DIGNITAS
Revija za človekove pravice
Slovenian journal of human rights
ISSN 1408-9653

A policy oriented search for basic European Values
Ivan Pajden

Article information:
To cite this document:
Pajden, I. (2016). A policy oriented search for basic European Values, Dignitas, št. 71/72, str. 115-138.

Permanent link to this doument:
https://doi.org/ 10.31601/dgnt/71/72-7

Created on: 16. 06. 2019
To copy this document: publishing@nova-uni.si

For Authors:
Please visit http://revije.nova-uni.si/ or contact Editors-in-Chief on publishing@nova-uni.si for more information.

A policy oriented search for basic european values[1]

Ivan Padjen[2]

In memory of
Myres S. McDougal (1906-1998)

ABSTRACT

The primary problem of the paper can be formulated by the following question: how can one establish – in the sense of recognizing and/or creating – basic values of the European Convention on Human Rights and Fundamental Freedoms (hereinafter: ECHR, Convention)? The answer is encapsulated in two claims. The first is that basic values of the ECHR can be established more fruitfully by policy oriented jurisprudence as adapted to Civil Law than by conventional Civil Law scholarship. The second is that under both past and foreseeable conditions one cannot establish distinctly European basic values of the ECHR other than values of the ECHR itself.

The secondary problem is a common misunderstanding of Harold D. Lasswell and Myres S. McDougal's policy oriented jurisprudence or configurative jurisprudence (hereinafter: POJ). The appraisal of POJ is wanting in three respects. First, although applicaton of law inevitably involves creation, conventional Civil Law scholarship is concerned primarily with application of law. Hence POJ, which is focused upon law-making, should be prima facie relevant even if it required simplification, and its wider framework, that is, Lasswell's policy sciences, were obsolete. Secondly, POJ could not have become a communicable doctrine since in its heyday in the 1960s and 1970s it was applied on the basis of frag-

[1] A summary of the paper was presented to 'Legal Theory and Legal Philosophy Conference „In Search of Basic European Values"' (Faculty of European and Government Studies and European Law Faculty: Ljubljana, Slovenia, 20-21 November 2015).

[2] Faculty of Law, University of Rijeka, Hahlić 6, HR-51000 Rijeka, Croatia. ivan.padjen@zg.t-com.hr.

ments of a theory and when the fragments were finally published together in the 1990s Lasswell and McDougal had no students that could apply it or adapt it for application. Thirdly, the disappearance of POJ is explicable also by a change of academic culture.

Keywords: European Convention of Human Rights, basic values, policy oriented jurisprudence

Politično usmerjeno iskanje temeljnih evropskih vrednot

POVZETEK

V tem prispevku se avtor najprej sooči s problemom, kako je mogoče dognati (prepoznati, tudi ustvariti) temeljne vrednote Evropske konvencije človekovih pravic (v nadaljevanju: EKČP, Konvencija). Njegov odgovor je zajet v dveh trditvah. Prvič, temeljne vrednote EKČP je mogoče bolj učinkovito dognati s pomočjo politično usmerjenega (policy oriented) pravoslovja prilagojenega kontinentalnemu (Civil Law) pravu, kot pa s tradicionalnim kontinentalnim pravoslovjem. Drugič, na podlagi preteklih in predvidljivih pogojev ni mogoče dognati drugačnih izključno evropskih temeljnih vrednot EKČP kot zgolj vrednot EKČP same.

Drugi problem predstavlja splošno nerazumevanje politično usmerjenega oziroma konfigurativnega pravoslovja (v nadaljevanju: PUP) Harolda D. Lasswella in Myresa S. McDougala. Ocene PUP so pomanjkljive v treh ozirih. Prvič, kontinentalno pravoslovje se, ne glede na dejstvo, da uporaba prava neizbežno obsega tudi njegovo ustvarjanje, prvenstveno ukvarja z uporabo prava. Zato bi PUP, ki se osredotoča na pravodavstvo, vsaj na prvi pogled moral predstavljati koristen pristop – četudi bi ga bilo potrebno potrebno poenostaviti in četudi je njegov širši okvir, tj. Lasswellova politična znanost, zastarel. Drugič, PUP ni nikoli postala uspešna doktrina, saj je že v času svojega razcveta v 1960. in 1970. letih temeljil zgolj na fragmentih teorije – ko pa je bila v 1990. letih dokončana, njena avtorja nista imela več študentov, ki bi jo lahko aplicirali oziroma prilagodili za uporabo. Tretjič, izginotje PUP je mogoče razložiti tudi s spremembami v akademski kulturi.

Ključne besede: Evropska konvencija o človekovih pravicah, temeljne vrednote, politično usmerjena sodna praksa

0.1. The primary problem of this paper can be formulated by the following question: how can one establish – in the sense of recognizing and/or creating – basic values of the European Convention on Human Rights and Fundamental Freedoms (hereinafter: ECHR, Convention)? The answer is encapsulated in two claims. The first is that basic values of the ECHR can be established more fruitfully by policy oriented jurisprudence as adapted to Civil Law than by conventional Civil Law scholarship (Section 2, esp. 2.3.1 ABC and BA and 2.5). The second is that under both past and foreseable conditions one cannot establish distinctly European basic values of the ECHR other than values of the ECHR itself (Section 3, also Section 2.3.1.BC and BE). Before stating in detail the two claims it may be useful to explicate what is meant here by a value and related terms (Section 1).

0.2.The secondary problem of the paper is a common misunderstanding of Harold D. Lasswell and Myres S. McDougal's policy oriented jurisprudence or configurative jurisprudence[3] (hereinafter: POJ),which was a part of Lasswell's policy sciences,[4] despite a recent revival of interest in the latter.[5] European lawyers[6] and

[3] The most comprehensive restatement of POJ is Harold D. Lasswell and Myres S. McDougal, Jurisprudence for a Free Society: Studies in Law, Science and Policy, 2 vols., Kluwer Law International, Alphen aan den Rijn, 1992, XL + 1588 p. The most important contributions to POJ are listed in Myres Smith McDougal: Appreciations of an Extraordinary Man, Yale Law School, New Haven CT, 1999, pp. 128-140.

[4] D. Lerner and H. D. Lasswell (eds), The Policy Sciences: Recent Developments in Scope and Method, Stanford University Press, Stanford CA, 1951. See also Rodney Muth, Mary M. Finley and Marcia F. Muth, Harold D. Lasswell: An Annotated Bibliography, New Haven Press, New Haven CT, 1989.

[5] N. Turnbull, Harold Lasswell's "problem orientation" for the policy sciences' (2008) 2:1 Critical Policy Studies, pp. 72-91; E. Montpetit, Policy (program) analysis and policy analysis frameworks, in L. Côté and J.-F. Savard (eds), Encyclopedic Dictionary of Public Administration, 2012, http://www.dictionnaire.enap.ca/dictionnaire/docs/definitions/definitions_anglais/policy_frameworks.pdf

[6] Bent Rosenthal, Étude de l'oeuvre de Myres Smith McDougal en matière de droit international public, Librarie Générale de Droit et de Jurisprudence Pichon et Durand Auzias, Paris, 1970, p. 201 dismisses McDougal's claim that POJ is theory of not merely international law but of law in general by the remark that there are areas of law, especially of national legal orders, such as family law or procedural law, which function 'perfectly regularly and predictably' so that the study of those areas by POJ would create 'exorbitant complications'. Sandra Voos, Die Schule von New Haven: Darstellung und Kritik einer amerikanischaen Voelkerrechtslehre, Duncker und Humblot, Berlin, 2000, p. 321 in a summary appraisal of POJ states inter alia that 'New Haven's <i.e. POJ> school's terminology and proposed framework of inquiry are impressive and possibly of assistance to sociological studies but seem to be too schematic and complex for legal studies, and do not bring significant cognitive gains'.

political scientists,[7] including British authors [8] and American lawyers [9] other than Lasswell and McDougal's admirers[10] or collaborators, have found POJ intellectually uneconomical on the ground that it requires the performance of great many tasks for meagre intellectual gains. Hence it may seem appropriate that Lasswell's framework is considered obsolete[11] although he is recognized as the founder of disciplined policy studies. [12]

The appraisal of POJ in the preceeding paragraph is wanting in three respects. First, although applicaton of law inevitably involves creation, conventional Civil Law scholarship is concerned primarily with application of law. Hence POJ, which is focused upon lawmaking, should be *prima facie* relevant even if it required simplification, and its wider framework, that is, Lasswell's policy sciences, were obsolete. Secondly, POJ could not have become a communicable doctrine since in its heyday in the 1960s and 1970s it was applied on the basis of fragments of a theory and when the fragments were finally published together in the 1990s[13] Lasswell and McDougal had no students that could apply it or adapt it for application. Thirdly, the disappearance of POJ is explicable also by a change of academic culture. POJ's tenet that humans are irrational[14] and manipulable[15] is squarely at odds with rational choice theory, which became the dominant perspective in the social sciences in the 1980s and 1990s, teaching that humans are purposive actors and/or motivated exclusively by self-interest.[16] Since Lasswell's policy sciences coincided with industrial capitalism while rational choice theory has flourished in financial capitalism, a historian of ideas may hypothesize that the change of academic culture has been ideological (cf 3.2.1.7).

---

[7] Knud Krakau, Missionsbewustsein und Voelkerrechtsdoktrin in den Vereinigten Staaten von Amerika, Metzner, Frankfurt a.M., 1967, p. 459-518 interprets POJ as an expression of American religious and political faith in the historical mission of the USA.
[8] Ph. Allott, Language, method and the nature of international law, British Yearbook of International Law, vol. 45 (1973), p. 79-135, esp. p. 121-133.
[9] E. g. O. R. Young, International law and social science: the contribution of Myres S. McDougal, vol. 66, no. 1 American Journal of International Law (1972), p. 60-76.
[10] R. A. Falk, New approaches to the study of international law, in M. Kaplan (ed.), New Approaches to International Relations, St. Martin's Press, New York, 1968, p. 357-379.
[11] Montpetit (note 3).
[12] E. g. Wayne Parsons, Public Policy, Elgar, Cheltenham, 1995, p. 6, 9, 18-19.
[13] H. Lasswell and M. McDougal.
[14] Harold D. Lasswell, Psychopathology of Politics, Univertsity of Chicago Press, Chicago IL, 1930.
[15] E.g. Morimitsu Inaba, The Politics of Mechanomorphism: A Critique of Harold D. Lasswell's Maniputative Images of Politics, University of Toronto, Ph.D. Dissertation, 1970.
[16] E.g. D. D. Hechathorn, Sociological rational choice, in G. Ritzer and B. Smart (eds), Handbook of Social Theory, Los Angeles CA, p. 273-274.

1. Values and Other Standards

1.1. A value is used here as an ideal type.[17] It is defined as a state of affairs that is good.

1.2. A value can exist as something merely spoken of, or thought of, that is, inedpendently of either an action or a goal of action. A value in that sense is a standard of conduct or, to put it differently, a measure of action.[18]

1.3. A value can exist also as an attained goal, that is, an achieved state of affairs. A value in that sense results from a human action or a natural event. Only the former is of interest here. If a result is intrinsic to an action (as the open door is intrinsic to opening the door) the result is an effect. If a result is extrinsic to an action (as draught is extrinsic to opening a door) the state is a consequence.[19] A value as an attainded goal is something that can be measured by a standard of conduct but may also function as such a standard.[20] Its function in law is known as the nature of things.[21]

1.4. The structual properties and differences between a value and related standards of conduct (or measures of action), if the latter are also construed as ideal types, are as follows: [22] 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 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.

1.5. In this paper the terms value, goal and principle are sometimes, when the distinctions stated in sections 1.3 and 1.4 are not important, used interchangeably or together and connected by a slash.

---

[17] Max Weber, "Objektivitaet" sozialwissenschaftlicher und soziopolitischer Erkenntnis, in Id., Gesammelte Aufsaetze zur Wissenschatfslehre, 3. Aufl., Mohr, Tuebingen, 1968, p. 146-214; Barbara Saegesser, Der Idealtypus Max Webers und der Naturwissenschaftliche Modellbegriff: Ein begriffskritischer Versuch, Birkhaeuser, Basel, 1975, p. 159-172.

[18] Thomas Aquinas, Summa theologiae, IaIIae, Q 1, Art 1.

[19] Georg Henrik v.Wright, Norm and Action, Routledge and Kegan, London, 1963, p. 39-41.

[20] Aquinas Q 91, Art 2.

[21] See A. Kaufmann, W. Hassemer und U. Neumann (Hg.), Einfuehrung in die Recthsphilosophie und Rechtshtheorie der Gegenwart, 6. Aufl., Mueller, Heidelberg, 2004, p. 196 ff.

[22] Cf S. Sajama, Dužnost i vrijednost <Duty and Value>, tr. Zbornik Pravnog fakulteta Sveučilišta u Rijeci, vol. 6 (1985), p. 161-169.

1.6. This paper distinguishes two principal kinds of legal standards of conduct, namely, constitutional and systemic.

1.6.1. Constitutional standards are the highest standards of a legal system. They are of two kinds: secondary standards prescribe the ways other legal standards are made (e.g. constitution, legislation, contract, administration, adjudication); primary standards prescribe the activities other than the ways legal standards are made (e.g. englightenment, welfare, well-being, affection, etc.). For the sake of simplicity, this paper treats constitutional and other strict standards (*jus strictum*) as standards of the same legal force. Constitutional standards can be embodied in constitutions, organic laws, customs and judgments but can also exist as principles whose existence is not tied to an act.

1.6.2. Systemic standards determine the structure of a legal system. Formal systemic standards determine relations among legal standards and include items such as generality, publicity, prospectivity, clarity, coherency, stability, observance and equality in the observance of legal rules;[23] deductivity, formality, axiomaticity, decidability, independency, coherency, completeness.[24] There is no comparable list of material systemic standards.[25] Candidates are values such as human dignity and principles like responsibility and proportionality. Systemic standards may but need not be recognized as constitutional or legal standards. Unalterable constitutional rules such as the republican form of government in the Italian Constitution and the federal system of government in the German Basic Law[26] are *prima facie* candidates for systemic standards of Italian, that is, German law. Public order goals/values in the sense of POJ are systemic standards.

1.7. Basic values of the ECHR can also be divided into constitutional and systemic values.

1.7.1. Constitutional values of the ECHR include primarily those that are mentioned explicitly in the Convention, especially in titles of Articles. They include life (Art. 2), liberty (Art. 4-5), security (Art. 5), fair trial (Art. 6), freedom of expression (Art. 10), etc. Basic values of the ECHR include also those that are not mentioned explicitly in the Convention but have been developed by juris-

[23] Lon L. Fuller, The Morality of Law, rev. ed., Yale University Press, New Haven CT, 1963, p. 33-94.
[24] Gerard Timsit, Thèmes et systèmes de droit, Presses Universitaires de France, Paris, 1986, p. 64-88.
[25] Ibid, p. 89-101.
[26] E. Denninger, Constitutional law between statutory law and higher law, in A. Pizzorusso (ed.), Law in the Making: A Comparative Survey, Springer, Berlin, 1988, p. 115.

prudence of the European Court of Human Rights (hereinafter: ECtHR) and/or legal doctrine. Examples are freedom of the press and freedom of radio and television broadcasting[27] or media freedom.[28] Internet freedom as a distinct basic value of the ECRH may be in the making.

1.7.2. General systemic values, in section 1.6.2, are at least strong candidates for systemic values of the ECHR.

2. Policy Oriented Jurisprudence and Legal Dogmatics

2.1. Legal Dogmatics

2.1. Legal dogmatics (*Rechtsdogmatik*, also *Juridik*, *Jurisprudenz*; *dogmatique juridique*; *dogmatica giuridica; dogmática juridical*; юридическая догматика), is the central discipline of Civil Law scholarship. Its task is to interpret and systematize positive law with a view of its application to fact situations by making concrete legal acts, that is, judicial decisions, administrative acts or legal transactions.[29] Legal dogmatics does not have a counterpart in Anglo-American Common Law, wherein the function of legal dogmatics is performed chiefly by judicial opinions.[30]

2.1.1. The strongest side of legal dogmatics is systematization of law.[31] If one takes five standard canons or methods of interpretation of law, that is, gramatical, logical, historical, teleological and systematic canon,[32] only the last one, which is based directly

[27] Monica Macovei, Freedom of Expression, 2nd ed., Council of Europe, Strasbourg, 2004, p. 11-15.
[28] M. Oetheimer (ed.), Freedom of Expression in Europe, Council of Europe, Strasbourg, 2007, p. 11-60.
[29] Sp.: Hermann Kantorowicz, Rechtswissenschaft und Soziologie, Mohr, Tuebingen, 1911; R. Dreier, Zum Selbstverstaendnis der Jurisprudenz als Wissenschaft, in Id., Recht-Moral-Ideologie: Studien zur Rechtstheorie, Suhrkamp, Frankfurt a.M., 1981, p. 48-69; Aulis Aarnio, Denkweisen der Rechtswissenschaft, Springer, Berlin, 1979, p. 34; Dogmatique juridiqiue, in Dictionnaire encyclopedique de théorie et de sociologie du droit, Librarie générale de droit et de jurisprudence, Paris, 1993, 188-190; Юридическая догматика: ответ критикам, http://yurist-blog.ru/yuridicheskaya-dogmatika-otvet-kritikam
[30] R. Stith, Can practice do without theory? Differing answers in western legal education, Archiv fuer Rechts- und Sozialphilosophie, vol. 94 (1980), p. 426-435.
[31] See: Lars Bjoerne, Deutsche Rechtssysteme im 18. und 19.Jahrhunderts, Gremer, Ebelsbach, 1984; Paolo Cappellini, Systema Iuris, Giuffre, Milano, 1985; Michel van den Kerchove et Francois Ost, Le système juridique entre ordre et désordre, Presses Universitaires de France, Paris, 1988; Timsit.
[32] In detail Stefan Vogenauer, Die Auslegung von Gesetzen in England und auf dem Kontinent, Bd. I, Mohr <Siebeck>, Tuebingen, 2001, p. 430-663, 442, which divides the subject matter into grammatical (linguistic), historical, systematic (contextual), and purposive (teleological) interpretation, mentioning that the earlier division into the grammatical method and the logical method has been retained in French doctrine. Briefly on German doctrine Kaufmann, p. 279-280. Briefly on French doctrine Boris Starck, Introduction au droit, 3ème ed. Litec, Paris, 1991, p. 115-132.

on systematization of law, is genuinely legal – unless one recognizes that historical and teleological canons are its variants. It is genuinely legal in two senses: it relies primarily on legal criteria; it cannot be substituted for by criteria of another discipline, such as philosophy or sociology.

2.1.2. The weakest sides of legal dogmatics are, on the one hand, a reliance on standards of positive law only, or even more narrowly on legal rules as the only relevant standard of positive law, and, on the other, a disregard for facts, that is, for the subject matter, conditions and consequences – especially functions – of legal standards.

2.1.2.1. Legal dogmatics includes methodology of interpreting but not of creating law. The reason can be found in Article 4 of the French Code Civil, which obligates the judge 'to pass a judgment even when he is in doubt about the meaning of the law or when the law is silent'. The reason underlying Article 4 is not a blind faith in completeness of the law but the right of a citizen to a judgment by a judge independent of the legislature. [33] Hence the mission of legal dogmatics is to be serviceable to judges and advocates in the application of law. The mission has been expanded for the benefit of its consumers to recognize that there are gaps in the law and even to invent methods of filling them.[34] However, the mission has barred the discipline from developing a fully fledged methodology of creating law or, to use the Latin expression, *de lege ferenda.*

2.1.2.2. The mission explains also paradoxes of the doctrines on the relationship between legal dogmatics and legal policy. First, the doctrine of sources teaches that judicial decisions are not primary sources of law because they regulate a single case after the fact. In reality they are applied in the future to similar cases. Secondly, the belief in completeness of the law implies that when application of law includes creation new laws can be derived from the existing ones.[35] However, even plain application of law, if it exists at all, includes looking back and forth

[33] Heinz Monhaupt, Das Rechtsverweigerungsverbot des Artikel 4 Code civil, in Z. Pokrovac und I. Padjen (ur./Hg.), Zabrana uskrate pravosuđa i prava / Justiz- und Rechtsverweigerungsverbot, Rechtswissenshaftliche Fakultaet der Universitaet zu Split, Split, 2010, p. 77-114, cit. p. 77.
[34] E.g. Vogenauer (note 30), p. 143-145, 290 f, 312 f, 367 f.
[35] E.g. 'every innovative interpretation proceeds by analogy', Kaufmann (note 19), p. 278-279.

between laws and facts.[36] Moreover, corrections[37] of distributive justice,[38] such as judicial review of legislation[39] and/or regulation (e. g. in anti-trust cases), may depend primarily on points of fact, especially on causation. Thirdly, lawyers, who are rarely trained in policy analysis, are called to draft legislation because they know how to systematize it. Political scientists, who are trained to be experts in policy but not in law, search for a demarcation between the two to make themselves useful in the former without the latter.[40] Finally, the principal discipline of Civil Law is concerned with application rather than making of the law, although lawyers in the Civil Law world search for the man-made objective law,[41] which can hardly be found in the American Common Law.[42]

2.2. Policy Oriented Jurisprudence (POJ)

2.2. The second approach to law, including legal science, is Harold Lasswell and Myres McDougal's policy oriented jurisprudence or configurative jurisprudence (POJ) – however, as adapted to Civil Law (APOJ) in section 2.3. POJ is an offshoot of Harold Lasswell's policy orientation or policy sciences.

2.2.1. Lasswell defined policy sciences initially, in 1950, as the "social sciences" which are "better designated as policy sciences – their function is to provide intelligence pertinent to the integration of values realized by and embodied in interpersonal relations".[43] Thus they had two tasks: first, research into the policy process; and, secondly, finding and feeding relevant knowledge

[36] Marijan Pavčnik, Das "Hin- und Herwandern des Blickes". Zur Natur der Gesetzesanwendung, in Id., Auf dem Weg zum Mass des Rechts, Steiner, Wiesbaden, 2011, p. 173-190.
[37] Aristotle, Nicomahean Ethics, 1132b22-24.
[38] Ibid., 1130b31-35.
[39] graphai paranomon in Aristotle's Constitution of Athens and Related Texts, tr. by K. v. Fritz and E. Kapp, Hafner, New York, 1950, p. 59.
[40] Cf: 'The problem of finding a criterion which would enable us to distinguish between the empirical sciences on the one hand, and mathematics and logic as well as 'metaphysical' systems on the other. Karl Poppper, The Logic of Scientific Discovery, tr., Routledge, London, 2002, p. 13; the problem of finding a criterion which would enable us to distinguish between 'administration of policy and the policy of administration, especially when responsibility for the administration of policy conflicts or overlaps with responsibility for the policy of the administration of policy', Yes Minister season 2 episode 7, min. 15.00-15.11, https://www.youtube.com/watch?v=zh6x1Mt-Owg
[41] Wolfgang Fikentscher, Methoden des Rechts in vergleichender Darstellung, Bd. 1, Mohr <Siebeck>, Tuebingen, 1975, p. 8, 15 ff.
[42] Ibid., Bd. 2, 1976, p. 219-220.
[43] Harold D. Lasswell and Abraham Kaplan, Power and Sociey, Yale University Press, New Haven, 1960, p. XII.

to that process.[44] He redefined them as narrower than the psychological and social sciences but open to the relevant knowledge gathered by all scientific disciplines.[45] Hence he recognized that contributions to policy sciences had been made in the academic fields of political science, mathematics, psychology, economics and anthropology.[46]

2.2.2. The problem orientation is the pivot of policy sciences, including POJ. It is the demand that a policy science is serviceable in solving social problems and for that reason starts with the identification of such problems. Lasswell adopted the problem orientation from John Dewey's negative attitude towards inherited philosophy.[47]

2.2.3. Lasswell's theory is eclectic. It combines pragmatism with several streams of continental European – especially German – intellectual heritage. Lasswell adopted Max Webers's institutionalism, [48] Sigmund Freud's psychoanalysis[49] (which he actively practiced for years[50]), Eduard Spranger's typology of personality, [51] and Roman and German legal rhetorics.[52] Moreover, Lasswell's theory is in several respects close to Karl Marx's theory.[53]

2.2.4. Policy sciences in the sense defined by Lasswell in 1950 have subsisted as a distinct tradition till this very day.[54] But they have followed[55] Lasswell's commitment to positivism, that is, naturalism in the social sciences.[56] Not surprisingly, the surviving policy scientists overlook the fact that Lasswell's most numerous and,

[44] H. D. Lasswell, The policy orientation, in D. Lerner and H. D. Lasswell (eds), The Policy Sciences, Stanford University Press, Stanford CA, 1951, p. 3; Id., The Policy Orientation of Political Science, Lakshmi Nagrain Agarwal, Agra, 1971, p. 3.
[45] Lasswell, Policy, p. 3.
[46] Ibid., p. 4-5.
[47] Lasswell and Kaplan, Power; Harold D. Lasswell, A Pre-View of Policy Sciences, Elsevier, Amsterdam, 1971, p. XIII-XIV; John Dewey, Reconstruction of Philosophy, Henry Holt and Co, New York, 1920, p. 13-18.
[48] See William L. Morrison, Weber in Law, Science and Policy Terms (Unrevised manuscript. Not to be regarded as published)' (1962), p. 48. Given to the present author by Myres S. McDougal.
[49] Lasswell, Psychopathology.
[50] R. Muth, Harold Dwight Lasswell: a biographical profile, in Id., p. 6.
[51] Lasswell, p. 49 a summary reference to Eduard Spranger, Lebensformen.
[52] I. Padjen, Catholic theology in Croatian universities: Between the Constitution and the Treaty; a policy oriented inquiry, in B. Vukas and T. Šošić (eds.), International Law: Liber Amicorum Božidar Bakotić, Nijhoff, The Hague, 2009, p. 38-39.
[53] John D. McDougall, An Analysis of Harold D. Lasswell's Contribution to the Study of World Politics, Duke University, Ph.D. Dissertation, 1975, p. 27-28.
[54] Policy Sciences: Integrating Knowledge and Practice to Advance Human Dignity for All, http://www.policysciences.org/; also the scholarly periodical Policy Sciences, Springer, Dordrecht, 1970-.
[55] R. A. Pielke Jr., What future for policy sciences? Policy Sciences, vol. 37 (2004), p. 215.
[56] Lasswell and Kaplan, Power (note 41), p. XIII, XXIV; A. Kaplan, Definition and specification of meaning, Journal of Philosophy, vol. 43, no. 1 (1946), p. 281-288.

arguably, most significant contributions to policy sciences were produced, in the 1960s and 1970s, in the vein of POJ, [57] which is not naturalistic.

2.3. The Adapted Framework (APOJ)

2.3. A promising approach to identifying basic values of the ECHR, as well as other basic legal standards, is the policy oriented jurisprudence framework of inquiry as adapted to Civil Law (hereinafter: APOJ).[58] It is fruitful because it is problem oriented (section 2.2.2) and, partly for that reason, postulates rather than justifies basic values, but relates them to both the law as a means to attain them and the conditions under which the law has attained and probably will attain the values (section 2.4). In addition, APOJ rectifies the POJ disregard for law as a normative system by taking into account that law in the orbit of Civil Law is such a system or a series of overlaping normative systems.

2.3.1. APOJ requires the performance of two sets of tasks. The first is a definition of the components of a legal inquiry (see A). The second is the performance of the inquiry.[59]

(A) The first task, which is propedeutic, is a definition of the components of inquiry. It consists of the following:

(AA) The identification of the problems of inquiry, namely of: (AAA) the legal and political or practical problem, that is, a state of social relations (political, economic, educational, etc.) which conflicts with, or fails to achieve, basic goals/values in sections ABC and BA, and can be rectified by a new law (*lex ferenda*), which either differes from the law now regulating the social relations that are problematic or fills a legal gap by regulating them – e.g. invasions of privacy through internet; (AAB) the scientific or theoretical problem, that is, inadequate scientific knowledge of the practical problem; in Civil Law the theoretical problem includes virtually by definition inexistent systematization of the new law (identification of the theoretical problem consists in the review and appraisal of scientific literature).

[57] Even Pielke, who recognizes Lasswell's collaboration with Myres S. McDougal.
[58] I. Padjen, Law and religion in post-modernity, in M. Polzer et al. (eds.), Religion and European Integration, The European Academy of Sciences and Arts - Edition Weimar, Weimar, 2007, p. 377-398; Id. (note 50); G. Lalić Novak and I. Padjen, Europeanisation of asylum, Politička misao / Croatian Political Science Review, year 46, no. 5 (2009), p. 75-101.
[59] Lasswell and McDougal, p. 3-38 ff.

(AB) The selection of the end and of the framework of inquiry, which includes: (ABA) the end of knowledge gained by the inquiry (theoretical, the end in itself; practical, a good end outside knowledge; instrumental, any end outside knowledge); (ABB) the theoretical and methodological framework: (ABBA) theories/methodologies, (ABBB) concepts, (ABBC) presuppositions, (ABC) the postulation of systemic values of the ECHR in the sense of APOJ in sections 1.6.2 and 1.7.2. or basic public order goals in the sense of POJ; the basic public order goal in the sense of POJ, which is accepted also by APOJ, is human dignity, which is defined as 'the greatest production and widest possible distribution of all important values';[60] (ABD) subject-matter; (ABE) methods; (ABF) hypotheses: (ABFA) practical, (ABFB) theoretical.

(B) A simple POJ inquiry studies decision-making in a single legal system, e.g. German, ECHR or international (a complex inquiry studies two or more legal systems e.g. national and national, international and national, EU and national) by performing the following five basic tasks:

(BA) The choice, in accordance with the systemic values/principles in section ABC, of constitutional and other strict standards (hereinafter: constitutional standards) within the chosen legal system – e.g. freedom of expression in internet.

(BB) The description of past tendencies in ordinary (i.e. non-constitutional) law decisions and the appraisal of the tendencies as being *infra, contra* or *praeter* the constitutional standards in section BA and, indirectly, the systemic values in section ABC.

(BC) The analysis of factors, that is, causes and other conditions (hereinafter: conditions) affecting ordinary law decisions: (BCA) intra-institutional; (BCB) extra-institutional.

(BD) the projection and appraisal of probable future ordinary law decisions, without intervention of the kind envisaged in section BE, under: (BDA) the past conditions in section BC; (BDB) probable future conditions.

(BE) The invention of policy alternatives that are more than the probable future ordinary law decisions in section BD in accord with the constitutional standards in sections BA and, indirectly, the systemic values in section ABC.

[60] Ibid., p. 35, 740.

2.3.2. As stated in the opening lines of this paper, the paper's first claim is concerned with the tasks ABC and BA, while the second claim is concerned with the tasks BC and BE.

2.4. The Postulation of Values

2.4. APOJ accepts the POJ demand that basic goals of public order, that is, systemic values, should be postulated. For instance, an APOJ inquiry whose practical problem is invasions of privacy through internet (see section 2.3.1.AA) and tries to establish - in the sense of recognizing and/or creating - internet freedom of expression as a constitutional value of the ECHR (see section 2.3.1.BA), should start by postulating a systemic value, or a set of systemic values, such as human dignity defined as the widest possible shaping and sharing of all other values (see section 2.3.1.ABC).

2.4.1. Legal theory that postulates systemic values may seem to be decisionist in addition to being positivist, that is, maintaining that positive – or man made – law is conceptually distinct from and independent of natural law as a set of standards of human conduct binding for rational beings *qua* rational beings. However, POJ is methodically rather than substantively positivist. Myres McDougal, when asked whether he believed in something like natural law replied readily, „Of course, in Brierly's sense".[61] Lasswell and McDougal have advocated postulation in contradistinction to derivation.[62] 'Infinitely regressive logical derivations from premises of transempirical or highly ambiguous reference contribute little to the detailed specification of values, in the sense of demanded relations between human beings, which is required for rational decision'.[63] The postulation of basic goals of the public order in terms of POJ or of systemic values in terms of APOJ is not decisionist or arbitrary either. Very different from that, the postulation is a method of a realistic legal science – as explained in sections 2.5.2-2.5.4.

2.4.2. Realistic legal science is in this paper defined as a legal science that is naturalized appropriately.

2.4.2.1. Appropriateness implies that legal science has been[64]

[61] To the present author in 1990.
[62] Lasswell and McDougal, p. 17, 19-20, 34-35.
[63] Ibid., p. 34.
[64] Dieter v. Stephanitz, Exakte Wissenschaften und Recht: der Einfluss von Naturwissenschaft und Mathematik auf Rechtswissenschaft und Rechtsdenken in zweieinhalbjahrtausenden, De Gruyter, Berlin, 1970; Maximilian Herberger, Dogmatik: zur Geschichte von Begriff und Methode in Medizin und Jurisprudenz, Klostermann, Frankfurt, 1981.

and should be modelled to a significant degree on natural sciences but is not likely – and for that reason should not be urged – to become a natural science; the reason is that normativity as the pivotal dimension of law – and also of society – has thus far defied naturalistic explanation.[65] Suffice it to note that attempts to explain meaning naturalistically[66] have not succeeded and are not likely to succeed in a real world.[67]

2.4.2.1. Realism of the adapted policy oriented jurisprudence, as well as of POJ, is to be measured not so much by naturalized social sciences, such as social psychology, as by legal dogmatics.

2.4.3. Realism of a legal inquiry carried out withing the framework of POJ or APOJ is achieved by relating postulated goals/values to both the law as a means to attain them and the conditions under which the law has attained and probably will attain the values. The postulation of basic public order goals/values in terms of POJ or of systemic values in terms of APOJ leads to realistic results by achieving the following four interrelated functions, that is, unintended as well as intended consequences of the postulation.

2.4.3.1. The first is the explication of evaluative assumptions, which are entertained by the policy analyst whenever she identifies a practical or legal problem.

(A) The explication of evaluative assumptions is incompatible with or at least foreign to legal dogmatics as defined in section 2.1.

(B) The need for the explication is inherent in, *inter alia*: law as a minimum morality (epitomized in the saying *non omne quod licet honestum est*[68] and restrictions of human rights for protection of morals[69]), which implies that it is usually appropriate to probe into moral dimensions of a positive legal standard; legal dogmatics based on jurisprudence of interest (*Interessenjurisprudenz*),[70] which has turned into[71] jurisprudence of value (*Wertungsjurisprudence*);[72]

[65] S. P. Turner and P. A. Roth, Introduction, in Id. (eds.), Philosophy of the Social Sciences, Blackwell, Oxford, 2003, p. 13.
[66] Kaplan, Definition.
[67] Karl-Otto Apel, Analytic Philosophy of Language and the Geisteswissenschaften, Reidel, Dordrecht, 1968, p. 23 ff.
[68] Digesta 50.17.144.
[69] E.g. International Covenant on Civil and Political Rights (UNGA resolution 2200 A, XXI), of 1 December 1966, art. 12 sect. 3, art. 14 sect. 1, etc.
[70] Rudolf v. Jhering, Der Zweck im Recht, Breitkopf und Haertel, Leipzig, 1877, http://digital.ub.uni-duesseldorf.de/urn/urn:nbn:de:hbz:061:1-108490
[71] Karl Larenz, Methodenlehre der Rechswissenschaft, 6 Aufl., Springer, Berlin, 1991, p.125-132; Heinrich Hubmann, Wertung und Abwaegung im Recht, Heymanns, Koeln, 1977.
[72] E.g. Helmut Coing, Juristische Methodenlehre, De Gruyter, Berlin, 1972.

Dewey's problem orientation, which implies that a state of affairs is wanting because it is not measuring up to standards of evaluation; hermeneutic philosophy, which argues that there is no such a thing as presuppositionless knowledge;[73] post-empiricist philosophy, which maintains that theories are logically constrained but underdetermined by facts and for that reason based on criteria that may be recognized as evaluative.[74]

2.4.3.2. The second function of the postulation of systemic values is the limitation of the third function, namely, of the choice of legal systems and constitutional standards. A distinction between the second and the third function may seem to be farfetched unless one takes into account seriously Lasswell's claim that one can construe a policy science of tyranny as well as of democracy.[75]

2.4.3.3. The third function is the choice of legal systems and constitutional standards. It consists in recognition and ordering, from among a virtually endless flow of data, of those decisions that are, on the one hand, constitutional or strict and, on the other, in accord with the postulated systemic values. The choice of a legal system is a functional equivalent of the basic norm in Kelsen's sense.[76] The choice of a constitutional standard is a functional equivalent of Hart's rule of recognition.[77]

(A) Legal dogmatics as defined in section 2.1 presupposes the validity of its own – for instance, German – legal system. Hence legal dogmatics tends towards the primacy of its own national law. [78] From that perspective international law is merely external national public law, whereas private international law is the national law, either internal or external, which regulates transnational private legal relations.

(B) Positivist legal theories, which maintain that efficiency is a distinctive feature of law, overlook the fact that efficiency is not such a feature when it is needed. The following cases at least indicate the problem.

[73] Hans-Georg Gadamer, Wahrheit und Methode, Mohr <Siebeck>, Tuebingen, 1960.
[74] M. Hesse, Theory and value in the social sciences, in Ch. Hookway and Ph. Pettit (eds.), Action and Interpretation, Cambridge University Press, Cambridge, 1978, p. 1-16.
[75] H. D. Lasswell, Democratic character, in Id., Political Writings, The Free Press, New York, 1951, p. 471n.
[76] Hans Kelsen, General Theory of Law and State, tr., Russell and Russell, New York, 1961, p. XV, 110 ff, 120, 436.
[77] H.L.A. Hart, The Concept of Law, Clarendon Press, Oxford, 1961, p. 92-93.
[78] Kelsen, General, p. 386-387.

(BA) To avoid current political controversies over the relationship between the UN and NATO, it may be safe to ask what was the law of international security in the cold war, when observance of that law was a condition of the survival of mankind: the law of the UN or the law created by the two superpowers?[79] Is it possible that a correct answer is: both?

(BB) What is the law governing freedom of religion in public schools that display religious symbols: the ECHR or the law of every single nation state that is the party to the Convention? [80] If one accepts the primacy of international law,[81] or at least of the ECHR as a transnational law, the correct scholarly answer is that the ECHR as interpreted by the European Court of Human Rights (hereinafter: ECtHR) governs the case by the doctrine of the margin of appreciation that allows a party to the ECHR to derogate it partly. However, if one takes into account the inflationary use of the margin of appreciation,[82] is it not possible that a correct answer, again, is: both?

2.4.3.4. The fourth function of the postulation of systemic values is a correlation between law, which includes constitutional standards in section 2.3.1.BA and ordinarys legal decisions in section 2.3.1.BB, and, on the one hand, systemic values in section 2.3.1.ABC and, on the other, conditions in section 2.3.1.BC. Such a correlation, although it looks like a social law modelled on natural laws, is not such a law. It looks like a hypothesis but cannot be either verified or refuted. It is a developmental ideal type which serves as a criterion for recognizing, gathering and correlating data. It is valid as long as it serves the purpose. It is discarded as cognitively fruitless if/when the data subsumed under the hpyothesis indicate a week, that is, not sufficiently significant relationship between the basic goals/values, and the conditions.

(A) The fourth function is outside the scope of legal dogmatics as defined in section 2.1

(B) It may appear that the fourth function can be achieved only by including empirical sciences of law – sociological, psychologi-

[79] See: Isaak I. Dore, International Law and the Superpowers, Rutgers University Press, New Brunswick NJ, 1984; Thomas M. Franck and Edward Weisband, Word Politics, Oxford University Press, Oxford, 1975.
[80] Lautsi and Others v. Italy, App No. 30814/06 (ECtHR, 3 November 2009; ECtHR, GC, 18 March 2011).
[81] Kelsen, General, p. 386-387.
[82] Jan Kratochvil, The inflation of the margin of appreciation by the European Court of Human Rights, Netherlands Quarterly of Human Rights, vol. 29, no.3 (2011), p. 324-357.

cal and economic – into policy oriented jurisprudence. Without denying the role that the empirical disciplines can and should play, section 3 of the paper attempts to demonstrate that the function can be achieved, in a significant number of cases at least, by historical institutionalism, which is derived largely from legal history, that is, a conventional legal science.

3. Basic Values of the ECHR

3.1. Historic Institutionalism

3.1. Lasswell and McDougal's formulation of POJ includes a highly complex explanation of decision, which includes a wide variety of conditions[83] and a multitude of methods of inquiry.[84] It is not POJ but APOJ that divides conditions into intra-institutional 2.3.1.BCA and extra-institutional conditions in section 2.3.1.BCB. The distinction is made on the basis of the following considerations.

3.1.1. An inquiry into basic values of the ECHR identifies and studies as an institution not only the ECtHR, but also a typical proceeding before the ECtHR, such as a public hearing, on the one side, and the ECtHR combined with highest courts of the parties to the ECTH, on the other side of the spectrum. An institution has three components or dimensions. 'The rule' of the performance includes the ECHR, Rules of Court and also customary technical rules and ways of doing things. 'The individual' is a participant in the proceeding, from the Registrar to a single judge and to an information technician, who adds something of her own creation to every single performance of the proceeding. 'The context' is an actual performance of the proceeding, which is often repeated many times so that it makes sense to speak of the performance, in the sense of typical or even essential features of the series of performances taken as a whole. The performance in that sense is an institution.

3.1.2. Historical institutionalism shares, on the one hand, the presupposition of sociological institutionalism that people are normabiding rule followers and, on the other, the presupposition of rational choice that people are self-interested rational actors,

[83] Lasswell and McDougal, p. 335-772, 865-972.
[84] Ibid., p. 865-972.

but maintains that 'how one behaves depends on the individual, on the context, and on the rule'.[85] Thus a rational choice theorist focuses on the individual participants of court proceedings assuming that every single one of them is always trying to achieve the highest gain possible. A sociological institutionalist is concerned with the performance as an institution and assumes that its participants act more like drilled soldiers marching in a parade than unreahearsed actors prone to improvisation. A historical institutionalist balances both perspectives.

3.1.3. An institution can be explained also by extra-institutional conditions. Thus a Court proceeding can be explained by a culture war, economic exploitation, sexual or aggressive drives etc. Such explanations are obviously more complex and less determinate than intra-institutional explanations.

3.1.4. Explanation presupposes understanding. [86] Understanding can be seen as a kind of explanation that varies – often imperceptibly – between justification and explanation by a singular cause. Justification accounts for an action by reference to a binding reason (e.g. a rule of language as a rule of practice[87]), that is, a reason which is required by another binding reason and requires in turn the actor to perform the action. Explanation by a singular cause accounts for an action by reference to a singular cause (e.g. an instance of language use), including a non-binding reason (e.g. a rule of language as a summary view[88]), that is, a cause which is not caused by another identifiable cause, or subsumable under a general law, which causes in turn the actor to perform the action. Explanation of a legal action presupposes understanding of both non-legal and legal reasons, the latter ones including legal standards of conduct. However, ordinary explanation, which accounts for an action by reference to a cause that is a consequence of another cause, or is subsumable under a general law, can result in a new understanding of a legal action. For instance, the action that has been understood by reference to legal standards of con-

[85] S. Steinmo, What is historical institutionalism?, in D. Della Porta and M. Keating (eds.), Approaches and Methodologies in the Social Sciences, Cambridge University Press, Cambridge, 2008, p. 118-138, cit. p. 126.
[86] Georg H. v.Wright, Explanation and Understanding, Cornell University Press, Ithaca NY, 1971; G. Meggle, G.H. v. Wright's Understanding of Action , http://www.sozphil.uni-leipzig.de/cm/philosophie/files/2013/01/GHW-Understanding.pdf
[87] Rule of practice in the sense of J. Rawls, Two concepts of rules, The Philosophical Review (1964), vol. 64, no. 1 (1964), p. 25-29.
[88] Ibid.

duct as a proposal to settle disputes arising under the Transatlantic Trade and Investment Partnership by ad hoc arbitral tribunals can be explained by a long chain of socio-economic events[89] and, as a result, reidentified as a new phase of the dismantling of nation-states by globalized capital. [90]

3.2. The second task analysed in this paper is the invention of policy alternatives that are, under the past conditions (section 2.3.1.BC) and probable future conditions (section 2.3.1.BDB), more than probable future ordinary law decisions (section 2.3.1.BDD) in accord with constitutional standards (section 2.3.1.BA) and, indirectly, systemic values (section 2.3.1.ABC). The most intriguing part of the second task is Lasswell's developmental analysis, renamed as the analysis of probable future conditions in section 2.3.1.BDB. [91] The task cannot be performed by either a decisionistic fiat or a derivation from higher standards. It consists in adjusting future ordinary law decisions to, on the one hand, constitutional standards and, on the other, the probable future conditions.

3.2. Values and Identity

3.2. Although the second claim is of such a magnitude that it cannot be supported by preponderant evidence, which can be adduced to back social theories of the middle range,[92] there are *prima facie* proofs that there is no distinct European identity that could generate distinctly European basic values of the ECHR.

3.2.1. There is no distinct European identity that could generate distinctly European constitutional values of the ECHR.

3.2.1.1. To begin with the obvious, Europe, which is divided from Asia merely by the Urals, is geologically not a continent.

3.2.1.2. Europe is not a continent biologically either. While ancestors of most Europeans had inhabited Europe for thousands of years, they had close relatives in Africa and Asia[93]

[89] Cf. v. Wright (note 84), ch IV.1.
[90] M. Barlow et R. M. Jennar, Une disposition contestée du grand marché transatlantique:
[Le] fléau de l'arbitrage international, Le monde diplomatique(février 2016), p. 6.; On the European Commission counter-proposal in C. Titi, Transatlantic Trade and Investment Partnership (TTIP) and a paradigm shift from arbitration to investment law trial Kluwer Arbitration Blog (16 January 2016), http://kluwerarbitrationblog.com/2016/01/19/transatlantic-trade-and-investment-partnership-ttip-and-a-paradigm-shift-from-arbitration-to-investment-law-trial/
[91] Ibid., p. 973-1031. See H. Eulau, H. D. Lasswell's Developmental Analysis, The Western Political Quarterly, vol. 11 (1958), p. 229-242
[92] Robert K. Merton, On Theoretical Sociology, The Free Press, New York, 1967, p. 39-72.
[93] E.g.: M. Nei and G. Lischits, Genetic relationships of European, Asians and Africans and the origin of modern homo sapiens, Human Heredity, vol. 39 (1989), p. 276-281.

even before they were conquered by Asians in the early Middle Ages.

3.2.1.3. Europe, contrary to the self-understanding of many believers, has not been defined by a faith or religion. Europeans have been deeply divided by all the three great western monotheistic religions. The Jews have been living among the Christians, while the Moslems, who had failed to penetrate Christians from their suthern flanks, are now becoming a major religion in the center of Western Europe.[94] Meanwhile, a bulk of the population between the Urals and the Atlantic declare themselves as atheists or non-religious.[95]

3.2.1.4. The self-understanding of many modern Europeans that Europe has been shaped decisevly by the Enlightenment overlooks conveniently the fact that the Englightenment has been seen as a religion[96] and as such a source of division rather than unity. It is a religion in Durkheim's sense of 'a system of ideas by means of which individuals represent to themselves the society of which they are members, and the obscure but intimate relations which they have with it'.[97]

3.2.1.5. Europe has never been a political entity. The limes between the Roman Empire and the Germanic tribes[98] reemerged in the modern religious reformation,[99] which was stabilized by the principle *cujus regio ejus religio*, and can still be observed as a political as well as economic divide in Europe in the economic crisis of 2008-.[100]

3.2.1.6. Europe is not even a distinct economic system. Even the European Union as the Europe within Europe has the inner circle

[94] 5 Facts about the Muslim Population in Europe, Pew Research Center: Facttanks (17 November 2015), http://www.pewglobal.org/2014/05/12/chapter-4-views-of-roma-muslims-jews/#mixed-views-of-muslim-minorities.

[95] European countries with large number of atheists: Netherlands 66%, UK 66%, Israel 65%, Germany 59%, Switzerland 58%, Spain 55%, Austria 54%, France 53%, Denmark 52%, Ireland 51%, Latvia 50%. R. Noack, Map:These are the World's Least Religious Countries, The Washington Post (14 April. 2015), https://www.washingtonpost.com/news/worldviews/wp/2015/04/14/map-these-are-the-worlds-least-religious-countries/.

[96] Carl E. Becker, The Heavenly City of the Eighteen Century Philosophers, Yale University Press, New Haven CT, 1932; Peter Gay, The Enlightenment, Knopf, New York, 1966.

[97] Émile Durkheim, Les Formes élémentaires de la vie religieuse et le système totemique en Australie, 1912, 5ème éd. Les Presses universitaires de France, Paris, 1968, livre II, ch. VII, s. IV, 219.

[98] UNESCO, World heritage list, Frontiers of the Roman Empire, http://whc.unesco.org/en/list/430/multiple=1&unique_number=1539.

[99] Diercke International Atlas, The Reformation in Europe in circa 1570, http://www.diercke.com/kartenansicht.xtp?artId=978-3-14-100790-9&seite=32&id=17460& kartennr=1.

[100] G. Friedman,Europe, Unemployment and Instability: the European Crisis is no Longer Finance but the Devastating Effect on Unemployment, Mercatornet: Navigating Modern Complexities (7 March 2013), http://www.mercatornet.com/articles/view/europe_unemployment_and_instability/11890

of the Eurozone and the outher circle of nation states with their own currencies.[101] The European Union as a whole is being integrated with the United States of America into a single economic market by the Transatlantic Trade and Investment Partnership.[102]

3.2.1.7. If there is a feature that has distinguished the countries between the Urals and the Atlantic from the rest of the world and thus provided something like a European identity it is the effort to transit from liberal capitalism into, at least, social democracy.

Social democracy rests on the universal rights doctrines proclaimed by liberal democracy...Social democracy, by contrast <to libertarian democracy – I.P.>, begins with the premise that freedom involves the opportunity to adopt a plan of live autonomously, which can only occur when the concrete cirumstances of a person's life do not inherently rule out too many choices. For freedom in this sense to be meaningful, every person must have a right to the social goods that enable free action.[103]

Social democracy was intertwined in Western European countries with industrial capitalism and corpoate democracy in ca 1945-1980. Industrial capitalism, which was the dominant economic system in North America and Western Europe, was designed to achive full employment, rising wages and robust aggregate demand.[104] Corporate democracy, which was – and still is - a distinctly Central European and Scandinavian invention, unites three strongly organized economic blocs - labor, employer and government – in collective bargaining that absorbs social policy into economic policy.[105]

The weakening of social democracy, especially of social, economic and cultural rights, is a conseqence of three parallel developments. The first is the advent of financial capitalism. 'In place of wage growth as the engine of demand growth, the new model substituted borrowing and asset price inflation.'[106] The second is

[101] European Union, The Euro, http://europa.eu/about-eu/basic-information/money/euro/ index_en.htm.
[102] European Commission, Trade (10 February 2016), http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230
[103] Thomas Meyer et al., Theorie der Sozialen Demokratie, Verlag fuer Sozialwissenschaften, Wiesbaden, 2005, p. 592.
[104] T. Palley, America's Exhausted Paradigm Macroeconomic Causes of the Financial Crisis and Great Recession, New American Contract: A Project of American Foundation (22 July 2009), p. 3-4, http://www.newamerica.net/publications/policy/america_s_exhausted_paradigm_macroeconomic_causes_financial_crisis_and_great_recession.
[105] Harold L. Wilensky, Ritch Democracies, University of California Press, Berkeley CA, 2002, p. 85-88 ff.
[106] Palley, America's, p. 4.

the disappearance of communism. It was the Soviet Union and its communist allies that promoted social, economic and cultural rights, arguing that they form a unity with civil and political rights.[107] More importantly, the very existence of communism pressed liberal democracies to observe social, economic and cultural rights.[108] The third is the conversion of social democracy into the 'third way', that is, social-liberalism, which has made social democracy indistinguishable from liberalism and alienated even traditional left-wing voters.[109]

3.2.2. Europe does not have a distinct legal system. Both the Council of Europe, including the ECtHR, and the European Union combine Civil Law and Common Law. Hence there is no distinct European identity that could generate distinctly European systemic values of the ECHR.

3.2.3. Since there are no distinctly European basic values the only plausible hypothesis is that the basic values of the ECHR are common to liberal democracies in and outside Europe. Counter-examples that first come to mind can hardly discard the hypothesis out of hand. For instance, the fact that capital punishment has been abolished in Europe but not in the USA does not make Europe different from non-European liberal democracies, since capital punishment has been abolished also in Canada, Australia and New Zealand, and for a while was suspended in the USA.

3.3. Establishing Basic Values

3.3.1. Basic values of the ECHR could be established by policy oriented inquiries that explain and/or justify their subject-matter by extra-institutional conditions. Section 3.2.3 suggests the hypotheses, that is, the ideal types of development (section 2.4.3.4), of such inquiries. The hypothesis of recognition is that the existing values of the Convention have been created by liberal democracies in and outside Europe. The hypothesis of creation is that new basic values of the ECHR, both systemic and constitutional, can be postulated and then tested by a correlation of the ordinary law decisions to the basic values, on the one hand, and to all the conditions of liberal democracies in and outside Europe, on the

[107] J. Amos, The Soviet Union and the Universal Declaration, in S.-L. Hoffmann (ed.), Human Rights in the Twentieth Century, Cambridge University Press, Cambridge, 2010,. p. 147-165, esp. p. 150-152.
[108] Ronald St. J. Macdonald, personal communication 1973-74 and 1989.
[109] S. Halimi, Fin de cycle pour la social-démocratie, Le monde diplomatique (mars 2016), p. 1, 20.

other. European critics are right that these lines of inquiry, that is, explanations by extra-institutional values, are unduly complex and cognitively little rewarding (see 02).

3.3.2. For most practical purposes it will do to establish the basic values of the ECHR by inquiries into intra-institutional conditions on the assumption of historical institutionalism. Such inquiries take it for granted that that basic values of the ECHR, both systemic and constitutional, are in the Convention itself as interpreted by the ECtHR and, presumably, highest courts of the states that are parties the the ECHR.

3.3.3. The problem with inquiries into intra-institutional conditions of the basic values underlying the European Convention on Human Rights is not that they are shallow. The problem is that they can be easily misunderstood as being deep enough to establish European unity, and thus replicate the German romantic faith in the revival of the Roman social order by law faculties' *Spruchkollegen*.[110]

[110] See James Q. Whitman, The Legacy of Roman Law in the German Romantic Era: Historical Vision and Legal Change, Princeton University Press, Princeton NJ, 1990, p. 30, 34-36, 51-54, 135-150.