry in such a case should move to the question of the nature of the basic norm.
Related is the problem of the persistence of the objective sense of a volitional act outside of some mind that does the norming, i.e., after the act by which the norming is performed has ended. Kelsen assumes this situation (cf. Ibid, p. 28) but unfortunately does not, in my opinion, explain it in any details. A mechanism ensuring such persistence based somehow in the domain of *Sollen* could give coherence also to the distinction between subjective and objective sense.

The problem, however, is that we have no way of knowing in advance whether the subjective sense of a volitional act is a norm.

I will now leave aside the above suggested discrepancy, which, moreover, may be caused, at least in part, by the fact that The General Theory of Norms was not completed and was published posthumously. In what follows, I will look more closely at the problem of empowerment.

3. Empowerment in The General Theory of Norms

Bindingness of a norm is understood as a state in which the one who performs a volitional act is empowered to form the sense of the volitional act, which is consequently a norm. The state in which a norm is to be followed signifies that there is some other norm which stipulates that the former is to be followed. This other norm is always an empowering norm. Kelsen understands the binding character of a norm as in fact the only condition for the validity or normative existence of a norm, and therefore the position of empowering norms is seen as crucial for normativity, and only of secondary importance are commands.[15], [16]

Empowerment is one of the functions of norms. Other functions of norms include commanding and permitting, later explicitly also derogating, and marginally in some of Kelsen's works also defining a concept.[17]

However, empowerment is introduced in Kelsen as a kind of command.[18] The General Theory of Norms distinguishes three basic types of empowerment:[19]

(i) Subject A commands subject B to issue a command to subject C, thereby authorising subject B to issue a command to subject C;

(ii) Subject A commands subject C to obey subject B, and thus subject A has empowered subject B to issue norms binding to subject C;

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[15] Kelsen (n 3) p. 27.

[16] This view of the primacy of empowerment over commands is not uniform, especially in the phase of Kelsen's thought that precedes the second edition of the Pure Theory of Law. Hart, for example, interprets Kelsen to understand empowerment as inherent part of commands, which is seen as Kelsen's attempt to reduce empowerment to commands. Cf. Herbert L. A. Hart, *The Concept of Law* (2nd edn, Oxford University Press, 1994) p. 35-36. With reference to Kelsen, among others, Torben Spaak also regards the commands as primary with reductionist ambition. Cf. Torben Spaak, 'Norms that Confer Competence' (2003) 16 (1) Ratio Juris 89, pp. 95-96. And also Ibid, footnote n. 23. Cf. also Kelsen (n 3) p. 258-261, where Kelsen claims that empowerment is derivative. Paulson on the other hand argues influentially for understanding empowering norms I Kelsen's theory as primary and commands as derivative. Cf. Stanley L. Paulson, 'An Empowerment Theory of Legal Norms' (1988) 1 (1) Ratio Juris 58, p. 68; Stanley L. Paulson, 'Hans Kelsen as outlier: the defence of a radical norm theory' in Stefano Bertea (ed), *Contemporary Perspectives on Legal Obligation* (Routledge, 2020) pp. 54-67.

[17] Derogation in the second edition of the Pure Doctrine of Law and in the General Theory of Norms. Defining a concept more emphatically in the second edition of The Pure Theory of Law. Overall, however, I think that these are rather marginal topics within Kelsen's theory of norms.

[18] Kelsen (n 3) pp. 258-261.

[19] Ibid, pp. 260-265.

(iii) Subject A commands something to subject B, and thereby empowers everyone to give commands to subject B such that they can be subsumed under the command given to subject B by subject A itself.[20]

Point (i) is the case, which Kelsen already discusses in the first edition of The Pure Theory of Law. The problem that arises with this type of empowerment is that it is difficult to show why, for example, my empowering one of my subordinates to command something to a bystander would create an obligation on the bystander to follow such a command from my subordinate. This type of empowerment can only work in a closed normative system and constitutes, in my view, a residue of early Kelsen's doctrine, but one that can be given some coherent meaning, as I will show below.

Point (ii), on the other hand, is an expression of a common and intuitive idea of empowerment, i.e., that if I have power, for example, over one of my subordinates, then I can command him to obey another of my subordinates as well, and thus actually transfer part of my power over the first subordinate to the second subordinate, who can thus act normatively in relation to the first subordinate's behaviour.

Point (iii) seems to me to be extremely counter-intuitive, but it is a consequence of Kelsen's departure from the logic of norms. For if the individual norm cannot be derived from the general norm because the individual norm does not follow from the general norm, then this mechanism must be provided directly in the realm of the senses, i.e. through the will. Thus, any general command must empower all to issue individual commands that correspond to that general command.

Kelsen further elaborates a division according to whether the empowerment is formal or formal and material, i.e. whether the content of the empowering norm already indicates what content the norm issued by the empowering agent is to have, or whether it is only a blanket empowerment.[21] However, there is no need to go into detail at this point.

However, I think it is worth noting that the fact that empowerment can be introduced as a kind of command is a consequence of the modal plasticity of language, which means that the same expression can at one time mean a command in terms of normative function, at another time an empowerment, and from a normative point of view these are interchangeable, just as a command within the classical theory of deontic logic can be understood as a forbiddance of the opposite. Command can also be introduced by empowerment, which I will show below. I take it that in the case of Kelsen's norm theory, and especially as a consequence of the basic norm theory, the understanding of empowerment as the primary modality is indeed much more intuitive than the situation where command is taken to be primary.

4. The importance of empowering norms - the basic norm as empowerment

Let us now return to why I think that empowering norms are more relevant to Kelsen's theory

[20] In this transcript on commands, Michael Hartney also lists the types of empowerment, cf. Hartney (n 8), p. xli.

[21] Kelsen (n 3) pp. 260-261.

than command norms. As indicated above, the reason for this is my belief that the basic norm shares its function, that of empowering, with the empowering norms, despite the fact that the former is not a norm of positive law in The General Theory of Norms. Kelsen goes even further here by not even treating the basic norm as a hypothetical norm, but explicitly stating that it is a fiction, a thought norm, which is the sense of a thought volitional act.[22]

The basic norm as the final justification of the validity, and therefore the final justification of the binding character of the norms of a normative system is nothing more than an empowerment projected hierarchically throughout the system. While there can be no normative reason for the actual validity of a basic norm, since it would no longer be a basic norm, it can nevertheless be argued for, at least from the point of view of legal theory.

According to Kelsen, the basic norm may or may not be presupposed, but only if it is presupposed, and this is essential, can the subjective sense of a volitional act directed at another be the norm.[23] Thus, a positive law can only be positive if it is conditional on the basic norm being valid, and this condition is satisfied. Without the basic norm, there can be no positive law, and its existence in turn reciprocally justifies the existence of the basic norm.

The above can be illustrated by an example. Consider a norm expressed in a normative sentence:

(iv) If a delict occurs there ought to be a sanction.[24]

In this sentence, "ought to" expresses both the command to impose a sanction and the empowerment to do so. However, it is important to determine when "ought to" in this example expresses a command and when it expresses an empowerment.

On this point, Kelsen states that it is a command when the omission to impose a sanction by the one who is empowered to impose it is itself subject to a possible sanction by someone else against the one who should have imposed the first sanction. In the other case, it is a simple empowerment.[25] This second-order or second-instance possibility of imposing a sanction for failure to impose a sanction in the first instance, unless it is again secured by the possibility of a sanction of some still higher instance, is again an empowerment (i.e., a simple empowerment and not a command), namely, an empowerment of the second instance, which consists in the latter being empowered to impose a sanction on the former.

It is the modus of empowerment that appears whenever one talks about law, not only when one talks about empowerment as such, but also when one talks about commands.

This (iv) corresponds in a sense to the type of empowering norm as described under (i) above, and can also be rewritten in a developed form from which the plasticity of normative modes is evident, as follows:

(v) If person S1 commits delict D, person S2 is empowered *[commanded, obliged]* to impose sanction X on S1, and if S2 fails to impose sanction X on S1, then person S3 is empowered *[empowered]* to impose sanction Y on S2.

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[22] Ibid, p. 256.

[23] Ibid.

[24] I have taken the example from Paulson (n 16a) p. 68.

[25] Kelsen (n 2) pp. 24-27.

The empowerment in the basic norm then, in my view, plays the role of the second empowerment in sentence (v) above, that is, the role of the empowerment of S3, who, if he or she existed, would be empowered (empowered) to impose a sanction on S2, who is empowered (commanded, obliged) to impose a sanction on S1.

In order for person S2 to be obliged to do something, i.e., to be commanded to sanction some conduct, there must be some other, albeit fictitious, person who ensures that person S2's empowerment is actually a command to carry out his or her empowerment. The fact that the empowerment of person S2 is already, at the time of the normative-theoretical reconstruction that is supposed to justify the basic norm, understood as a command, on the other hand, in turn justifies the existence of the basic norm, despite a certain circularity of justification in that the fact that this S2's empowerment understood as a command would not be possible without the basic norm.

Conclusion

In this paper, I have discussed Kelsen's theory of norms, shaped mainly in the period from the 1960s until Kelsen's death. In the course of describing norm theory as an empowered sense of a volitional act directed towards the behaviour of another, a certain inconsistency in the uniformity of understanding of norm theory in Kelsen's late work was revealed, whereby at one time the norm is by definition the subjective sense of a volitional act, at another time it is an objective sense, i.e. a perhaps sense interpreted in accordance with some external and pre-existing norm or such, that just is in accordance with objective sense without further interpretation, but for unknown reason.

This discrepancy, which cannot simply be reconciled by some overarching conception, can, in my view, be overcome in the sense that the first conception of norms will be understood as being directly related to the volitional nature of norm-making in the realm of *Sollen*, and the second conception will be understood more in terms of pure theory.

It is a separate question, however, whether Kelsen's later thought is an abandonment of pure theory of law and its replacement by an entirely new theory, or whether it is a revision of pure theory of law supplementing the theory with the volitional theory of norms to describe the dynamics of the emergence and functioning of norms directly within the realm of *Sollen*.

In the next section, I moved on in my analysis of norm theory to isolate empowerment as an important function of norms. With respect to empowering norms, I first explained their importance within norm theory and then introduced and briefly commented on the different types of empowering norms.

Despite the traditional understanding, which coming from Kelsen's own articulation I have argued in this paper that for a more straightforward understanding of Kelsen's work, it is appropriate to understand empowerment with primary importance and command only with secondary importance. This is due to a certain analogy between empowered norms by positive law, where the empowering norms, as well as the norms that arise from this empowerment, are already in the context of positive law and the established normative system, and the empowered norms by the basic norm, which are applied precisely when the normative system is established, and as an unbridgeable factual condition. In this vein,

I have also discussed the functional similarity between the empowering norms and the basic norm.

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