Introduction to The New Law – Suggestions for Reforms and Improvements of Existing Legal Norms and Principles

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A. Augsburg Graduate Conference in Law

The Augsburg Graduate Conference in Law provided young scholars wishing to pursue an academic career with a forum in which they could present their academic work, exchange innovative ideas and engage in a scholarly discussion. It encouraged the participants (doctoral and post-doctoral candidates) to develop an international academic network that would serve to advance their careers. It also provided a venue for taking first steps in the academic world, including a chance for a publication with a respected publisher.

As the organizers, we recognized that many young scholars and researchers are intimidated by their experienced colleges and role-models and that they are, consequently, reluctant to present new ideas that may diverge from the accepted state of affairs. Our goal was to encourage them to share these new concepts. The conference aimed at enhancing the self-confidence of ambitious young scholars by showing them: (1) that their innovative ideas can gain recognition; (2) that they can present and publish like experienced scholars and (3) that their comments and observations may advance the work of others or become a source of inspiration.

The reaction following the call for papers for the Augsburg Graduate Conference in Law exceeded our expectations. We received over 100 abstracts from scholars from Europe, Asia, North America and Australia. The chosen participants come from fourteen countries (Czech Republic, Finland, Germany, Greece, Hungary, India, Iran, Norway, Poland, Scotland, Slovenia, Thailand, Ukraine and Vietnam) from top academic institutions such as the Max Planck Institute for Comparative Public Law and International Law, Free University of Berlin and the Universities of Budapest, Edinburgh, Kiew, Krakau, Ljubljana, Oslo and Thessaloniki. The presenters and contributors are a blend of experienced and early-stage researchers with diverse legal and cultural backgrounds and with different interests and ideas

about and for law. Their commonality was having forceful and original proposals for a new law.

The theme of the Augsburg Graduate Conference in Law was "The New Law – Suggestions for Reforms and Improvements of Existing Legal Norms and Principles." All laws are, by definition, imperfect, thus needing further interpretation and contextual understanding. Throughout the evolutionary development of law, many have struggled with unjust, impractical and obsolete laws, requiring practitioners and academics to seek alternative solutions when the legal rules did not keep pace with societal or technical developments, and to look for equitable principles or the spirit of the law when the letter of the law was unclear or unfair. These are only a few of the many problems legal scholars have faced and have overcome while influencing the process of reforming and improving the law. Adopting this theme aimed at stimulating a deep exploration of the mentioned issues and finding common patterns for their resolution which could be applied in different legal contexts.

A broad wording opened the Conference to all young, talented legal scholars regardless of their particular legal field. The scholars were provided with an opportunity to combine the knowledge and experience of legal academics and practitioners with their legal know-how and creativity so as to think beyond the traditional legal models and to introduce significant innovations advancing the existing body of law. Especially welcome were original approaches situated 'outside the box' of traditional legal thinking.

The young scholars participating in the Augsburg Graduate Conference were not limited to a particular question or area of law or to a specific research approach. Solutions to legal problems can be found by applying different approaches, reasoning or methodologies. However, and not surprisingly, most of the questions discussed during the conference and in the contributions have an international character extending beyond countries to regions and continents.

As innovation also entails failure, it is not necessary that the reader is always convinced by the proposed solutions. Nevertheless, we do hope that they will be helpful in advancing the legal discussion and the law.

B. 'The New Law' as Innovative and Constructive Proposals, Predictions, Evaluations and Theoretical Conceptions

In this publication the contributions are organized according to the geographic scope of applicability of the discussed issues. There are therefore three parts in which new ideas focus on national (Part A), European (Part B) and international (Part C) laws. An additional part is dedicated to solutions influencing our understanding of general legal concepts.

The common feature shared by all the contributions is a discussion of a new law. What is 'new law'? This simple question requires a complex answer. There are four ways in which this term was understood by the contributors.

I. 'The New Law' as an original proposal for a solution to an existing legal problem

There are many recognized problems that remain unsolved in legal literature. The hitherto presented recommendations have proven unfit for a successful and definitive clarification of these matters. A new hope for solving such well-known issues looks to turn the existing discussion in a different direction by considering brand new ideas that, although building on already examined suggestions, are primarily based on an application of alternative approaches and fresh sources of inspiration.

The known controversy regarding the appropriate starting point for the period of prescription in relation to delictual claims is addressed in a revolutionary way by *Kruszyńska-Kola*. She examines the question of period of time that needs to expire before a debtor should be entitled to refuse performance in situations where Polish private law might classify rising the defence of prescription as an abuse of rights. To solve this significant problem, she proposes a novel and flexible regulation for determining the period of prescription, one that provides maximum transparency and predictability. Her recommendations are inspired by French law.[1]

The innovation that *Prostybozhenko* puts forward is to include goodwill (understood as "a favour or advantage that a person or a business controlled

1 In detail see *Kruszyńska-Kola*, Time, Emotions, Legal Certainty and Justice. New Period of Prescription of Delictual Claims for Damages in the Polish Civil Code, p. 47.

by a person has acquired especially owing to a number of factors, including education, knowledge, skills, contact network, intellectual property, branding, and good reputation") as a component in the process of dividing matrimonial assets acquired over the duration of validity of the matrimonial property regime. He suggests a method of determining goodwill and, depending on the type of a matrimonial regime applicable in a given country, different ways of incorporating it in a legal system. [2]

Fenkner introduces an original and radical proposal to optimize the interpretation and application of EU law. The mandatory requirement that has been imposed by the Court of Justice of the European Union to compare all twenty-four official language versions of a provision of European law to ensure uniform interpretation and application is, according to her, impractical, time-consuming, something demanding advanced language knowledge and, for most practitioners and individuals, simply, impossible to comply with. She presents an original alternative solution and analyses it.[3]

An improvement to EU law is proposed also by *Urban-Kozłowska*. She critically examines the new guidelines issued by the European Commission in 2014 on State aid to airports and airlines,[4] which provides a framework for determining whether State aid in the form of public funds granted to airports and/or airlines is compatible with the internal market. Her novel proposal significantly optimizes the Commission's decision-making process.[5]

As pointed out by *Nguyen*, the problem of jurisdictional conflicts occurring when a single dispute is submitted in parallel or consecutively to a number of fora has been studied before. However, he is the first to propose and comprehensively analyse a new approach: application of the principles

2 In detail see *Prostybozhenko*, Equal v. Fair: Considering Goodwill in the Division of Matrimonial Property, p. 115.

3 In detail see *Fenkner*, Multilingualism and the Uniform Interpretation of European Union Law, p. 143.

4 See: Communication from the Commission – Guidelines on State aid to airports and airlines, OJ C 99, 4.04.2014, p. 3–34.

5 In detail see *Urban-Kozłowska*, In Search of a More Effective Assessment of State Aid Measures in the Aviation Sector, p. 179.

of treaty interpretation, particularly Article 31 (3) (c) of the Vienna Convention on the Law of Treaties, as a practical and useful alternative serving to minimize the negative consequences of multiple proceedings.[6]

An original idea advocating the adoption of a multi-faceted approach to climate change refugees – defined as "refugees who are forced to leave their normal places of residence because of environmental changes adversely affecting their lives and livelihood" – by using various international instruments is proposed by *Sanyal*. As he describes, this issue is potentially of enormous concern since by 2050 as many as 200 million people could be displaced by the consequences of climate change. His proposal aims at solving the problem of there not being any effective and uniform protection of the basic human rights of these refugees.[7]

Mendelsohn has an innovative idea for how to determine whether adopted legislative and policing measures minimize systemic risks. In her contribution, she inquires whether the actions undertaken by legislators and policy makers are sufficient to prevent the next systemic crisis. In so doing, she looks at the reasons behind systemic risk – understood as "the risk that the failure of one or more financial institutions or a shock in the financial system can lead to widespread losses and consecutive failures that threaten the stability of the entire financial system and the real economy at large" – considering both the economic description and legal definition of systemic risk and also analysing the consequences of bailouts associated with such risks.[8]

II. 'The New Law' as a prediction of future developments in law

The term 'new law' can also be understood as a prediction of advancements in legal regulations, customary law or legal doctrines. These tendencies can be identified, for instance, on the basis of the evolution of the relevant area of law and the opinions on its future prospects as represented in legal liter-

6 In detail see *Nguyen*, Resolving Jurisdictional Conflicts Between WTO and RTA Dispute Settlement – Possible Roles for Article 31(3)(c) of the VCLT, p. 211.

7 In detail see *Sanyal*, Solutions to the Problem of Climate Change Refugees, p. 289.

8 In detail see *Mendelsohn*, The Theory and Principles of Banking Regulation after the Financial Crisis: No (Systemic) Risk, No Fun, p. 307.

ature. Given that the harmonization of different laws happens also in a bottom-up process, the uncertainty of the future – along with the uncertainty of what it may bring – can be further minimized by considering progressive laws that have already been adopted in other countries and by determining, where possible, how those laws came to evolve.

The direction of the development of liability principles in Polish and German tort law (in particular, the principles of fault, risk and community life) and the assessment of their potential evolution is what *Krygier* sheds light on. After comparing and analysing relevant regulations and legal literature from these two jurisdictions, she presents original suggestions for improving effectiveness in applying the principles of liability in Polish and German tort law.[9]

The task of identifying current and foreseeable trends in the reform of rules on forced succession and of estimating their future shape was undertaken by *Miler*. In her study, she poses a question: How is the freedom of testation likely to be balanced in the future in respect of a close family member's interest in receiving a portion of the testator's estate (rules of forced succession)? To answer this question, she analyses rules on forced succession in chosen civil law jurisdictions, examining both their character as well as recent reforms.[10]

III. 'The New Law' as a critical evaluation of new laws, practices, theories and proposals

In many cases, the efficiency of new legislation can be assessed only after the law is adopted, enforced and complied with. At that point, the controlling law can be scrutinized not only theoretically but also from a practical perspective. Suggestions for the improvement of such law can then be based on known outcomes that could not always be predicted in advance. Additionally, new legal practices, theories and proposals can be examined regarding their correctness, applicability or usefulness. Thanks to constructive critique, they can gain recognition, acceptance and further evolve.

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9 In detail see *Krygier*, Principles of Liability in Tort and Their Future in the German and Polish Legal Systems – *De Lege Lata* and *De Lege Ferenda* Remarks, p. 61.

10 In detail see *Miler*, The Present and Future of Forced Succession in Chosen Civil Law Jurisdictions, p. 89.

Kotowski critically evaluates the new law regulating supplementary performance – the law includes both a right of repair as well as the right to have a defective product replaced – and identifies a number of problems in this law. For instance, there are no detailed rules explaining the enforcement of supplementary performance, there is no statutory period system for its accomplishment and customers are persistently misinformed about their rights. However, based on his analysis, commercial guarantees do not provide a sound alternative to supplementary performance. Thus, the author looks for alternate new solutions.[11]

The newest Iranian Act on debt convictions from 2015 is constructively critiqued by *Barzegar*. The Act regulates the problem of imprisoning convicted debtors. This problem, rather unknown to European scholars, has not only been considered in Iran for decades but also has significant practical importance: "78 per cent of the inmates in Iran prisons are imprisoned because of financial matters." *Barzegar* explains the legal and social-historical background of this issue, critically assesses the newest Act and recommends a number of progressive changes.[12]

An improvement of the unwritten principle prohibiting an abusive use of rights – thereby constituting a limitation on the exercise of the fundamental freedoms ensured by the European Treaties – is the goal of *Beck*. Such abuse takes place when "a factual circumstance is created that allows rights to be exercised contrary to the purposes the fundamental freedoms intend to protect." After an analysis of the principle's legal foundations and the relevant case law, he discusses the most recent developments regarding the abuse of rights doctrine.[13]

Pouikli scrutinizes the transposition, application and enforcement of Directive 2004/35/EC on Environmental Liability with Regard to the Prevention and Remedying of Environmental Damage and identifies a number of issues. She finds that the Directive is ineffective as it is difficult to reach the threshold set in it and that it is not uniformly and efficiently implemented due to its inherent ambiguity. In particular, the Member States can each de-

11 In detail see *Kotowski*, Effective Supplementary Performance?, p. 77.

12 In detail see *Barzegar*, A Critical Review of Iranian's New Imprisonment Policy Regarding Convicted Debtors, p. 131.

13 In detail see *Beck*, Abuse of Rights in EU Law: A General Law Principle Limiting the Exercise of Rights at the EU Level?, p. 157.

cide for themselves on the strength of the implemented measures. She considers a number of significant revisions that would allow for the creation of a powerful liability system.[14]

Puškár, on the other hand, is concerned with the almost unlimited immunity enjoyed by international organizations in a host state that allows these organizations to be excluded from the jurisdiction of the host state's courts as well as other state organs. He questions whether this immunity should not be restricted, especially in context of an individual's right of access to a court. After considering the reasons for the immunity and the current prevailing practice, he makes a strong recommendation on how jurisdictional immunity could be restricted.[15]

Current practice is also challenged by *Korošec* and *Veber*. They examine whether and under what conditions the use of force against non-state actors could be classified as an exercise of the right of self-defence under Article 51 of the United Nations Charter. Particular attention is given to the interpretation of the term 'armed attack' as used in the article as well as the role of the 'unwilling or unable doctrine', providing that the unwillingness or inability of a state to prevent the use of its territory as a shelter for terrorist activities may justify use of force against this state. The theoretical discussion is set in context of the most recent international developments, starting from the 9/11 attacks and the reaction of states and international bodies thereto, and continuing on to the US-led coalition's military intervention against ISIL (Islamic State of Iraq and the Levant) in Iraq and Syria.[16]

The ineffectiveness of international law in preventing mass atrocity crimes is criticized by *Žagar*. She argues that the primary responsibility for the maintenance and restoration of international peace and security is borne by the United Nation's Security Council. She critically examines the latest international developments and the initiatives to change 'veto as a right' to 'veto as a responsibility'.[17]

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14 In detail see *Pouikli*, Propositions towards a Potential Revision of Directive 2004/35/EC on Environmental Liability with Regard to the Prevention and Remedying of Environmental Damage (ELD), p. 199.

15 In detail see *Puškár*, Jurisdictional Immunity of International Organizations – Should It Be Restricted?, p. 233.

16 In detail see *Korošec* and *Veber*, The Right of Self-Defence in International Law: Contemporary Developments in the Context of the Fight against Terrorism, p. 243.

17 In detail see *Žagar*, Responsibility Not to Veto, p. 275.

Kompatsiari explores a legal gap falling between the rejection of a legal obligation of people to live and the rejection of a positive right to die, a gap that forces people incapable of committing suicide to remain alive. In her contribution, she discusses the social legitimation of law and the element of 'fellowship' among members of a society. She disapproves of the current state of affairs and looks to stimulate a legal debate on the existence of and preconditions for a right to die as held by people incapable of committing suicide.[18]

IV. 'The New Law' as innovative theoretical conceptions of legal issues

The theoretical understanding of a concept leads to its better enforcement and application. To influence the entire legal system, a concept's nature, characteristics and manner of function must be explored. Only a clear understanding of the world of legal norms and rules allows improvements of a general nature and the creation of laws that not only perfectly fulfil their purpose but also are easy to enforce and comply with.

MacFarlane investigates the unique nature of the right to enforce a benefit provided by contracting parties to a party that is external to the contract (a third party right) in Scots and German law. The theoretical classification of the legally unsystematized right has practical consequences. What laws are to be complied with? What terminology is to be used? How do we make third party rights doctrinally and theoretically sound? How are they classified in German law and could this support their classification in Scots law? How do we make them theoretically apt for any future harmonization measures? To answer these questions *MacFarlane* briefly considers eight potential approaches to the nature of third party rights and discusses in detail the advantages and disadvantages of two of them (the promissory and *sui generis* analyses) in Scots and German law.[19]

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18 In detail see *Kompatsiari*, Contribution of the Element of 'Fellowship' to the Recognition of a Positive Right to Die for People Incapable of Committing Suicide, p. 327.

19 In detail see *MacFarlane*, The Nature of Third Party Rights: Lessons from German Law, p. 27.

The contribution of *Salmi* disapproves of legal rules that have forms against which real life activities cannot be measured. In his opinion, it is particularly problematic when public authorities supervise and enforce rules requiring continuous compliance of the relevant activities. He correlates the difficulty of complying with norms to such norms' vagueness and indeterminacy and urges the introduction of specific, precise norms in dynamic compliance situations, especially when they are enforced by a public body.[20]

The phenomenon of 'retroactivity' in law is studied by *Tøssebro,* who discusses the principle of retroactivity specifically in context of Norwegian constitutional law. She formulates a ground-breaking hypothesis arguing that the content of the principle and the scope of its application are different than commonly accepted. Particularly, she distinguishes two different rules under the principle: The prohibition to make 'true' retroactive laws and the permission to make 'false' retroactive laws. She examines these rules' characteristics and justifications, their possible links with each other and with other relevant legal principles. Finally, she discusses the applicability of these rules to individually drafted administrative decisions.[21]

A novel approach to explaining the relationship between the world of legal norms and systems and the natural world is proposed by *Saensawatt*, who attempts to prove that legal systems, as with all the other systems existing in the nature world, have the nature and characteristics of complex adaptive systems. In his contribution, *Saensawatt* focuses on explaining the first feature, namely the complexity of a system, by discussing hierarchical organization, the concept of nonlinearity, initial conditions and their relation to the chaotic behavior of dynamical legal systems, and the emergent behaviour of dynamical legal systems. The author lists potential benefits that can be gained through the recognition of legal systems as complex adaptive systems.[22]

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20 In detail see *Salmi*, Principles Based Regulation and Compliance with Financial Legislation, p. 343.

21 In detail see *Tøssebro*, The Principle of Non-Retroactivity and Its Application to Administrative Decisions, p. 361.

22 In detail see *Saensawatt*, On the Nature and Characteristic of Legal Systems as Complex Adaptive Systems, p. 379.

C. Concluding Remarks

Each of the contributions included in this volume embodies the idea that moved us to organize the Augsburg Graduate Conference in Law, namely that young scholars and researchers should receive a chance to present their work; propose solutions attempting to solve legal problems; critically analyse governing laws, current legal practices or academic policies and their newest developments; formulate bold theories; and, most importantly, with their novel ideas contribute to legal progress and an enhancement of the quality of law.

We hope that the new ideas envisioned and examined by the young scholars during the Augsburg Graduate Conference in Law and presented here will help solve problems that international organizations, states, populations and common people struggle with every day. The proposals for new laws that the young scholars have shared with us inspire belief in a bright future for the law. We are delighted to have contributed to advancing law by disseminating their ideas for potential reforms and for the improvement of existing legal norms and principles.