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Systematic Interpretation and the Re-systematization of Law: The Problem, Co-requisites, a Solution, Use

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Abstract
A renewed search for legal certainty is a reaction to the preponderance of judge made law, which has been in turn prompted by the democratic deficit of the EU and the impact of Anglo-American law. The problem is that the search is oblivious to both systematic interpretation and the need of re-systematization of law. The paper defines systematic interpretation, relates the definition to standard French and German conceptions, indicates the room for systematic interpretation in Anglo-American laws, and states prima facie reasons for a re-systematization of law as a prerequisite of systematic interpretation. The problem cannot be appreciated outside its proper context. It is a disregard for causation and evaluation. Hence the paper outlines Aristotle's understanding of causation and evaluation in his presentation of phronesis, reconsiders continental European legal thought in the light of Aristotle's presentation, and offers policy-oriented jurisprudence as a remedy to the deficit of evaluation and causation in European legal thought. A solution to the problem offers a typology of criteria and clarifies positive and fundamental legal concepts, positive and fundamental criteria of systematization, and the place of criteria in knowledge of law. The usefulness of the criteria is demonstrated by a common approach to the systematization of law and an alternative diagnosis of a defect of systematization diagnosed by an authority in history and philosophy of law rather than legal theory.

Keywords Systematic interpretation · Systematization of law · Causation · Evaluation · Phronesis · Policy-oriented jurisprudence

(0) The problem addressed in this paper is the renewed search for legal certainty that is observable in recent writings, e.g. [16], and which is oblivious to both systematic interpretation and the need for a re-systematization of law.

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(0.1) The delimitation of the problem is made in two steps. Section 1.1 explains the search as a reaction to the preponderance of judge made law, which has been in turn prompted by the democratic deficit of the EU and the impact of Anglo-American law. Section 1.2 defines systematic interpretation, relates the definition to standard French and German conceptions, indicates the room for systematic interpretation in Anglo-American laws, and states prima facie reasons for a re-systematization of law as the prerequisite of systematic interpretation.

(0.2) The problem cannot be appreciated ouside its proper context. It is a disregard for causation and evaluation, which has plagued continental European legal thought in practice as well as in theory. Hence the preliminary tasks, the fulfilment of which should create the co-requisites of the legal system and systematization of law; and, at the same time, meet expectations raised by the editors' agenda. To those ends, the paper outlines Aristotle's understanding of causation and evaluation in his presentation of phronesis (Sects. 2.1–2.2), reconsiders continental European legal thought in the light of Aristotle's presentation (Sect. 2.3), and suggests that policy oriented jurisprudence is a remedy for the deficit of evaluation and causation in European legal thought (Sect. 2.4).

(0.3) The solution to the problem offers a typology of criteria useful for the purpose at hand (Sect. 3.1) and clarifies positive and fundamental legal concepts (Sects. 3.2–3.3), positive and fundamental criteria of systematization (Sects. 3.4–3.5), and the place of criteria in the knowledge of law.

(0.4) The concluding Sect. 4, which should demonstrate the usefulness of the criteria in previous sections, outlines a common approach to the systematization of law (Sect. 4.1), indicates a defect of the systematization that has been diagnosed by an authority in the history and philosophy of law, but not in legal theory (Sect. 4.2), and proposes an alternative diagnosis and a corresponding remedy for the defect (Sect. 4.3).

1 The Problem

1.1 The Preponderance of Judge Made Law

The search itself is not a problem. It is constitutive of law. The renewed search is laudable as a reaction to the decline of the rule of law in Europe due to the ever-growing preponderance of judge made law. This law defies systematization, which is the prerequisite of systematic interpretation.

(1.1.1) In the laws of European integration the preponderance of judge made law is a consequence of a democratic deficit. Both the European Union and the Council of Europe lack democratic institutions, most notably parliaments with full legislative and budgetary powers and executives responsible to parliaments and electorates. An

example of this preponderance is the jurisprudence of the European Court of Human Rights, which is based not only on the European Convention of Human Rights and Fundamental Freedoms but also on the European Social Charter [37: 245–253]. The latter instrument is plainly not a source of law that the Court is allowed to rely on to declare or create rights and duties.[1]

(1.1.2) The preponderance of judge made law is also a consequence of the impact of Anglo-American laws.

(1.1.2.1) English law, which has observed the rule of precedent more closely than its US counterparts and undergone conceptualization inspired by both civil law scholarship and English analytical philosophy, may be even more certain than continental European laws, as claimed by a classic Anglo-American authority, [18: 40–65, cited by [34:13]. However, the observance of precedents creates rules that are more limited in scope than the rules of codified legal systems [44: 2.2]. The multitude of rules is itself an obstacle to systematization. An even more formidable obstacle is the lack of connection among the rules due to the art of distinguishing between cases. This consists in disqualifying all the precedents proposed by the opponent, and thereby reducing facts of the case to a singular event, all with a view to proposing a decision, precedental or original, that fits just the event. This art results in legal standards that are not only narrow in scope, in comparison to continental European legal standards, but also discrete. Finally, the disagreement of Anglo-American lawyers on the criteria for distinguishing between the *ratio decidendi* and *obiter dicta* of a judicial precedent, vide [12: 65], leads to an awkward conclusion: unlike American laws, English law, whose practitioners are more inclined to believe that the distinction between *ratio* and *obiter,* may be conceptualized systematically, provided it is not vitally important whether what has been conceptualized is a real or merely putative law.

(1.1.2.2) The problem with American judge made law was diagnosed vividly by the following comparison made by Ruth Wedgwood at a conference on international criminal law: when a German judge applies her five hundered concepts to the facts at hand, she has the discretion to sentence the defendant from 3,5 to 5 years of imprisonment; when an American judge applies to the same facts all of her fifty concepts, she has a discretion between zero and twenty years of imprisonment [41]. The basic assumption of this paper is that this comparison captures the difference between continental European civil law and Anglo-American common law. A basic

[1] European Social Charter (Revised) of 3 May 1996, European Treaty Series No. 163; https://rm.coe.int/168007cf93, Part VI (entry into force, territorial application etc.) or other parts, and European Convention on Human Rights (as amended by Protocols 11 and 14, and supplemented by Protocols 1, 4, 6, 7, 12 and 13) of 4 November 1950, European Treaty Series No. 005 at al.; http://www.echr.coe.int/Documents/Convention_ENG.pdf, do not provide for that the Charter is binding for the European Court of Human Rights.

claim of the paper is that the difference is a consequence of the more systematic structure of the former (Sect. 1.2.2).

1.2 Systematic Interpretation and Systematization

As was mentioned, the problem addressed in this paper is the renewed search for certainty that is oblivious to both systematic interpretation and the need for a re-systematization of law.

(1.2.1) Systematic interpretation is the primary and the only genuinely legal method of interpreting law in the continental European legal tradition. It is the genuinely legal method in that it is the way of determining the meaning of a law (a word, a rule, an institution, etc.) by considering the law in its statutory (*Gesetz*, *lois*) or other legal context only, that is, in one or several legal acts of the same legal system (a statute, a regulation, an administrative act, a contract, a judicial decision). Systematic interpretation differs from non-legal methods, that is, the ways of determining the meaning of a law by considering the law outside its legal context, most notably in ordinary language, extra-legal technical expressions (medical, scientific, financial, etc.), extra-legal values (political, moral, economic), etc. Systematic interpretation is the only legal method in that other methods are either special cases of systematic interpretation (most notably historical interpretation, which takes into account *travaux préparatoires*, and purposive interpretation that considers purposes in the legal context) or non-legal methods. Systematic interpretation is the primary method in the continental European legal tradition, understood as what is typical (rather than average) of continental European legal orders, in that the meaning of a law is determined primarily by considering a law in its statutory or other legal context, and only by considering the law outside its legal context if that is not possible. For instance, the meaning of the word 'vehicle' is determined for the purposes of custom duties from statutes or other legal acts on custom duties, for the purposes of traffic safety from statutes or other legal acts on traffic safety, for the purposes of taxation from statutes or other legal acts on taxation, etc.; and only if the word 'vehicle' is not defined in statutes and other legal acts is its meaning determined by uses of the word in ordinary language.

(1.2.1.1) Systematic interpretation as defined in 1.2.1 is largely identical with logical interpretation in the standard French sense, which takes into account not only the context but also the purpose and history of the law that is being interpreted [62: 234] [56: 384–389]. However, the definition in 1.2.1 also includes consideration of the legal context, which is in French jurisprudence categorized as grammatical interpretation [62: 235].

(1.2.1.2) Systematic interpretation in German jurisprudence is sometimes used in the sense identical to the sense defined here [27: 279–290]. But in the standard German usage systematic interpretation does not include interpretations that take into account history, purpose and extra-legal values [62: 29–48, 438–65].

(1.2.1.3) It is systematic interpretation, which presupposes a legal system, that differentiates the continental Europan legal tradition from its Anglo-American counterpart. However, this is a difference of degree rather than substance [54: 461–510].[2] The difference may look insignificant due to the high degree of conceptualization of American laws, which is at a glance strikingly similar to conceptualizations of European laws. The reason for this lies in American legal education. American national law schools, ca 200 in number, educate their students in American law, which does not exist as positive law. What exists as positive law are the common laws of fifty states, federal constitutional law and the emerging federal common law. American law exists only by virtue of elaborate legal concepts that have been formulated largely by leading American legal scholars. However, concepts of American law, such as the ones in *Black's Law Dictionary*, although they are linked in clusters, do not form a hierarchically integrated system. This fact is explicable by a series of reasons. The first is the art of distinguishing between cases, already outlined at 1.2.1, which American lawyers learn at law schools and use in everyday practice. The second reason is the relationship between judge made law and statutory law, wherein the latter consists of exceptions to the former [54: 471–472]. The third is that, as a consequence of the first and second reason, and also of the undergraduate (and even graduate) education of American law students in fields other than law, the concepts of American law are fundamental legal concepts that often differ significantly from the positive legal concepts of the common law of states (for further clarification, see the two types of legal concept in Sects. 3.2–3.5). The final reason is that American law schools do not teach systematic legal disciplines, neither as legal dogmatics nor as legal theory/jurisprudence (in the sense in Sect. 3.5). Weaker systemic connections among the legal standards of the Anglo-American legal tradition, in comparison to the connections among the legal standards of the continental European tradition, narrow down the possibilities for systematic interpretation of laws and leave ampler room for the literal or plain meaning rule, which requires the judge to recognize that a word in the statute that is being interpreted has the meaning that the word has in ordinary language [62: 875–878].[3] According to the literal rule, the word 'vehicle' has the meaning that the word has in ordinary language—unless, of course, the word is explicitly defined differently by the statute that is being interpreted or by another relevant legal act (as it increasingly is in most Anglo-American laws).

(1.2.2) Although systematic interpretation, which is the primary as well as the only genuinely legal method of interpreting law in the continental European legal tradition, presupposes the concept of a legal system, the latter is in disarray. Suffice it to

[2] Summers, Robert S. and Taruffo, Michele, point out [54: 464–465] that the higher courts of all legal systems analysed in the Study (Agentina, Germany, Finland, France, Italy, Poland, Sweden, UK, USA) "appear to rely on what might be called a 'common core' of at least 11 basic types of argument", which include the following two that largely overlap with what is meant by systematic interpretation, namely, "2. Arguments from a standard technical meaning of ordinary words of of technical words, legal or non-legal" and "3. Contextual-harmonization arguments".

[3] Other mentions of the literal rule are indexed at [62: 1472].

note two prima facie reasons for a re-systematization of continental European laws, which might be of interest also to Anglo-American laws. First, Roman-German civil law, which has been the model for the systematization of other branches of law, was completed in the 19th century, *vide* [4, 6]. Secondly, the most obvious criteria of systematization, namely, the ones for identifying and distinguishing legal subjects, have been misplaced to such an extent that the the legal subject has virtually disappeared from fundamental legal concepts while all the attention has been devoted to human rights, most notably the right to equality (see Sects. 4.3).

2 Co-requisites

2.1 Phronesis, Cleverness, and Causation

The first preliminary problem is the proclivity of continental European jurists to derive individual/concrete legal decisions—especially judgments—from a set of general/abstract legal standards, that is, rules, principles, etc., either deductively, that is, from the general/abstract standards of positive law in a way that is supposed to be logically necessary, or argumentatively, that is, by combining deduction, induction, traduction (arguments *a simili*, *a contrario*, *a fortiori*) or mere rhetorics. The derivation can also be identified as justification, that is, as a statement that an individual/concrete decision as a prescriptive reason for action is legally right or correct by virtue of its foundation in one or several general/abstract legal standards as higher prescriptive reasons. The derivation or justification has become the cornerstone of more advanced legal education in continental Europe in the past thirty or forty years (the Kantian legal education[4] still consists of learning dogmatics—that is, the systematization and abstract interpretation—of civil law, criminal procedure etc. by heart).

(2.1.1) Derivation, in other words, justification, is inadequate as a way of deciding cases and, consequently, also for learning law. The reason is that even the simplest application of general/abstract legal standards to the facts at hand also includes the creation of law [28: 133–134]. For instance, the application of a code provision that a perpetrator ought to be fined from 100 euros to 500 euros includes, even after the provision has been interpreted systematically to take into account all the aggravating and mitigating circumstances prescribed by law, the choice between, say, 300 euros and 400 euros. It is irrelevant whether the official doctrine teaches that the choice is made outside law, that is, by excercising discretion that is not bound by legal criteria [22: 138–144, 121 ff.], [14: 108 ff.], [35: 335], or within law, that is, on the basis of legal criteria [11: 32 ff.]. The judge ought to discharge her duty responsibly, by

[4] It assumes, usually out of ignorance, that the application of law is not the proper subject-matter of university legal education, for reasons that were stated by Kant, Immanuel, *Kritik der reinen Vernunft*, A 132–135/B 171–174 and assimilated by German legal educators at the turn of the 19th century, as explained by Jan Schroeder [51].

making the choice in accordance with the best available reasons. Is it possible that they are justifications only?

(2.1.2) Aristotle's understanding of phronesis (φρόνησις; also: prudence, practical wisdom, moral insight), may explain why deduction or argumentation as a way of deriving or justifying individual/concrete legal decisions from, or on the basis of, general/abstract legal standards is problematic in that it accounts for derivation from, or justification on the basis of, law only; or, even more narrowly, on the basis of the general/abstract rules of positive law.

(2.1.2.1) Aristotle's presentation of phronesis [1: VI, 1138b18–1145a11] is notoriously difficult to interpret [8]. But it does include the following two straightforward passages, which lead to the first preliminary problem:

Again, the function of man is achieved only in accordance with practical wisdom (φρόνησις) as well as with moral excellence (ἀρετή); for excellence makes the aim right, and practical wisdom the things leading to it [1: VI.12, 1144a24–29].

There is a faculty which is called cleverness (δειότης); and this is such as to be able to do the things that tend towards the mark we have set before ourselves, and to hit it. Now, if the mark be noble, the cleverness is laudable, but if the mark be bad, the cleverness is mere villainy; hence we call clever both men of practical wisdom and villains. Practical wisdom is not the faculty, but it does not exist without the faculty. [1: VI.12, 1144a24–29]

(2.1.2.2) While comments of Aristotle's presentation of phronesis dwell on the relationship between cleverness, phronesis, and virtue [7: 59–62], [21: 225–236], [13: 228–235], the discontinuation of the ancient and medieval definitions of phronesis [64: 858–863], or Machiavelli's and More's drastic transformation of the concept by basing practical reasoning on techne rather than phronesis [19: 49, 51–52], [43: 205–226],[5] cleverness is commonly taken for granted as merely an auxiliary faculty, which can be safely disregarded. This may well be so in ethics. Morality may be binding for rational beings *qua* rational beings but can exist even if it is of little consequence for a social group, say, a band of robbers or a political movement. Unlike morality, law, even if it is inherently moral, is by definition efficacious.[6] To put it more precisely, a law in the sense of a legal order (*e.g.* Croatian, Polish, international, EU law) is by definition on the whole efficacious. And it can be efficacious only if law-making factors, which consist of humans acting cleverly in their social and natural environment, cause the intended consequences of standards of a legal order, that is, of legal rules, values, principles, institutions, etc. Hence individual/

[5] Habermas, Juergen, *Theory and Practice*, trans. (Boston: Beacon Press, 1973), at pp. 49, 51–52; Randall, David, "The prudential public sphere", *Philosophy and Rhetoric*", vol. 44, no. 3 (2011), pp. 205–226.

[6] Vide a survey of analytical positivistic theories of efficacy [5: 119–130], with an English summary "The Concept of Law and Efficacy - Analytical Approach", at [5: 130].

concrete legal decisions cannot consist of, and cannot be accounted for, by a mere derivation or justification; they also consist of a causal nexus between—and can be accounted for by an explanation of—the law-making factors that include clever acting and the consequences, un-intended as well as intended, of legal standards.

(2.1.3) Since law-making factors of high potency are the *conditio sine qua non* of law, the cleverness of law-making may not be a faculty that can produce bad as well as laudable results. It may seem that cleverness can only produce law that is inherently moral, roughly in the sense suggested by Lon L. Fuller.

(2.1.3.1) The suggestion is highly convincing but not necessarily conclusive. While there are commands issued as laws that have been declared null, that is, void ab initio, because they have violated extra-positive legal standards (e.g. Nazi commands to annihilate Jews), no regimes have been declared null on the basis of such standards.[7] Thus experience renders the view that definitions of law are stipulations more plausible than the assertion that they are statements about the essence of the law, as a thing. Furthermore, lawyers are, if not by nature then by nurture, notoriously clever in making bad laws, which even Fuller might have recognized as bad, but which are nonetheless laws. Suffice it to mention here the Croatian judicial minutes of a witness hearing dictated by a judge [30], which allow the judge to select, twist and label statements of facts at will.

(2.1.3.2) If Fuller's theory of the inner morality of law is relevant to the purpose at hand, it is a requirement of the morality of law that there ought to be congruence between official action and the declared rules [17: 81–91]. The requirement implies that a regime can be considered lawful if its standards of conduct issued as law are efficacious, in that they are followed by the actions not merely of subjects but also of the authorities of the regime. Hence even Fuller's theory of the inner morality of law, perhaps inadverently, supports the point that individual/concrete legal decisions are to be accounted for not merely by the way they are derived from or justified by law, but also by the way the intended consequences of the standards of a legal order are caused by law-making factors, which consist of humans acting—more or less cleverly—in their social and natural environment.

2.2 Phronesis, Principles, Evaluation

The second preliminary problem is something that can be characterized, by analogy with the fear of flying, as a fear of values as legal standards.

[7] The Axis powers created several puppet states in the countries they occupied in WWII, such as the Independent State of Croatia. It was declared nul ab initio due to the lack of sovereignty rather than for its evil deeds.

(2.2.1) The fear of values is obvious in the early jurisprudence of the Croatian Constitutional Court, which relied on Article 3 of the Croatian Constitution.[8] Although Article 3 lists freedom, equality, national equality etc. as "the highest values of the constitutional order of the Republic of Croatia and the basis for constitutional interpretation", the early jurisprudence from the 1990s invoked the freedom, equality and national equality mentioned in Article 3 as the highest principles rather than values.[9] Only the more recent jurisprudence of the Croatian Constiututional Court accepts that Article 3 lists values.[10]

(2.2.2) The fear of values is barely perceptible in German legal thought, by virtue of the presumed impact of *Wertphilosophie*[11] or *Wertungsjurisprudenz* [26, 38]. Nonetheless, it can be discerned in reference manuals. Two encyclopedias may indicate the place assigned to legal values in German legal thought. The *Historical Dictionary of Philosophy* (hereinafter: HDP) [45] includes a comprehensive article entitled "Value" ("Wert") [25: 555 ff.], which does not mention values in law; and does not include an article on legal values (*Rechtswerte*). HDP includes an article entitled "Philosophy of Value" ("*Wertphilosophie*") [2: 611 ff.], but not an article on the philosophy/theory of legal values/valuation (*Wertungsjurisprudenz*). Neither does the Anglo-American and German *Encyclopedia of the Social and Behavioral Sciences* [65] include an article on legal values.

(2.2.3) The fear is implied by the widespread belief that legal standards are of only one kind, namely, rules or norms, and at most of two kinds, the second being principles, e.g. [15]. *A contrario*, values are not legal standards. The fear is explicable by the quest for legal certainty, which is inherent in legal reasoning. The reasons behind the fear is that the evaluation—that is, the justification—of human conduct on the basis of values, is inconclusive. If it is based on a single value, evaluation merely indicates the required direction. It is comparable to a command "move forward!" that can be obeyed by moving forward 1 mm. If evaluation is based on two or more values, it may also be inconclusive in the sense that it points in opposite directions. It is comparable to the simultaneous commands "move forward!" and "stand still".

(2.2.4) To understand the fear of values as legal standards it may be useful to present the structures of values, rules and principles, with the caveat that structures are construed as ideal types, that is, to be useful rather than true or false [cf. 48: 161,169].

the structure of a value is "Q is good", where Q stands for a state of affairs; the structure of a rule is "If P, there ought to be Qe", where P designates and actor and fact-conditions, if any, while Qe stands for the effect of an action; the structure

[8] Ustav Republike Hrvatske—Pročišćeni tekst [Constitutiona of the Republic of Croatia—Consolidated Text], *Narodne novine*, 56/90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14.

[9] E.g. U-I/892/1994, *Narodne novine*, 99/96.

[10] E.g. U-VIIR-164/2014, *Narodne novine*, 15/14.

[11] Mentioned in [27: 282]. Not even mentioned in Kaufmann, *Einfuehrung*, 8. Aufl. (note 10).

of a principle is "If Pi, there ought to be Qc", where Pi designates an actor and a condition that are less determined than conditions of a rule, while Qc stands for the consequence of an action [40: 119, cf. 115–137].

(2.2.5) The following passage has been used to interpret Aristotle's view of the relationship between phronesis, on the one hand, and ends and/or principles, on the other:

And this eye of the soul acquires its formed state not without the aid of excellence as has been said and is plain; for inferences which deal with acts to be done are are things which involve starting point viz. *'since then, i.e. what is best, is of such and such a nature', whatever it may be (let it for the sake of argument be what we please); and this is not evident except to the good man; for wickedness perverts us and causes us to be deceived about the starting-points of action* [1: VI.12, 1144a29–36].

The state of "the eye of the soul" has been interpreted as a grasp of the end and/or practical principles, the result being that, on the one hand, both the state and the grasp are parts of phronesis, and that, on the other, it is the grasp that distinguishes phronesis from cleverness, including the laudable one [13: 229–230]. At the cost of oversimplification, it is assumed here that in this section the end approximates the value in Sects. 2.2.1–2.2.3 and 2.2.4, while the principle in this section approximates the principle in Sect. 2.2.4.

2.3 Ignorance of Methods de lege ferenda

The derivation of individual/concrete legal decisions from general/abstract legal standards, which is coupled with the fear of values as such standards, results in ignorance of the methods *de lege ferenda*, that is, policy making by law. Although this ignorance hardly needs additional explanation, for the sake of clarity it is encapsulated in the following two propositions. First, policy-making by law makes sense only if it is directed to a certain end or value. This is precisely what many continental jurists tend to avoid. Secondly, policy-making by law can result in efficacious law only if it is created cleverly, that is, by fitting legal means to legal ends. Continental jurists are not trained to do this because of their proclivity to derive law from law, that is, to justify law by law, without a due regard for causation.

2.4 Policy-Oriented Jurisprudence

A solution to the preliminary problems can be provided only by legal thought that integrates causation/explanation, justification/derivation, and evaluation in such a way that the solution includes the following: law is an instrument for achieving practical ends outside itself, such as the distribution of power or wealth, the enhancement of health or education, etc.; legal thinking is serviceable to the practical ends of law. Both requirements are met by American pragmatic instrumentalism [53: 20 ff.].

(2.4.1) Its most promising branch is policy-oriented jurisprudence, which was formulated by Harold D. Lasswell and Myres S. McDougal (hereinafter: POJ). What distinguishes POJ most is its focus on problems, which has been adopted explicitly from John Dewey's rejection of inherited philosophy [31: XII, 32], [9: 13–18]. Hence a POJ inquiry is required to perform the tasks that follow in A–D [33: VII, summary at 3–38].

(A) "The establishment of the observational standpoint" of "the scholarly observer, whose primary concern is for enlightenment" or "the authoritative decision-maker and others whose ultimate interest is in power" [33: 22, cf. 22–24, 39–48].

(B) "The delimitation of the focus of inquiry", so that the inquiry concerns "operations" as well as "perspectives", "control "as well as "authority", all the relevant "processes of authoritative decision", and the relation of law to not merely "social process" but also "its larger community context" [33: 24–32].

(C) "The formulation of particular problems for inquiry", that is, of "deprivations and nonfulfillments", whose consequence is that "many different participants… make claims to the established decision makers of the community for the minimization and amelioration of such deprivations and nonfulfillments" [33: 32–34].

(D) "The explicit postulation of basic public order goals". The goal of postulation is to avoid "(i)nfinitely regressive logical derivations from premises of transempirical or highly ambifuous reference". POJ postulates the basic values of "human dignity, or a fee society", whose basic thrust is "toward the greatest production and widest possible distribution of all the important values" [33: 34–35].

(E) "The performance of intellectual tasks", which includes the following five steps of inquiry [33: 35–38].

(EA) "The clarification of community policies", that is, "specification of postulated goals, whatever the level of abstract of their initial formulation, in terms which make clear empirical reference to preferred events in social process" [33: 36].

(EB) "The description of past trends in decision" in "systematic in terms of degree of approximation to clarified policies" [33: 36–37].

(EC) "The analysis of factors affecting decisions", which will not ascribe "overwhelming importance" "to any one factor or category of factors" [33: 37].

(ED) "The projection of future trends". "Expectations about the future will be made conscious, explicit, comprehensive, and realistic as possible".

(EE) "The invention and evaluation of policy alternatives" [33: 38], that is, reasoning *de lege ferenda*, which advocates a course of decision that is, given the past conditions described at EC and probable future conditions implicit in ED, more in accord with the postulated public order goals at D and the clarified community policies at EA than the expectations described at ED.

(2.4.2) POJ includes the study of causation or causal explanation in the following elements of inquiry at 2.4.1: (B) the delimitation of the focus of inquiry, which takes into account operations as well perspectives etc.; (EC) factors affecting decision; (ED) probable future conditions and trends in decision.

(2.4.3) POJ includes evaluation in the following elements of inquiry: directly in the clarification of community policies on the basis of the public order goals (2.4.1.E + EA); indirectly in the justification of the past trends in decision, future trends in decision and the advocated course of decision on the basis of community policies (2.4.1.EA + EB + ED + EE).

(2.4.4) The coupling of evaluation and causation leaves the impression that POJ has, at first sight inadverently, duplicated Aristotle's conception of phronesis and cleverness. A better acquaintance with McDougal's legal arguments, especially if read in the light of his first occupation as a teacher of classics, may reveal that POJ has emulated Aristotle's teaching.

(2.4.5) POJ is deficient in two major respects.

(2.4.5.1) POJ does not recognize that basic legal concepts, such as the "perspectives", "operations", "authority", "control", etc., are value-laden [55: 139–170, 157–160].[12] Consequently, the application of such concepts is a tacit evaluation. Since it can hardly be detected, it may be detrimental to POJ as both the theory and practice of law.

(2.4.5.2) Secondly, POJ rejects the idea that law has an objective meaning [42: 9–50].[13] The already used example of a code provision that a perpetrator ought to be fined from 100 euros to 500 euros (Sect. 2.1.1) may indicate what the objective meaning of law is. It is primarily the interpretation within a proper context that a violator of the code provision ought to be fined from 100 to 500 euros. The interpretation is made objective by the reasons it is based on. Only secondarily is the objective meaning the agreement on the interpretation and/or practice of fining violators of the provision from 100 to 500 euros. What makes the agreement relevant is the authority of its parties. Likewise, what makes the practice relevant is its uniformity. POJ fails to recognize the objective meaning of law due to the reduction of legal standards, which inform legal subjects how they ought to act, to expectations, which are—or at least may be understood as being—statements on how legal subjects act in fact and are likely to act in the future.

(2.4.6) The remedy of the defects in 2.4.5 is a re-systematization of fundamental legal concepts, the addition of the re-systematized concepts to POJ, and the systematic interpretation of law on the basis of these concepts.

[12] See for criticism of Lasswell's claim that his political science is free of values.

[13] Esp. at [42: 19, 20, 31, 44 ff.].

3 A Solution

This solution clarifies the types of criteria (Sect. 3.1), positive and fundamental legal concepts (Sects. 3.2–3.3), the positive and fundamental criteria of systematization (Sects. 3.4–3.5) and the place of criteria in the knowledge of law.

3.1 Types of Criteria (translation of [39: 113–115])

A criterion (greek κρίνειν) is used in philosophy in the sense of a ground or for appraising the quality of something, and also in the sense of a sign or means for distinguishing something from something else that is similar yet different. Birnbacher has provided an analysis of the concept of criterion and types of criteria that follow from this concept at 3.1.1–3.1.2 [3].

(3.1.1) A criterion is primarily distinguished by its relational form. It is always a criterion for something different from the criterion. Furthermore, a criterion is distinguished by its content, which is threefold. First, a criterion is a sign signifying an object. A speaker who uses a criterion as a sign progresses from knowledge of the sign to knowledge of the object. Hence a speaker who acknowledges that playing Chopin's *Études* perfectly is a sign of virtuosity and accepts that the proposition 'Pogorelić plays Chopin's *Études* perfectly' is true, can or even must accept that the proposition 'Pogorelić is a virtuoso' is also true. Secondly, a criterion is not only a sign but also a reason or ground (*Grund*), which enables conclusions such as 'Pogorelić is virtuoso', and the principle of reasoning/grounding (*Prinzip der Begruendung*). Hence, if the fact that someone plays Chopin's *Études* perfectly is acknowledged as a criterion of virtuosity, the criterion is at the same time a scheme for infering such conclusions. Thirdly, a criterion is a measure for determining truthfulness and falsity; and, as such, is both a principle and an instance of its application. Hence a criterion is in every single of its functions a criterion of validity [3: 7–8].

(3.1.2) The distinction between defining, non-defining and evidentiary criteria as stated in Sects. 3.1.2.1–3.2.1.3 is also useful in the analysis of the systematization of law.

(3.1.2.1) Defining criteria—or, more simply, definitions—indicate an object and determine the necessary and sufficient conditions of its existence. An example is the presence of a bacilus as a criterion of the state known as angina. A criterion of this type is identical to a concept, that is, the definition of a concept (e.g. of civil law) or the division of a concept (e.g. of civil law into the law of things, law of obligations, law of inheritance, etc.). Since it is logically equivalent to the *definiendum* or *dividendum*, it is not a logical problem. However, a defining criterion always presupposes further criteria, whereby it is possible to determine that two cases are identical or equal, and such further criteria, which in the final analysis are non-defining, and which cannot be expressed by a formula, constitute a logical problem [3: 22–23].

(3.1.2.2) A non-defining criterion, which is rarely invoked, is often an independent link in a chain of criteria that constitutes a state of affairs. This is why we often rely on different criteria to determine whether someone is reading or understanding or, most importantly, whether she or he is a person [3: 23–26].

(3.1.2.3) An evidentiary criterion is neither constitutive of nor identical with the object it indicates. For instance, an expression of pain as a criterion and the pain indicated by the expression are not only different but also discrete states.

(3.1.3) For the purpose at hand, the defining criteria of the systematization of law are divided into two kinds, namely definitions and divisions. Both are ways of determining the conceptual meaning of legal expressions and can be explicit or implicit.

(3.1.3.1) A definition determines the content of the meaning of a legal expression. The most common explicit definition is analytical. It consists in determining the *genus* of the *definiendum*, that is, the concept that is being defined and the specific difference between the *definiendum* and all the other concepts that can be subsumed under the same *genus,* e.g. [46: 96–98]. For instance, the analytical definition of the expression 'a sale' is that it is a contract (*genus proximum*) to transfer the ownership of a thing in exchange for money (*differentia specifica*).[14] For the sake of simplicity, a legal definition is hereinafter treated as a legal concept, that is, as a result of a legal definition.

(3.1.3.2) A legal division is the determination of the scope of the meaning of a legal expression. It consists in indicating the *species* within the *genus*, the sub-*species* within the *species*, etc. For instance, the expression 'contract' is divided into contracts of sale, contracts of exchange, contracts of donation, while contracts of sale are divided into sale by right of preemption, trial sale, sale by sample or model, etc.[15] A legal division is hereinafter treated as a criterion of systematization. It is broader than a division in three respects. First, it determines not only the scope of legal concepts but also the relations among entities of a legal system, which are primarily legal concepts. Secondly, by determining the relations among the entities of a legal system, a division also functions as a definition of concepts. Thirdly, for that reason, a criterion of systematization may include both a division and a definition of law.

(3.1.3.3) A legal concept or a criterion of the systematization of law is positive and/or fundamental. A positive legal concept or a positive criterion of the systematization of law is the meaning of a legal expression. A legal expression is an expression, most commonly a word, of a legal act whose meaning is defined by other

[14] *Definitio fiat per genus proximum et differentiam specificam.*

[15] Zakon o obveznim odnosima, Narodne novine, 35/2005, s izmjenama i dopunama; English translation: Civil Obligations Act of the Republic of Croatia, with amendments; https://www.bing.com/search?q=croatian+law+on+obligations&form=PRUSEN&pc=UP94&mkt.

expressions of the same legal act or other legal acts belonging to same legal system. A legal act is a set of expressions, entitled typically 'a statute', 'a regulation', 'a judgment', etc., which consists of a legal standard, such as a rule, value, institution, etc., or of a part of a legal standard or of several legal standards, or of parts of several legal standards, etc. A legal system is defined in Sect. 4.1. A fundamental legal concept or a fundamental criterion of the systematization of law is the meaning of an expression that is not a legal expression. It may be defined most usefully by legal theory.

3.2 Positive Legal Concepts

(3.2.1) An example of a positive legal concept is the status of a student, as defined genetically[16] by the Croatian Law on Scientific Activity and Higher Education.[17] Article 86 of the Law, which is entitled "Admission to the Student Status", begins with the following provision: "The student status is acquired by admission to the university, the polytechnic or the college…" Article 89 of the Law, which is entitled "Termination of the Student Status", runs as follows: "A person shall lose a student status: 1. Upon completion of study programme; 2. Upon withdrawal from the university, the polytechnic or college; 3. Upon dismissal from the study…; 4. If he or she fails to complete the study programme within the term determined by the statute or…; 5. For other reasons determined by the statute or other regulations…"

(3.2.2) While it is possible to imagine a positive legal concept that is defined completely by one or several legal acts, it is assumed here that there are at the very least—by analogy with the expression 'hard cases'—hard positive legal concepts, whose meaning cannot be determined by legal acts alone. It requires completion, which can be performed best by fundamental legal concepts.

3.3 Fundamental Legal Concepts

(3.3.1) The example at 3.2.1 may be also used as an indication of possible relationships between the two positive and fundamental legal concepts. A reader familiar with higher education is likely to understand the example at 3.2.1 as a definition not merely of the expression 'the status of a student' but also of the expression 'a student', on the assumption that a person who has the status of a student is a student. The assumption implies several associated concepts, the most obvious being the following: a status, a person, a person with a status, a legal act, a law (in the sense of a legislative act). None of these expressions is a positive legal concept of Croatian law. They are all defined in writings that an informed reader will recognize as belonging primarily or partly to legal theory. Hence, they are fundamental

[16] On genetic definition and other forms of definition, see [46: 93–96, 96–148].

[17] Zakon o znanostvenoj djelatnosti i visokom obrazovanju, *Narodne novine*, 123/2005, pročišćeni tekst, *Narodne novine*, 131/2017.

legal concepts. Although one will hardly find a jurisprudential text that defines the expression 'a student', the fact that it is used in ordinary language, informed by positive law, and usable by legal theory may qualify it as a fundamental legal concept.

(3.3.2) Typical fundamental legal concepts are law, a legal order, a legal subject, a legal act, a source of law, etc.

(3.3.3) A fundamental legal concept is, tendentiously, a meta-concept, which describes a legal concept as its object. Since a meta-language cannot be construed, a fundamental legal concept can hardly be a perfect description. More importantly, as a description of a legal expression or a legal concept, it is by and large superfluous.

(3.3.4) Hence, a fundamental legal concept is used, metaphorically, as a yardstick to measure one element or several elements of law, including a legal concept or several legal concepts. For instance, the fundamental concept of a statute in the material sense, which stipulates that such a statute consists of general/abstract legal rules, can be used to measure whether an element of law, say, a hypothetical Law on the 1 July 2020 as the Public Holiday, is a statute in the material sense.

(3.3.5) A fundamental legal concept has the function of an ideal type in Weber's sociological theory [63: 146–214], [47: 159–172]. As such it is neither true nor false but more or less useful for the purpose at hand. It can only be useful if it is informed by experience, so that the facts it is applied to are similar to the concept but short of being either a description of the facts or a generalization of the description.

(3.3.6) Unlike sociological concepts, which are usually construed consciously, but often by using elements of concepts from ordinary language, some fundamental concepts are construed consciously, whereas others are positive legal concepts or even ordinary language concepts. For instance, in Catholic countries the legal concept of a family as defined by the Canon Law of the Catholic Church has been used as a fundamental legal concept. The reverse is also often the case. For instance, the fundamental concept of a statute in the material sense may become a positive legal concept.[18]

3.4 Positive Criteria of Systematization

(3.4.1) An example of positive criteria of systematization of law is the division of a statute into parts, chapters, articles, sections etc. Another example is the division of

[18] Fuller, [17: 47] gives the example of a statutory provision which was created to circumvent the constitutional prohibition of special statutes but inadvertently prompted litigation that resulted in the judicial prohibition of such provisions based on jurisprudential criteria of generality of law, that is, criteria that in this paper are considered fundamental legal criteria. The statutory provision *in fraudem constitutionis* runs, roughly as follows: "the statute shall apply to all the cities in the state which according to the last census had a population of more than 165.000 and less than 166.000".

real rights by the Croatian Law of Ownership and Other Real Rights[19] into Servitude (Articles 174–245), Real Burdens (Articles 246–279), The Right to Build (Articles 280–296), Lien (Articles 297–353).

(3.4.2) Systematic interpretation in law determines the meaning of a law primarily by taking into account positive definitions and divisions of law. As noted, it is assumed here that often they do not suffice, because they presuppose definitions, such as the definiton of a right, and divisions, such as the division of law into public and private, that are as a rule not defined, at least explicitly (let alone analytically), by positive legal criteria.

3.5 Fundamental Criteria of Systematization

(3.5.1) An example of a fundamental criterion of the systematization of law is the division of prescriptions that are legal standards of conduct, according to the structures of their condition and consequence, into rules, values, and principles (Sect. 2.2.4). Another example is a division of real rights, according to their legal consequences, into ownership and possession, as well as the division concerning the rights listed at 3.4.1.[20] The division differs from the division by the Croatian Law of Ownership and Other Real Rights, which treats possession as a fact, most obviously for the reason that possession can also be acquired in violation of the law.

(3.5.2) Although fundamental criteria of systematization can be meta-positive criteria, as much as fundamental legal concepts can be meta-positive concepts (Sect. 3.3.3), if a fundamental legal criterion is not informed to a high degree by positive law and positive legal criteria, it may be a respectable achievment of the philosophy of law but of limited use in legal theory and legal practice.

3.6 Criteria and Knowledge of Law

(3.6.1) One cannot learn the structure of a positive legal system without understanding the positive legal criteria of systematization, that is, positive legal definitions and divisions of law. Understanding cannot be replaced by criteria of other scholarly disciplines, most notably by a disciplie from the humanities, such as philology or history, unless it is a discipline—such as jurilinguistics or legal history—that has integrated and perhaps even upgraded positive legal criteria. Even less can understanding be replaced by criteria of the social sciences, to the extent that the social sciences are naturalized humanities, let alone criteria of the natural sciences, such as criteria of naturalistic psychology.

[19] Zakon o vlasništvu i drugim stvarnim pravima, *Narodne novine*, 91/1996, pročišćeni tekst *Narodne novine*, 152/14-.

[20] For reasons stated inter alia by Holmes, Oliver W. [24: 206–246, esp. 213–215].

(3.6.2) While law can be identified only by understanding positive law in the way it is understood by lawyers, in both practice and theory law is useful, especially in a complex society, if it takes into account problems and results of other scholarly disciplines, starting with philosophy and the social sciences. This is why law cannot be studied without legal theory as a systematic inquiry into fundamental legal concepts, whose centrepiece is not merely a legal system but relations, on the one hand, between two or more legal systems (*e.g.* Croatian law, the law of the EU and international law; Croatian law and Austrian law), and, on the other, between a legal system or law in general and social phenomena that are explicitly or functionally normative, such as religion, morality, politics, economics, etc.

(3.6.3) The distinction between positive and fundamental criteria may be used to explain the distinction between legal dogmatics, legal history and legal theory as three functions of legal science rather than three mutually independent scholarly disciplines [39: 9–10]. To put it briefly, legal dogmatics, whose mission is to select, interpret and systematize positive law to facilitate its application, can formulate independently satisfactory definitions and divisions of law only if positive law, both as stated by general/abstract legal standards (rules, values, principles etc.) in statutes, regulations etc., and applied by individual/concrete legal standards in contracts, administrative acts and judicial acts, is stable. If general/abstract legal standards change significantly and/or individual/concrete legal standards depart significantly from the general/abstract ones, dogmatics needs, on the one hand, legal history, that is, historical explanation of singular causal links between individual/concrete standards, their conditions (*inter alia* in general/abstract standards), and their consequences (*inter alia* in their legal generalizations/abstractions); and, on the other, legal theory, that is, fundamental definitions and divisions to compare with a view to explaining and/or justifying relations between positive legal standards and between their conditions and consequences.

4 Use

A demonstration of the usefulness of the abstract solution offered in Sects. 2–3 may require more than a treatise on legal theory, which re-defines major fundamental legal concepts, re-systematizes them, and explains them at least historically, if not by integrating the major findings of other scholarly disciplines concerned with law; it may also require a series of inquiries within the framework in Sects. 2–3 into really existing legal problems. Since such a complex task is far beyond the scope of this paper, it should suffice here to outline a common approach to the systematization of law (4.1), indicate a defect of the systematization that has been diagnosed by an authority in history and the philosophy of law, but not legal theory (Sect. 4.2), and propose an alternative diagnosis and a remedy for the defect (Sect. 4.3).

4.1 Systematizations of Law

Legal theories commonly systematize law on the basis of one or all of the following three criteria: a source or procedure; a content or substance; a consequence or function.[21]

(4.1.1) According to the first criterion, of a source or procedure, a legal system is made of legal rules or legal norms, which belong to the system if their creation is justified by a source or procedure of the system. Hence a judicial rule/norm belongs to a legal system if the creation of the rule/norm is justified by a statutory rule/norm of judicial procedure; the statutory rule/norm belongs to the system if the creation of the statutory rule/norm is authorized by a constitutional rule/norm, which belongs to the system if the creation of the constitutional rule/norm is authorized by a rule/norm of the first constitution, which is identified as such by the rule of recognition or the basic norm of the legal system. A legal system construed according to the first criterion is divided hierarchically into rules/norms of the same legal force: constitutional, statutory, regulatory, administrative, judicial, etc.

(4.1.2) According to the second criterion, of a content or substance, a legal system is made of legal standards of all kinds, that is, of legal rules/legal norms and also of legal principles and even legal values, which belong to the system if their content or substance, that is, the rights and duties they impose, is justified by the content or substance of higher standards of the system. Hence a judicial standard belongs to a legal system if the content of the standard is in accord with the content of a statutory standard of, say, public law, civil law or criminal law; the statutory standard belongs to the system if the content of the standard is in accord with the content of a constitutional standard; the constitutional standard belongs to the system if it is in accord with the content of an extra-positive value or principle. A legal system construed according to the second criterion is divided into institutions, each consisting of actors with their roles and interactions and performing certain actions (*e.g.* property acquisition, property protection, etc.).

(4.1.3) According to the third criterion, of a consequence or function, a legal system is made of legal actors whose roles (expectations and/or prescriptions created by others and internalized by the actors) result in actions. Actors, roles and actions belong to the system if the roles prompt actors to perform actions that in turn cause consequences or functions that contribute to the overall functions of the system. A legal system construed according to the third criterion is divided into institutions, which include actors and actions, and their functions.

[21] The Sects. 4.1.1–4.1.2 follow closely, whereas the Sect. 4.1.3 follows remotely [49: 16–17].

4.2 Criticisms of Human Rights

Michel Villey, a legal historian who renewed French philosophy of law, criticised human rights in a series of writings, culminating in the book *Law and Human Rights* (1983) [61]. The book is illuminating and, taken as a whole, correct. Suffice it to note that invocations of human rights today tend to demand universal equality before the law while ignoring growing economic inequalities.

(4.2.1) The solution prescribed by *Law and Human Rights* is a return to ancient Roman law, since it did not include rights (*droits subjectives*) and for that reason could not include human rights. This solution is not very helpful. First, there is no reason why Roman law should be more authoritative than our laws. Secondly, if Roman law did not include rights, their absence should not be considered an advantage over our laws. Thirdly, Roman law did include the expression *res* (and the often synonymous expression *corpus*), which had diverse meanings, which varied from case to case [36: 19–51, summary at [23] and ranged from, in non-technical usage, the things that the emperor does [36: 21], to litigation or court cases [36: 22], to laws (iura) [36: 23]; and, in the technical usage, to things and persons, which are in the early days of Roman law not distinguished [36: 24].

(4.2.2) Villey's solution is not particularly helpful because the malaise he diagnosed may not actually be an illness, when considered from the perspective of his own terms. In the essay on subjective rights, subtitled "The genesis of rights in William of Ockham" (1964), Villey notes that the concept of subjective right (*droit subjectif*) emerged from two historical developments. The first is egoism, that is, "intellectual horizons of every subject naturally narrowed down to dimensions of his interests". The second is "the influence of Christian ideas but deformed and extrapolated outside the registry that convenes them" [60: 140–178]. He traces the origin of the adjective "subjective" to the ancient scholastique usage that had been preserved in Germany in the 18th century:

> *subjective is an attribute of the subject, what belongs to his essence, what is inherent to him* (subjacent)*; objective is on the contrary …added to the subject, thrown at him* (ob-jectum) [60: 144].

(4.2.3) A substantially different appraisal of the emergence of subjective rights (*droit subjectif*, *subjektives Recht*) is provided by Larry Siedentop, who also, like Villey, attributes the emergence of rights to William of Ockham.

> *Ockham, in particular, held that any attempt to create a 'natural' theology by drawing on ancient rationalism and the idea of 'necessary truth' was doomed to fail, for it required reason to prove more than it was capable of proving……Ockham drew on the Augustinian tradition which portrayed a descent into the self as leading, paradoxically, to discovery of a higher will. That tradition presented the individual will, when properly directed, as a vehicle of divine agency* [52: 310–311].

(4.2.4) In this context a more important reason why Villey's solution is of little assistance is the fact that his diagnosis is correct but misnomered. Villey insightfully notes that "the expression subjective rights (*droit subjectif*) denotes the kind of law that is in the final analysis *drawn from the being* of the subject himself, from his essence, from his nature" [60: 145]. Villey's diagnosis that his finding is about rights rather than about the subject is a misnomer, which may not have been very harmful in the philosophy of law. However, in legal theory and legal practice this misnomer has been seriously misleading. Lawyers and non-lawyers alike argue whether a human right (e.g. the right to marriage) exists or not, and if it does what is its content, instead of arguing whether the subject that is supposed to have that right is capable of having it.

4.3 Subjects, Rights, Rules

The reason why legal theory has failed to notice that the problem of rights, including human rights, is really the problem of the legal subject is twofold: the disappearance of the legal subject from legal theory; the failure to clarify the relationship between a rule and a right.

(4.3.1) The legal subject started disappearing from legal theory in the very acts of its coming into being.

(4.3.1.1) Legal theory in the sense at 3.5 came into being through a Stoic reconceptualization of Roman private law. Suffice it to contrast it with Hammu-Rabi's code, which "had the logical structure of a prescriptive order based solely upon perceptual conceptions" [10: 65].

In sharp contrast to this, "The legal person in classical Roman private law is an abstract conception derived by deductive reasoning from a metaphysical postulate…" [10: 67]. In other words, the Roman legal person is an expression that can be attached to every single human being without asking why or even whether he or she is a human person. By the same token, a right can be ascribed to any legal person without asking why or even whether that person is capable of having the right.

(4.3.1.2) The concept of legal person becomes even more abstract when it is also extended to juridical entities. Such an extension has been duly acknowledged in continental European laws, which have divided legal persons, more commonly known as legal subjects, into two or even three types, namely, natural persons, juridical persons, and entities that are not legal persons but can nonetheless have legal rights and duties, such as non-registered associations in Croatian law. Anglo-American laws, which are inimical to such abstractions, have not assimilated the typology.

(4.3.1.3) A further development is the disappearance of the distinction between natural persons and juridical persons. Savigny considered the latter a fiction that can only enjoy the rights and duties conferred upon it by a law (*Gesetz*) [50: 40

ff.], *vide* the commentary in [20: 5–15]. Today juridical persons can have all the rights, including human rights, except the ones they are by nature not capable of having. The most important human right is increasingly the right to equality, which is claimed for and by any conceivable group, but most vocally for the so-called vulnerable groups—which rarely include the poor and other economically disadvantaged people.

(4.3.1.4) The final stage of development is legal theories without legal subjects.[22]

(4.3.1.5) A reason why the legal subject has been disappearing from legal theory is the separation of the 'is' and the 'ought'. The terms of the separation cannot account for the capacity or accountability, which has a cognitive and a volitive component. Since neither can be reduced to either the 'is' or the 'ought', legal theory ignores them and leaves them to legal dogmatics of special branches of law: criminal, civil, etc.

(4.3.1.6) An additional reason why in Kelsen's theory the legal subject is a mere dot that can be qualified by any properties, *vide* [28: 95] is Kelsen's reduction of all law to public law [28: 201–207], the identification of law and the state [28: 181 ff.] and the recognition of the state, that is, law as God [29: 29–55], as the only legal subject, with all the other subjects being his objects or, subjects in the litteral sense derived from *subjaceo*.

(4.3.2) As noted, legal theory has failed to notice that the problem of rights, including human rights, is the problem of the legal subject, which is in turn a result of the failure to clarify the relationship between a rule and a right. This is not to say that there is one true model of the relationship. But there are more or less fruitful criteria of systematization.

(4.3.2.1) A fruitful criterion for relating a legal rule and a legal right is as follows:

(A) As stipulated at 2.2.1, the structure of a general/abstract rule is *"If P, there ought to be Qe", where P designates an actor and fact-conditions, if any, while Qe stands for the effect of an action.*

(B) A right is an individual/concrete rule whose part P (that is, the actor and fact-conditions) obtains.

(4.3.2.2) The criterion of relating a legal rule and a legal right at 4.3.2.1 makes it possible to analyse separately the actor, which is in law a legal subject, fact-conditions, and the part Q, which may be considered a right (or duty) in the narrow sense. Hohfeld's analysis of fundamental legal conceptions, which include rights, duties

[22] Vesting [59] comes close to being a legal theory without a legal subject.

and other similar entities [23: 710–770], is evidence that the separation proposed here is possible and useful, *vide* [58], [57].

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