Taking Modern Legislation Seriously – Agency Rights as a Special Challenge

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If legislation has been, up to recent years, a somehow neglected topic in jurisprudence (Bar-Siman-Tov, in the present volume), there is one sub-topic even more neglected: the relationship between legislation and ordinary citizens. One could justify the absence of research and debate on this topic by the fact that legislation has to be dealt with by specialists, the jurists – the "specialist law-detectors" (Waldron 1999: 14). Research, under these circumstances, should concentrate on the access to the legal texts by those specialists. This argument, however, is not acceptable for several reasons. Firstly, there is a – legal – principle according to which everybody is supposed to know the law ("*Nul n'est censé ignorer la loi.*"). Secondly, many statutes are drafted with the aim to be read directly by their addressees, and not necessarily by the specialists advising them in legal issues. A historical example is the French Civil Code[1]; among other contemporary examples are constitutional texts[2]. Thirdly, now that all legislation is available on line, it has become much more probable than in the past for non-jurists to have a direct contact with legislation[3].

This is why legisprudence has to discuss, among other domains of inquiry, the issue of the relationship between legislation and non-jurists. Among other concerns guiding the production of legal texts, adequate relevance has to be given to the question of how to formulate them, to identify them, and to circulate them, in order to facilitate the access to and a useful understanding of their content by non-specialists.

In approaching this issue, legisprudence should take advantage, as far as possible, of the knowledge about the reception of legal texts by lay citizens provided by socio-legal research. This research domain, however, comparatively, is not among the domains that deserve more attention from the part of the researchers' community (Baer 2015: 220). It is, for the moment, not an institutionalized domain of specialization. None of the Working Groups of the Research Committee on Sociology of Law of the International Sociological Association, and none of the Collaborative Research Networks of the influential American Law & Society Association addresses directly the topic of access to and understanding of legislation by lay citizens. However, several research projects are currently being carried out and we are allowed to

[1] Among other references, Hespanha (2003: 247) with a discussion of the difficult relationship between democratic principles and the defence of a professional elite legal culture.
[2] As an example, the Swiss Constitution adopted 1999; see the *Message du Conseil fédéral* introducing the new text (Conseil fédéral 1996 : 120) : "Écrit dans un langage simple, le projet constitutionnel est intelligible et bien structuré. Le citoyen s'y retrouve."
[3] About the access to legislation through the internet, Oliver-Lalana (2011: 314 f.; 333 f.); about the Portuguese case, Almeida et al. (2014: 180). For evidences about the consultation of law by non specialists, see Helena Xanthaki (in this volume).

expect an intensification of these efforts[4]. The present paper understands itself as preparing a modest contribution to this trend.

Our main assumption is that the design of research in this domain should take in due account the considerable diversity of legal mechanisms. Classically, research about the knowledge and opinion about the law has concentrated on legal texts defining obligations and prohibitions. Another type of legislation deserves special attention, considering its central relevance in modern societies: texts recognizing rights and liberties. To mobilize the guiding topic of this volume: one misconception, at least of sociological research focusing on legislation, if not of legisprudence in a broader sense, is to neglect the issue of rights (de Munck 2017: 2). In this paper, as a necessary preliminary and comparative step, I would like to briefly discuss the socio-legal approach to the relationship of citizens to texts stating legally binding obligations or prohibitions (I.), and, in the main section, to put forward a case for the socio-legal and legisprudential approach of the relationship of citizens to texts establishing rights and, among them, what we will call here agency rights (II.).

I. Legislation on obligations and prohibitions

It is definitely an important question to know to what extent the addressees of the law are aware of obligations and prohibitions stated by the law, what exactly they know about it and how they acquire this knowledge. These questions have already been tackled by socio-legal research, inspired in particular by the seminal work of Patricia Ewick and Susan Silbey (1998).

The relationship between non-jurists and jurists in such issues may be qualified as relatively simple. Jurists are there to inform more precisely about what is compulsory and what is prohibited. They may indeed play an important role in the design of strategies of the addressees of a certain statute to deal with the constraints emerging from legal obligations and prohibitions (classical discussion of this topic: Parsons 1954). And they play an important role from the moment on legal steps are undertaken in cases of non-compliance, or of infringement. In such situations, they assist the addressee of the law in the specific context of legal procedures aiming at sanctioning the cases of non-compliance or infringement.

As an important development of this model, we could mention researches that take into account of the power relation which may develop between the specialized jurists and the non-specialized citizens. This is one of the main topics discussed by Bourdieu in his paper “The Force of Law”, which tackles the “monopoly” of the jurists (Bourdieu [1986] 1987: 828).

Laws entitling certain persons with the right to a certain provision, which are texts stating obligations for certain entities to supply the provision, raise similar questions. The interested person may know, or not, that she/he is entitled to benefit from that provision, while insufficient knowledge may lead to the “non take up” of the provision. Jurists may play a role

[4] See, for example, the session “Legal Encounters: When People Meets the Law” organized by Quentin Ravelli within the framework of the 2018 RCSL Conference, Lisbon, September 2018 (see the Conference Programme available on https://www.rcsl-sdj-lisbon2018.com/).

in procedures aiming at enforcing the right to a certain provision, in the case it was refused to the interested person[5].

Things are more complex if the obligations or prohibitions are controversial. In such cases, the question is not only to know whether the addressee knows the legal text and does take it into account in her/his activities. It is also to know to what extent she/he adheres to the text or if she/he adheres to another position. And it is important to know how the position assumed has been developed and maintained; if a person has links to existing movements defending that position, how such movements are structured, what are their discourses and strategies. In such contexts, the question arises of the impact – symbolic effect (van Klink et al. 2016) – of the law – and, one might add, of the political process from which a certain law is the result – on the actual opinion of citizens, and on the discourses and strategies of movements involved in the debates about these obligations and prohibitions.

In such settings, jurists may play different roles. They not only may defend their clients, but also actively seek, at the occasion of the defence of their clients, to give visibility and force to a political positioning towards the norms at stake, or seeking to create a context favourable for a new political debate about the text, and to give emphasis to arguments favourable for the position they defend (cause lawyering; see Delpeuch et al. 2014: 122 f.).

The main aim of this short review of researches about the relationship between the citizens and the law is, before approaching a more specific topic, to identify the main domains of discussion in the approach of this relationship. The three main domains are the agencies in charge with the implementation of the law, the specialized legal professionals, and the plurality of non-legal discourses surrounding the law, three realities that condition the relationship between the citizens and the law.

II. Legislation recognizing agency rights

Legal norms recognizing rights and liberties raise quite different questions. As far as the understanding of the law is concerned, the question is not simply to know if a person is well informed about what she/he is entitled to do, but what, more concretely, she/he will do, taking advantage of the room for action opened by the legal entitlement. What she/he will do will depend, in an important measure, on non-legal norms. And the role of jurists is here less simple to characterize than it is the case for other types of legal norms. Indeed, the way the right has to be understood is an issue that, in most cases, does not specifically lie in the domain of expertise of jurists. I would like to discuss the legislation concerning this kind of legal norms first (A) defining more specifically the type of rights at stake, and then examining (B) what is the specific societal function of legal norms recognizing rights; (C) what is, in the specific case of this type of norms, the relationship between law and other normativities; (D) what could be here the role of jurists; (E) what are the implications of this discussion for legisprudence.

[5] References of several researches on this topic, Delpeuch et al. (2014: 69 f.).

In this general discussion of the relationship between citizens and legislation recognizing rights and liberties, we will not devote a specific point to the role of implementing agencies. Indeed, rights and liberties demand to be actualized in the first place by the citizens themselves, in very different settings, and the fact of this actualization by the citizens deserves to be discussed for itself, before considering – which is definitely also a relevant topic – the practice of, where it is the case, agencies to the functioning of which the activity freely exercised takes part (one obvious example: universities), or agencies in charge with the supervision of the exercise of these liberties[6]. Another necessary addition to the present paper is the discussion of the material conditions and of the social contexts in which citizens develop their activities. The question of the material conditions leads us to the already abundantly discussed issue of the social rights (Marshall [1950] 1992; Sen [2004] 2008). A first explanatory approach has been proposed in another paper (Almeida 2014: 193 ff.); the present paper focuses on the individual addressees of the legislation, and on the question of the way they may use legislation as a resource.

(A) Agency rights as a specific type of subjective right

In a first step, in order to better define the scope of the following discussion, it is necessary to characterize more precisely the different types of legal rights. What matters here in this legisprudential discussion are the formal characteristics of the mechanisms necessary for guaranteeing the rights, not their material purpose. This is why we have to depart from classical typologies, which distinguish rights according to their purpose and to the process of their historical emergence, such as the typology put forward by Thomas H. Marshall ([1950] 1992), distinguishing civil, political and social rights.

A possible methodology in the construction of such a typology is to take as a starting point the Charter of Fundamental Rights of the European Union proclaimed on 7 December 2000 and included in the Treaty of Lisbon, signed on 13 December 2007 and entered into force on 1 December 2009.

As a first type of legal rights, some of the rights included in the Charter could be named protective rights requiring abstention. They aim at protecting their holders against acts from the part of other persons likely to harm them, in the worst case to destroy them, in less severe cases to limit their resources and means of action. In this category we have the “right to life” (Article 2), the “right to the integrity of the person” (Article 3), the “right to liberty” (Article 6), or the “right to property” (Article 17). They correspond to prohibitions of behaviour addressing other persons, the most important of them being usually included in national penal codes. Some are included in the EU Charter itself, such as in the case of “slavery and forced labour” (Article 5), “collective expulsion” (Article 19), and “child labour” (Article 32).

A second type includes the rights that, with the same aim to guarantee to a certain person conditions of survival, means of action, and protection against all kind of constraints, entitle that person to claim for a positive act in her/his favour, from the part of other persons. They

[6] For a summary approach to this topic, see Almeida et al. (2014: 188 ff.).

could be named protective rights requiring action. Here an important distinction is the following: what is demanded from the part of the other person may be a – set of – material act(s), which will have to take a specific shape according to a particular situation of necessity or vulnerability; or it may also be the payment of a certain amount of money.

As examples of the first category, we have the right of children to protection and care (Article 24), the "right to benefit from medical treatment" (Article 35). A subcategory here are the rights corresponding necessarily to positive acts from the part of certain persons, while the formulation of the right does only suggest a very general characterization of the act likely to be demanded. This is the case for the "right to security" (Article 6) or for the somehow implicitly recognized right to "environmental protection" (Article 37).

Examples of the second category are to be found the domain of "Social security and social assistance" (Article 34).

Even if it is probably impossible to draw a sharp line separating the third type now to be introduced and the two types previously defined, it makes sense to mark here a difference. The aim of rights of this third type is not only to protect; it is to increase resources of all kind likely to enable the person to develop her/his own activity – let us name them empowering rights. The resources they guarantee can have as a focus the person itself and its own capabilities. They also may consist of the possibility for a person to count on the cooperation with other people. In many cases, such rights require action from the part of other people. An obvious example is the "right to education" (Article 14); another is the "right of access to placement services". When the relations of a person with other people are at stake, such rights also may correspond to prohibitions, addressing mainly the states, which should not hinder the establishment of certain relationships: this is the case for the "right to marry" (Article 9), the "freedom of assembly and of association" (Article 12), the "right of collective bargaining and action" (Article 28). Combinations between the two types of responding mechanisms – obligation of positive action and prohibition – also are possible, as in the case of the "freedom of information" (Article 11), which requires both positive action from the part of existing information media, and abstention from the part of major social actors, which should respect the independence of these media.

One could attribute to this type of right the "right to respect for (...) private and family life" (Article 7), the "right to the protection of personal data" (Article 8), since a protected private sphere may be considered – and historically has been considered, as we will see – as a condition for the development of a person and for the preparation of her/his means of action.

A specific case likely to be interpreted as combining personal and social empowerment is the "freedom of religion" (Article 10), since the belonging to a religion implies at the same time a certain individual education and the belonging to a certain community.

Political rights form a forth type of right: among them, in the EU Charter of Fundamental Rights, the right to vote and to stand as candidate for a political office (Article 39 and 40)[7].

[7] The EU Charter of Fundamental Rights does not include a general formulation of the political rights comparable to the one to be found in the International Covenant on Civil and Political Rights, article 25:

Political rights are comparable to the rights of the third type, in the sense that they are likely to enhance the means of action of a certain person; more precisely by entitling this person to participate in the definition of her / his conditions of life and action. Differently from the rights belonging to the three other categories, political rights, however, have as their main purpose to allow the interested person to act her / himself in a certain way: to vote in a certain way or to participate personally in the management of public affairs, which brings us close to the fifth type of rights.

If we have highlighted a third type of rights, empowering rights, it is because it emphasises the meaning of the whole typology, helping to qualify the fifth type. Indeed, empowering rights allow people to accumulate resources for action, beyond the basic resources guaranteed by the protective rights. If the accumulation of resources is guaranteed, it is because, in principle, the investment of these resources in concrete action is protected too. So a fifth type of rights recognizes the freedom of people to develop by themselves, beyond the specific domain of the political sphere, certain activities. We could name them agency rights. Belonging to this fifth type of right we find in the EU Charter, on the one hand, the "right to found a family" (Article 9), and, on the other hand, the "freedom to choose an occupation and right to engage in work" (Article 15) and the "freedom to conduct a business" (Article 16). The relationship between these two categories of rights is recognized at article 33, where the reconciliation of family and professional life appears as a principle. Also object of such agency rights, some more specific activities are mentioned, also protected as free activities: the "media" (Article 11) and "arts and scientific research" (Article 13). See also the mentions of the "academic freedom" (Article 13) and of the "freedom to found educational establishments" (Article 14).

With some effort of interpretation, one other domain of activity could be included here: activities taking place within the legal system. Indeed, "everyone is entitled to a fair and public hearing within a reasonable time by an *independent* and impartial tribunal previously established by law" (Article 47; our emphasis).

The differentiation of the five types of rights proposed leads to the following picture: the set of fundamental rights recognized by the EU Charter has at its focus the following general principle, founding the agency rights: everybody has the right to actualize her/himself in an activity contributing to the wellbeing of the collectivity. Other rights can be considered as helping the implementation of these agency rights.

Arguably, this general principle also inspires three additional types of rules.

Firstly, the principles of equality and non-discrimination (Articles 21 and 23): Indeed, not to give equal access to everybody to the activities where people can realize themselves means that some people are prohibited to realize her / himself in a certain domain of activity, or only under conditions that will make her / him experience her / himself as being recognized for what she / he does at a lower level, compared with other people. Actually, the principle "to be treated as an equal" is considered by Dworkin as "to be fundamental under the liberal conception of equality" (Dworkin 1978: 273). We will have to come back to this reasoning.

"Every citizen shall have the right and the opportunity (...) without unreasonable restrictions (...) to take part in the conduct of public affairs, directly or through freely chosen representatives."

Secondly, the regulations about abortion: at the root of these rules is the right of women "to decide independently in all matters related to reproduction"[8], which relates to the right for a woman to decide the life she wants to live as a woman; in other words: how she wants to actualize herself as a woman.

Thirdly, some rules can be interpreted as developing the right to self-actualization, in the sense that they recognize the right of a person to live one's life according to one's sexual orientation or gender identity[9].

The discussion of the foregoing typology leads to the following conclusion. Modern legal systems include rules that give people rights to freely develop substantial activities, and these rights can be considered as an essential justification for the complete set of fundamental rights recognized by these legal systems. This reasoning has actually already a long history. It corresponds quite precisely to the one defended by Alfred Marshall, quoted by Thomas Humphrey Marshall: Alfred Marshall admitted the possibility of a progress that would bring about conditions for everybody to, "by occupation at least, be a gentlemen" (Marshall [1950] 1992: 5). Observing in particular skilled artisans, he saw them "already rising towards the condition which he foresaw as the ultimate achievement of all. They are 'steadily developing independence (...) and steadily increasing their grasp of the truth that they are men, and not producing machines. They are steadily becoming gentlemen.'" (Marshall [1950] 1992: 5). In the meantime, the recognition of the quality of "gentleman" has been legalized by what we named agency rights. The reasoning of Dworkin, when discussing the "distinct liberties" nowadays established, is comparable to the one of Alfred Marshall. By treating people "as equals", Governments treat "whom (they) govern with concern, that is as human beings who are capable of (...) forming and acting on intelligent conceptions of how their lives should be lived" (Dworkin 1978: 272).

A closer look at the above reconstructed typology reveals that agency rights do not only define the main aim of the set of fundamental rights; they also play a crucial role in the implementation of many of these rights. The link between agency rights as an aim and agency rights as means is best visible in Article 11 of the EU Charter, devoted to the "Freedom of expression and information". In the same phrasing, this article recognizes (i) the right to "receive (...) information and ideas", information and ideas that are likely to strengthen the capabilities of those who work or conduct a business, and to (ii) the right to "impart information", a mention that is completed in the second paragraph of the same article, which guarantees the "freedom and pluralism of the media". In other words, it is assumed that an empowering information, likely to help those who have access to it to more intensely exercise their agency rights, has itself to be produced freely, as the exercise of an agency right. A similar connection can be established between the "right to education" (Article 14) and the "freedom to found educational establishments" (Article 14) or the "academic freedom" (Article 13).

Agency rights had to be duly identified because, contrarily to other rights, they do not correspond directly to obligations or prohibitions of behaviours likely to be substantially

[8] Official Website of Human Rights Watch: https://www.hrw.org/legacy/women/abortion.html
[9] About the Portuguese case, see the new legislation passed by the Parliament in April 2018, replacing Law Nr. 7/2011 of 15 March 2011.

defined by the law itself. Compliance, in the case of agency rights, requires new acts from the part of the holders of the rights – as well as, as we could see, from the part of the people in charge with the empowerment of them – to be imaginatively designed by their authors. So the implementation of these rights generates situations which analysis requires models very different from those shortly discussed in the previous section (I).

At the moment we start a discussion of agency rights in legisprudence, it is worth trying to back the relevance we were led to give to agency rights by authorized references of legal theory. Here we shall limit ourselves to two references. Dworkin's defence of the principle of equality points in the direction of agency rights, since what is at stake is, as already quoted, equality between human beings recognized as "capable of forming and acting on intelligent conceptions of how their lives should be lived" (Dworkin 1978: 272). Hart, when discussing the secondary rules that define modern legal systems, qualifies them as "rules conferring powers" (Hart [1961] 1994: 26, 80), ie rules entitling and committing those involved in the operations of the legal systems, the legal professionals, to develop autonomously a substantive activity. So agency rights, indeed combined with duties, are seen, in particular, as playing an essential role in the production of the modern legal systems.

(B) Agency rights and modernity

Agency rights are a special type of subjective rights. Niklas Luhmann has shown (Luhmann 1981) that the concept of subjective right is a specificity of modern law. One of the characteristic of the concept on which he draws our attention is that it makes possible something that was impossible in the Roman legal culture: to formulate entitlements without necessary mention of corresponding obligations (Luhmann [1970] 1981: 362)[10]. This is precisely what is necessary, as we saw in the previous sub-section, in the case of agency rights, where the emphasis is on the acts made possible, and not on the prohibition to hinder or prohibit such acts. So the legal concept of subjective right has been used in the Revolutions of the late 18th century to formulate the foundation the new democratic political order in terms of Declarations of Rights (Habermas [1963] 1974). Among them, we find agency rights which offer individuals possibilities of action, and, as rights are recognized by the law, ie by the nation, possibilities of an action recognized by the nation; an action that may be, in turn, an action beneficial for the nation[11].

[10] Additional references in Guibentif (2013).

[11] A statement explicit in this sense is made, in the course of the French Revolution, by the at that moment of history president of the Parliament, Boissy D'Anglas, in defence of a constitution draft recognizing, for the first time in the process of the French Revolution, the right to privacy, formulating what the Nation is entitled to expect from the part of those to whom it recognizes, among other rights, the right to privacy: "Let us reward those simple and private virtues, which enchantment is of all moments, which benefits are of all hours; let us honour the good son, the good friend, the hard-working and faithful spouse. Decency should obtain roses from your part, and innocence a crown of flowers. Call beneficent the man who, in his own poverty, did host the old age or the abandoned infancy; *the one who did enrich his country with a useful discovery, who did introduce, on its territory, a new kind of culture, or did succeed in making sprout a plant unknown by its agriculture*. Do not spare efforts for your celebrations to be moral, and your rewards to be political. The love of glory, peaceful virtues, *the*

Compared with the agency rights we could identify in the contemporary EU Charter, agency rights were at that time formulated in still very general terms. The Declaration of Independence of the United States mentions in its preamble the "inalienable right of (...) pursuit of happiness"; the French Declaration of the Rights of the Man and of the Citizen recognizes the "Liberty (...) of doing anything which does not harm others". More specific agency rights will appear in the course of the constitutionalization process that takes place over the 19th and 20th Century. Such more specific agency rights do participate in the production of what Axel Honneth calls "social freedom" (Honneth [2011] 2014: part C.III). Which means the freedom, not only in the sense of not to be conditioned or constrained by anybody else to act in a certain way (negative freedom); not only in the sense of being able to act according to one's own will (reflexive freedom), but to act, beyond these two conditions, in a way which will make sense in the view of others; to contribute, using the apt phrasing of Waldron, in "action in concert" (Waldron 1999: 157). In a way which is likely to be received as a constructive input from the part of other people; in a way that makes the acting person experience her/his action as productive, as a moment of self-actualization. This brings Honneth close to the reasoning of Sen, who relates rights to capabilities (Sen [2004] 2008: 150; Sen 2009: 381)[12].

At this point, it is worth expanding upon the characteristics of societies that recognize this type of individual agency rights. Perhaps their main characteristic is what Touraine has called "historicity" (Touraine 1984: 222). Such societies experience themselves as permanently changing, and as able to, at least to some extent, control the direction of this change. Considering the case of the Western world, one can argue that two processes were experienced there over approximately the same period of time: on the one hand, the fact that societies were changing, territorially, among other processes with the conquest of new territories – for instance in the Iberian Peninsula – or with the colonization of newly discovered parts of the world; and intellectually, with the Reform; and, on the other hand, the fact that individuals had the potential of developing new capabilities, notably in the domain of art and science. The Revolutions of the end of the 18th Century did somehow establish a link between these two experiences: societies were able to change, because they were composed by individuals able to develop themselves, taking advantage of the liberties recognized to them by the society[13].

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attachment to private duties, here are the foundations of a republican government, here are the motivations you have to use." Projet de Constitution pour la République française et discours préliminaire prononcé par Boissy-D'Anglas au nom de la Commission des Onze dans la séance du 5 Messidor, an III, imprimé par ordre de la Convention nationale, Paris, Imprimerie de la République, Messidor, an III (1795) (Available from: http://books.google.pt/books?id=gh9CAAAAcAAJ&hl=pt-PT&source=gbs_similarbooks [Accessed February 2018]), p. 74 (our emphasis). Document analysed in the course of a research on the genesis of the right to privacy, to be published soon.

[12] For a critical appraisal of Sen's theory of human rights, considering its individualistic bias, see Bessy (2007: 304). The necessity of successful cooperation for the actualization of individual projects, emphasized by Honneth's concept of social liberty, and the possibility of a will to contribute directly to the collective wellbeing, compatible with Sen's reasoning, could help to reduce this bias.

[13] An intriguing question which will not be discussed here is the following: are completely different evolutions – experience of societal change without changes at the scale of individuals, or vice-versa – possible and could such different evolutions have taken place in other regions of the world? Positive answers to this question could deeply change the conditions under which the discussion introduced in

Having reminded this characteristic of modern societies, we are in condition to relate the reasoning here defended with another one, defended elsewhere in the present volume, about the ideological functions of theories of legislation (Van Klink in this volume). Taking the work of Paul Ricoeur as a starting point, Van Klink identifies three functions of ideologies: to produce a distorted picture of reality, to legitimate authority, and to preserve social identity. Let us take apart, for the first steps of the discussion, the "distorting" function; the functions of legitimization of authority, and of collective identification, may be considered as necessary for all types of human societies[14], which all depend on mechanisms defining them as differentiated entities – function of identity definition – and on mechanisms maintaining some social control within that entity – function of authority legitimization. Modern societies, as societies experiencing permanent change, however, require one more type of mechanism: mechanisms taking into account and orienting social change. Among such mechanisms, we may find discourses about possible futures of the society at stake.

The relevance of such discourses gave rise to intense debate at a critical moment in the development of modern societies: the period following the First World War. The war had proved to be a time of destructive confrontation of politically influential ideas – ideologies –, calling for a new discussion of the role of ideologies[15]. One important input in that debate was Karl Mannheim's book *Ideologie und Utopie*. In that book, Mannheim, specialized in the sociology of knowledge (*Wissenssoziologie*), wanted to show that in the societies of his time ideologies do not only distort reality (ideologies in the narrow, "relative", sense of the term) but also "relate decisions to an always moving reality" (Mannheim [1929] 1952: 85), and in this second sense, ideologies may also be qualified as utopias (ibidem). Among ideas likely to be qualified as utopias, he identified one that he names the "liberal humanitarian idea" (Mannheim [1929] 1952: 191), and which he opposed in particular to the conservative idea (199) and to the socialist-communist utopia (207).

The concept of utopia defended by Mannheim[16] is worth being reused in the present discussion about legislation, and in particular legislation about rights. Such legislation not only identifies a society and organises and legitimizes structures aiming at the control of that

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the present essay would have to be carried out. But this discussion must not dispense the analysis of our own historical experience. So what is introduced here is a necessary, even if not sufficient, part of the work required for a critical theory adequate for the current state of the debates in social sciences.

[14] For the purpose of this paper we combine two definitions of society: on the one hand national societies, corresponding to the scope of application of national legal systems, and the world society. Migration and cultural hybridization did challenge the reality of national societies, but nevertheless they correspond to a space of shared historical experience, as it could be observed, for example, in Spain and Portugal during the recent period of austerity (Calvo García 2014; Guibentif 2016). World society is a rather inconsistent reality, but it has some existence, at least as the collectivity concerned by the activity on international organizations.

[15] A collection of papers documenting excellently this debate is Meja / Stehr (1982). About the World War as forcing a new analysis of political ideas, Szende (1922: 186), most explicitely: "*Man erlebte einen Massentod von Schlagworten.*"

[16] It is to be noticed that the concept of utopia suffered a significant evolution in more recent times. Certainly in close connection with the evolution of the socialist regimes, the meaning of the term has evolved, being used in later years to name a social world which has been isolated from history, and from which conflicts are absent (Dahrendorf 1958).

society. It also may define possible objectives for that society. This is in particular the case for legislation defining agency rights, which is also legislation stimulating individual action.

Historically, the concepts discussed by Mannheim were indeed applied to the law. Soon after the publication of *Ideologie und Utopie*, Hans Kelsen discussed in the first edition of his *Reine Rechtslehre* "the ideological meaning of the antinomy between individual and society"[17]. After having pointed out the "ideological function" of a concept of subjective rights derived from a "legal subjectivity" which enjoys "liberty in the sense of self-government and autonomy" (Kelsen 1934: 42 f.) he stated that "the individual who allegedly stands in a unsolvable conflict in relation to the society is nothing else than an ideology in the struggle of certain interests against their limitation be a collective order" (Kelsen 1934: 59). So the concern of developing a theory of law sharply differentiated from political thought – acute at that historical moment – led Kelsen to recognize "primary character" to obligations and only "secondary character" to rights (Kelsen 1934: 51). This reasoning of Kelsen explains why his work is not easy to relate to a discussion of legislation about rights. However, it is based on the assumption of a relationship between arguments about rights and strategies of power which might still be worth to be taken into account nowadays.

We now are in condition to come back to the distorting function of ideology. This function could be considered as a special case of a more general function of ideologies in modern societies: to give a counterfactual image of society. Counterfactual not necessarily with the aim of distorting our perception of reality, but with the aim of enabling us to design social practices alternative to the current state of affairs. This is, actually, the kind of "distortion" Van Klink identifies in the case of the "Law as Communication" legislation theory.

Here a distinction has to be introduced. Modern societies are "utopian" societies in the sense that they avail themselves with the capacity of designing different possible futures, being one of the tools for this designing of futures the political sphere and, related to that sphere, the legislation. In that sphere debates take place about possible routes to a society with less poverty, or to a more competitive society, or to an ecologically more sustainable society, or about possible ways of combining these different objectives[18]. But we may find in modern societies also that other "utopia", which is here at the core of our discussion: the project of a society of free individuals, cooperating in the development of the society to which they belong, within the framework of democratic institutions, and among those institutions, with the help of legislation. So there are, strictly speaking, two levels of utopian thought: at a first level, the utopia of a society of freely cooperating individuals is the "little helper" of legislation[19] and democratic institutions, and it enables, at a second level, legislation and politics, in turn, to participate in the production of other "utopias".

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[17] This section disappears in the 1960 edition. Some fragments of it are to be found in Kelsen ([1960] 1984: 61). As far as I could check, the quoted sentences of the 1934 edition were not maintained.

[18] One could argue that we witness a process of international institutionalization of such utopias, with the definition, by the General Assembly of the United Nations, of the Sustainable Development Goals (United Nations 2015).

[19] Picking up the valuable intuition of Van Klink (in this volume), that institutions need their "little helpers" in the form of theories providing thought and action of people involved in their functioning with useful references of orientation.

The question now is to reconstruct how "utopias", or in more neutral terms, discourses likely to inspire and orient social change are produced. To understand that production, we have to remember which requirements these discourses have to meet: they must be likely both to circulate among many people, to be effectively communicated; and to operate in individual processes of thought, in order to effectively motivate individual action. Historically, the production of this kind of discourse has been strongly favoured by specialization, which means: by functional differentiation of discourses, notably within what could be named the cultural sphere, a process which took place approximatively between the Renaissance and the Reform. Differentiation of discourses by specialization enables people to intensify the communication about their experiences of thought and action – among other mechanisms by facilitating the management of redundancies[20] –, and so to learn to practice a communication with strong involvement of individual intellectual processes. And differentiation of cultural discourses – notably art, science, and law – favours reflexivity of thought and communication, by making comparison between discourses possible[21].

In a certain sense, modern democracies can be seen as being the result of a process of generalization of the experience of individual autonomy and productivity earlier developed in the domains of cultural specialization. As a first step, the outcomes of specialized activities were in an increasing measure mobilized by the emergent state powers. Later on, they started to be disseminated in an emerging public sphere. The bourgeois revolutions at the end of the 18th century initiated a long and hesitant process of substitution, as users of specialized activities, of central state powers by the citizenry in general[22], a substitution which required measures to provide citizens with the means to act as citizens. In a deeply ambivalent way, the states – becoming welfare states – developed as a set of mechanisms at the same time strengthening their control over the citizens, raising the level of productivity of the labour force, but also empowering the citizenry[23]. The development of the mechanisms providing the services necessary for these aims required the involvement of professionals, which autonomy can be considered as a necessary condition for the education or treatment of people supposed to be educated or treated with a view to the exercise of their citizens' liberties.

As a result of this historical process, and as we already could see in the previous sub-section, specialists and non-specialists both are holders of agency rights, and there is a narrow link between the agency rights of specialists and those of non-specialized citizens. Using their freedom of producing new scientific knowledge, creative artistic work, alternative interpretation of social norms, specialists provide non-specialists with the means of knowledge, capacity of expression, and normative categories which open them spaces for agency.

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[20] Concept applied by Oliver-Lalana (2011: 325) to the communication between jurists, who proposes its extension to the communication between the legal system and the citizenry.

[21] This process has been studied by Niklas Luhmann, in particular in the volumes *Gesellschaftsstruktur und Semantik* (Luhmann 1980, 1981, 1989, 1995), as well as by Jürgen Habermas ([1981] 1987) and Pierre Bourdieu (1997).

[22] For an interpretation of this process in terms departing from the traditional interpretation emphasising democratizing pressures emanating from the people itself, Thornhill (in print).

[23] Explicit aim, in the case of France, of the setting up of the *Institut* as the centre of the educational system to be developed (Gusdorf 1978: 305f.).

(C) Agency rights and non-legal norms

Agency rights are recognized both to specialists and to non-specialists. In the case of specialized professionals, their rights and freedoms are recognized, precisely, in consideration of their professional status. Implicitly, they are recognized under the condition that the autonomous activity will be carried out according to certain professional standards. These professional standards, actually, take part in the "complex set of social processes" (de Munck 2017: 8) that generates "social freedom". A scientist exercises her / his scientist's autonomy under the condition of the competent application of scientific canons, and it is under that condition that new insights or new interpretations of what has been observed will be received as a constructive innovation by her / his colleagues, and, thus, by a broader audience. Among the mechanisms likely to favour at the same time the emergence and the communication of new thoughts between specialists of a certain domain, one is worth a special mention: theories, which develop over the last century, under this precise designation, in many differentiated domains of activities, and which are a source of in some cases rather precise normative statements[24].

Two evolutions are to be observed in this domain. In a certain way, what happens is that the more effective the freedoms at stake are becoming, the more sophisticated the mechanisms to control their exercise. Some of these mechanisms are internal to the professional domains at stake; others are external.

On the one hand, professional standards are currently experiencing a process of codification, a process which corresponds to the hypothesis of the establishment of a "fragmented constitution" of world society (Teubner 2012). This is what can be observed, for instance, in the economic domain with the setting up of mechanisms promoting the corporate social responsibility, but also in the scientific domain, with the publication of ethics charters[25] and the setting up of ethics committees. Such documents may include the mention of the rights of professionals, relating them to corresponding professional duties. Differently from legal rights, however, the rights recognized by such documents cannot be enforced by courts, and they have to be interpreted as recognized by the relevant professional milieu, not committing the community, represented by the state, as a whole.

A second evolution is the development of organizational mechanisms aiming at monitoring the results of professional activities (for a critical discussion of these developments, see Supiot 2015). Such mechanisms are being set up within the state, as mechanisms of the evaluation of public policies. They also develop in the economic domain, notably within the framework of the implementation of ISO-standards. These mechanisms also give rise to abundant normative documents. Differently from legal documents and from ethical charters, these documents do not address a broad audience, and they are not necessarily communicated to the addressees of the control mechanisms created, but they address specifically experts in the

[24] About "*Reflexionstheorien*" of differentiated social systems, see Teubner (1996: 264) and Teubner (2014); based on these works, about the role of theories in modern societies: Guibentif (2015).
[25] Two examples: the 2005 EU Charter for Researchers and the 2010 Singapore Statement on Research Integrity.

implementation of such mechanisms, both on the side of entities in charge with the accreditation procedures, and on the side of firms and other entities applying for the accreditation.

The foregoing discussion addresses activities taking place in differentiated domains of specialization. Agency rights may also concern less specialized activities. They always require, however, favourable social contexts likely to generate shared projects which will shape the activities actualizing certain agency rights. Recent social science research focuses in particular on the potential of cities and regional settings (among others: Kebir et al. 2017). Territorial differentiation seems to play here a role which would deserve to be compared with the role of functional differentiation in the promotion of individual agency. And one important research question, in the context of this paper on the legislation about agency rights is to know how, at regional or urban level, legal provisions co-exists with non-legal normativities in the production of the "ideological" mix favouring individual agency.

One question raised in particular by Amartya Sen is of special interest here: he argues that human rights do not need to acquire legal form, and should be recognized as ethical requirements (Sen [2004] 2008: 144). In favour of an alternative position, one could defend the following argument. The activities developed in the societal contexts here reviewed – institutions dedicated to functionally differentiated activities, cities – may require rather sophisticated arrangements, which will condition in a considerable measure individual activities. Under the pressure generated by these arrangements, the perception of liberties likely to be exercised may be eroded. The fact that certain liberties are legally recognized could have the symbolic effect of strengthening their – to some extent counterfactual – perception of a liberty, an agency right worth being defended. As it appeared in Portugal in the face of the austerity policies applied under the programme of financial assistance, the discourse about legal rights strongly helped collective reactions, in particular from the part of professionals experiencing limitations in the exercise of their liberties (Guibentif 2016).

(D) The role of jurists in the exercise of agency rights

Jurists play a probably less important role in the application of rules recognizing rights, compared with their role in the application of rules stating obligations and prohibitions. Rules recognizing agency rights often are applied in the exercise of a professional practice, which takes place in a professional context where jurists in principle are not necessarily involved. Experts in quality issues and project management are nowadays more frequently to be met in such contexts than jurists. In any event, in such context, jurists meet other professionals, who are in more favourable condition than ordinary citizens to negotiate the ways jurists may help them in their actions (Belley 2002: 157 f.).

If the addressees of legal liberties meet restrictions in the exercise of such liberties, they may adopt many possible strategies apart from judicial steps. They may avoid certain actions, or more radically, abandon the activity which was supposed to benefit from the liberty now challenged by the restrictions experienced.

Jurists are likely to be involved if organizations representing the addressees of the legal liberties at stake – in particular professional organizations or trade unions – take political or judicial steps in order to defend these liberties.

In such circumstances, however, the role of the jurists can be, not only to know what procedural measures can be taken and according to what formalities. It is also to participate in the interpretation of the legal text that formulates that liberty and in the defence of that interpretation. Her / his more specific role could be here to relate the legal texts applicable in the first place to other relevant legal texts, in particular, in the domain of rights and liberties, international instruments. And to relate the liberty in question with other legal principles: duties of the same addressees corresponding to that liberty, or rights of other persons, which implementation depends on the effective exercise of the liberty at stake: rights of the consumers, in the case of economic freedoms, or right to education or to health in the case of the autonomy of professionals in the domains of education or health care.

Whatever their role in this job of interpretation, an important relationship here is the following: between the liberty which defence is at stake, on the one hand, and, on the other hand, the liberty of the jurists themselves, in their professional activity. As François Ost puts it (Ost 2016: 132, 200), the main characteristic of the law is the fact that it creates, by the work of the jurists, a sphere where social reality can be thought of, hypothetically, in terms alternative to the current factual state of affairs. This, at the same time, commits and enables the jurists to exercise a very specific type of liberty, the liberty of interpretation. So the effective exercise of the jurist's task, which requires imagination and capacity to establish distance to the current social reality, is likely to strengthen the perception other professionals, or citizens in the exercise of their fundamental rights, have of their liberties[26].

Jurists still might have one more important role, in situations where non-specialized citizens have to deal with specialists: making use of relevant legislation, to protect the non-specialists against intrusive measures from the part of specialists. Such a role is notoriously being played by jurists in the relations between physicians and their patients. However, the concrete intervention of jurists in such contexts may be conditioned by the fact that the relationship between jurists and non-jurists is itself object of discussion[27].

This brings us back to the broader issue of the relationship between specialists and non-specialists, in the context of late modernity. Over the last decades, the level of legal knowledge of non-specialists has improved, with the development of education systems and with the public access to countless specialized sources through the internet. This does not make specialists superfluous, but obliges them to rethink their role and their relationship to non-specialists. In the case of the jurists, this discussion is particularly urgent in the domain of agency rights.

[26] One example is supplied by Meßerschmidt (in this volume), who argues that legisprudence has to be imaginative considering the need of the "containment of lobbyism". In the oral presentation of the paper he called for the "creativity of jurists" in this domain.

[27] In the French-speaking area, this is one main point in the debate between Commaille (2015) and Ost (2016).

What is at stake is to assess the real usefulness nowadays of specialized knowledge and how such a knowledge should be developed and made available to – partly well informed – non-specialists. Social theory scholarship suggests that specialization is a device of knowledge production which should not be abandoned, but that it requires a new legitimacy, based on the recognition of the fact that the gap between specialists and non-specialists has narrowed and that, in an increasing measure, knowledge will become a co-production associating specialists of differentiated knowledge disciplines and specialists of all kind of activities carried out on the ground. Open science policies, for example, tackle precisely these questions, but they are, for the moment, designed mainly in the political sphere. There is an urgent need for research and policy debates within the fields of specialized activities.

(E) Legisprudential implications

In quantitative terms, legal norms stating agency rights only make a limited proportion of the legislation produced. But these norms are located at crucial places in the legislation: important chapters in constitutions are devoted to them and norms of statutes which frame certain fields of private activity or certain public policies[28]. Moreover, a significant proportion of statute law is related to these norms, aiming at supporting – by appropriate training, by provision of material means – controlling or limiting the exercise of these agency rights.

Under these circumstances, and taking into account the foregoing discussion, legisprudential scholarship could be developed at the following five levels:

(1) Formulation of the legal texts: (i) Formulation in the narrow sense of the term: Legal discourse about rights is supposed to be assimilated by the holders of these rights themselves[29]. As a consequence, particular attention has to be devoted to their formulation. In this work of formulation, several alternatives are to be dealt with. One may use the terminologies of rights or of liberties. When referring to liberties, the law can attribute them to persons or to activities (see, in the EU Charter, the examples of the media, arts and scientific research). Rights and liberties may be directly referred to, or they may be implicitly recognized by the abolition of a prohibition, or by introducing a prohibition addressing activities likely to condition the exercise of somebody's rights or liberties (Webber et al. 2018: 20).

(ii) Internal organization of the legal texts: precisely with a view to ensure the accessibility of the texts stating the principles, it can make sense to separate, on the one hand, the formulation of the principles, and on the other hand, the procedural rules aiming at implementing these principles. This has been done in the EU Charter of Fundamental Rights, which devotes its Title VII to the "General Provisions Governing the Interpretation and Application of the Charter".

[28] One example: article 64 of the Portuguese *Estatuto da Carreira Docente Universitária*, Decree-Law Nr. 205/2009 of 31 August 2009 about the liberty of scientific orientation and opinion of University lecturers.

[29] On this point, see for instance Braibant (2001: 35)

(iii) Location in the legal discourse: to take rights seriously on a legislative level, one has to locate them in a meaningful way in the legal discourse, in particular by establishing explicit links between the different regulations that participate in the implementation of certain rights. Such links may be formulated in the legal text itself; they may be the result of the location of the text in the general system of the legislation, if there is such a system; they may be mentioned in preambles as well as in their footnotes. In terms of substance, four different types of links should be considered: with texts participating in the formulation of the same right (for example: a specific infra-constitutional regulation has to refer to relevant constitutional provisions, as well as to international instruments); with texts giving powers and liberties to persons expected to contribute to the empowerment of the holders of the rights actually legislated (for example: academic freedom as relating to the rights to engage in work or to conduct a business); with texts formulating rights of other persons, which would have to be balanced with the rights principally at stake (for instance: rights of the consumers to be balanced with the economic liberties of the goods and services providers)[30]; and with texts designing public policies likely to interfere with the exercise of the rights and liberties at stake (health policies to be balanced with the principle of the free disposition of one's own body, or with the principle of free exercise of medical professions).

In addition, it has to be noted that the discussion of agency rights often take place within the framework of politically sensitive procedures, where there can be strong tensions between the parties involved. This generates additional difficulties in the handling of formulation issues.

(2) Embeddedment in non-legal normativities: In the particular case of professional liberties, their legal recognition, or the reforms of their legal regime, should take place with due involvement of bodies representing these professions, and, as far as possible, specialists of the ethics of the profession at stake. Moreover, legislative procedures in such domains should be conducted having in consideration the fact that their outcome may have an impact on debates that are currently going on in the field of professional ethics. In the drafting of legal texts in such settings, special attention has to be devoted to possible specific functions of the law, such as: to ensure the appropriate perception of a certain liberty; to establish a connection between a certain activity and, beyond a community of professionals, broader social interests; to recognize the subjectivity of the person whose activity is supposed to be encouraged.

Beyond special professional norms, attention also has to be paid to other, more generalized, social norms. An interesting example of linking law with its normative environment in the legal text itself is the legislative format adopted for the EU Charter of Fundamental Rights. In the Charter articles formulating rights are introduced by titles referring to what the Convention in charge with its drafting considered as generally accepted values (Braibant 2001: 39).

(3) Due consideration of the role of specialized jurists: A first question here is that jurists, in principle, are not the main readers of the texts. As already mentioned, texts about rights and liberties have to address the owners of the rights and liberties. They may, however, also contain more technical points of interest for jurists in the first place. Here again, the EU Charter may be cited as an example, with a final section about "General Provisions", supposed to be read mainly by legal professionals, while the previous sections are aimed at all citizens.

[30] About the role of legislation in the articulation between rights, see Webber et al. (2018: 22, 55 ff.).

This corresponds to the idea of the "layered structure of legislative texts" (Xanthaki, in the present volume).

Beyond the recognition of this difference, another question is the necessary cooperation, in this domain, between jurists and non-jurists. At the periphery of legislative policy taken in its broad sense, there should be a concern for the way jurists may, in the future, contribute to the reception of a given legislation by lay citizens. In the case of legislation stating rights and liberties, attention should be paid to the fact that, in such domains, jurists do not only advise non-jurists in procedures of legal enforcement, they also should play a role, together with other specialists of the regulation of a certain domain of activity, in a constructive interpretation of the liberties at stake, in order to improve the mobilizing potential of the law.

Legisprudence could here play two rather different roles: on the one hand to participate in the design of procedures involving specialized jurists, apart from other experts, in the preparation as well as in the implementation and evaluation of the legislation, and, on the other hand, as far as possible on basis of its expertise – to be developed – in the issue of the direct relationship between the law and non-specialists, to help these specialized jurists in the development of new ways of working with non-specialists, an issue of particular relevance in a domain – agency rights – where, by definition, the agency of the citizens is at stake.

(4) Appropriate upgrade of the research and evaluation instruments: in the three domains discussed up to now – formulation and its possible impact; relationship between law and other normativities; role of specialized jurists – there is still a strong need for solid empirical evidence. We need to know more precisely how citizens build their notion of rights and liberties; what is the place of the law in that notion; what kind of relationship exists between this notion and the perception of other normativities; what is the impact of that notion on their capacity of action and on their actual activities; how they perceive the role of specialized jurists in the domain of rights and liberties; what is the impact of the notion they have of this role; what is their actual experience of cooperating with jurists, among other specialists likely to support them in the carrying out of their activities. And all these questions should be treated both in the domain of their specific professional activity, and in their non-specialized citizens' life, in particular their involvement in the life of the region or of the city in which they live. So the development of research in this field is urgent and requires a broad interdisciplinary cooperation, joining in particular legisprudence, researchers from the law and society domain, as well as psychologists.

(5) Participation in the political debate about rights: specialists in the drafting of legal texts about rights are likely to bring in valuable inputs in current debates about rights. In this domain, they should pay attention to a particular topic, the defence of the recognition of *an autonomous right to participate in the actualization of the other fundamental rights*. Arguably, such a right is a necessary complement to all fundamental rights. As rights, they have to be guaranteed by the collectivity which recognizes them. This guarantee requires concrete measures, and these concrete measures require concrete action, which means, action from the part of the members of the collectivity. Both the right to a certain right (access to a right) and the right to participate in the activities necessary for guaranteeing that right form the framework in which politics – the organization of collective activities composed by the

activities of autonomous individuals – unfold. Better than the right to access rights, necessary for the identification of certain social problems, the – individual – right to participate in its actualization – by a necessarily to a significant extent collective action – could contribute to bring about the perception of a "we" as identified by a common activity joining autonomous individuals, a perception that could reduce the demand for experiences of "we" as opposed to "the others"[31].

Committed to the gathering of knowledge with concrete basis about the possible and necessary composition of rights in the design of policies of rights, specialists in legisprudence find themselves in rather favourable conditions to participate in the political debate about this specific right. Actually, they are implicitly claiming precisely this right at the moment they invest their scholarly liberty in the development of expertise likely to contribute to the improvement of legislation guaranteeing agency rights. To contribute to the formal recognition of this right is just a matter of coherence.

This brings us back to the topic of the today contested issue of the relationship between specialists and non-specialists. By defending the right of every citizen to participate in the actualization of the rights of others, specialists in Legisprudence might be paving the way to a more intense participation, in legislative processes concerning a certain public policy, of all those who, on the ground, participate in the public action at stake.

Conclusion

The legislative domain addressing agency rights is worth particular attention, given its relevance for the quality of democracy. Indeed, not only the regular functioning of democratic institutions, but also the economic and cultural performances of a democratically organized togetherness depend on the way people exercise their rights and liberties. And they depend also, even if not only, on the way these rights are legally formulated. Research on the role of legislation in these matters, and legisprudential expertise based on such research, are particularly worth being developed at a time when the governance model of liberal democracies finds itself under increased competitive pressure from the part of other governance models.

Here a more specific political point could be added: now that non-legal ways of monitoring individual activities are becoming more efficient and more intrusive, and intensively used by companies and other large organizations, even where a democratic governance model prevails, it might make sense to handle with particular care legislative measures confirming individual rights and liberties. Such measures could contribute to counteract the erosion of citizens' capabilities that may be caused by mechanisms focusing more on the performance of functions than on the activity of people.

A theory of modern human individuality as outlined in the present essay, apart from suggesting more specific guidelines, could help a development of the discipline of

[31] About the construction of perceptions of "we" in legislation, see Waldron (1999: 158); for a tentative typology of "we" experiences, see Guibentif (2017).

legisprudence favourable to advances on these two lines. It is certainly a utopian theory but – this has to be reminded – it is only a partial utopia, aiming at helping a legislation which could design many possible futures.

Lisbon, June 2018

References:

Almeida, Marta Tavares de, João Caupers, and Pierre Guibentif. 2014. *Feitura das Leis. Portugal e a Europa*. Lisbon: Fundação Francisco Manuel dos Santos. https://www.ffms.pt/estudo/107/feitura-de-leis-portugal-e-a-europa. Accessed February 2018.

Bar-Siman-Tov, Ittai. In this volume. The global revival of legisprudence: a comparative view on legislation in legal education and research.

Baer, Susanne. 2015. *Rechtssoziologie. Eine Einführung in die interdisziplinäre Rechtsforschung*. Baden-Baden: Nomos.

Belley, Jean-Guy. 2002. Le pluralisme juridique comme doctrine de la science du droit. In: *Pour un droit pluriel –Études offertes au professeur Jean-François Perrin*, Kellerhals, Jean, Roth, Robert, Manaï, Dominique (ed.), 135-165. Basel / Frankfurt-am-Main: Helbing & Lichtenhahn.

Bessy, Christian. 2007. Le libéralisme d'Amartya Sen (Compte rendu de l'ouvrage : *La liberté au prisme des capacités, Amartya Sen au-delà du libéralisme*). *Economie et Institutions* Nr. 10-11 : 285-305.

Bourdieu, Pierre. [1986] 1987. The Force of Law – Toward a Sociology of the Juridical Field. *Hastings Law Journal* 38 (1987): 814–853 (transl. of La force du droit – Éléments pour une sociologie du champ juridique. *Actes de la recherche en sciences sociales* 64 [1986]: 3–19).

Bourdieu, Pierre. 1997. *Méditations pascalienne*. Paris : Seuil.

Braibant, Guy. 2001. *La Charte des droits fondamentaux de l'Union européenne. Témoignage et commentaires*. Paris : Seuil.

Calvo García, Manuel. 2014. Crisis económica y efectividad de los derechos sociales. in Maria José Bernuz Benéitez and Manuel Calvo García (ed.). *La eficacia de los derechos sociales*. Valencia : Tirant lo Blanch. p. 89-132.

Commaille, Jacques. 2015. *À quoi nous sert le droit ?* Paris: Gallimard (Folio).

Dahrendorf, Ralf. 1958. Out of Utopia – Toward a reorientation of Sociological Analysis. *American Journal of Sociology* 64: 115-127.

Delpeuch, Thierry, Dumoulin, Laurence, de Galembert, Claire. 2014. *Sociologie du droit et de la justice*. Paris : Armand Colin.

De Munck, Jean. 2017. Human Rights and Capabilities : A Program for a Critical Sociology of Law. *Critical Sociology*: 1-15.

Dworkin, Ronald. 1977. *Taking Rights Seriously*. London: Duckworth.

Ewick, Patricia, Silbey, Susan S. 1998. *The Common Place of Law – Stories from Everyday Life*. Chicago: University of Chicago Press.

Guibentif, Pierre. 2013. Rights in Niklas Luhmann's Systems Theory. In: *Law and Intersystemic Communication – Understanding 'Structural Coupling'*, Alberto Febbrajo and Gorm Harste (eds), 255-288. London: Ashgate.

Guibentif, Pierre. 2015. Theorien und Menschen im Werk von Gunther Teubner. *Zeitschrift für Rechtssoziologie* 35: 5-27.

Guibentif, Pierre. 2016. Societal Conditions of Self-Constitution – The Experience of the European Periphery. In: *Self-Constitution of European Society. Beyond EU Politics Law and Governance*. Přibáň, Jiří (ed.), 274-313. London and New York: Routledge.

Guibentif, Pierre. 2017. Entre agir sociétal et subjectivités – Pour un concept du politique dérivé de Niklas Luhmann. In: *Systèmes psychiques et systèmes sociaux chez Luhmann*, Lukas Sosoe (ed.), 99-132. Hildesheim / Zürich / New York: Georg Olms Verlag.

Gusdorf, Georges. 1978. *Les sciences humaines et la pensée occidentale – VIII. La conscience révolutionnaire. Les Idéologues*, Paris : Payot.

Habermas, Jürgen. [1963] 1974. Natural Law and Revolution. In *Theory and Practice*, Jürgen Habermas. London: Heinemann.

Habermas, Jürgen. [1981] 1987. *The Theory of Communicative Action*. Cambridge: Polity Press, 1987 (original German publication: 1981).

Hart, H. A. [1961] 1994. *The Concept of Law*. Oxford: Clarendon Press (Second edition with a Postscript, edited by Penelope A. Bulloch and Joseph Raz).

Hespanha, António Manuel. 2003. *Cultura Jurídica Europeia. Síntese de um Milénio*, Mem Martins: Publicações Europa-América.

Honneth, Axel. [2011] 2014. *Freedom's Right. The Social Foundations of Democratic Life*. New York: Columbia University Press. Original German edition: Honneth, Axel, *Das Recht der Freiheit*. Berlin: Suhrkamp.

Kebir, Leïla, Crevoisier, Olivier, Costa, Pedro, Peyrache-Gadeau, Véronique. 2017. *Sustainable Innovation and Regional Development: Rethinking Innovative Milieus*. Cheltenham: Edward Elgar.

Kelsen, Hans. 1934. *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik*. Vienna, Franz Deuticke.

Kelsen, Hans. 1960. *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik*. Vienna, Franz Deuticke (zweite, vollständig neu bearbeitete und erweiterte Auflage) (Portuguese translation: Kelsen,Hans, Teoria Pura do Direito, C. Arménio Amado, 1984).

Luhmann, Niklas [1970] 1981. Zur Funktion der 'subjektiven Rechte'. In Ausdifferenzierung des Rechts, Niklas Luhmann, 360-373. Frankfurt-am-Main: Suhrkamp (orig. publ.: 1970).

Luhmann, Niklas. 1980. *Gesellschaftsstruktur und Semantik 1.* Frankfurt am Main: Suhrkamp.

Luhmann, Niklas. 1981. Subjektive Rechte : Zum Umbau des Rechtsbewusstseins für die moderne Gesellschaft. In *Gesellschaftsstruktur und Semantik 2*, Niklas Luhmann, 45-104. Frankfurt am Main: Suhrkamp.

Luhmann, Niklas. 1989. *Gesellschaftsstruktur und Semantik 3.* Frankfurt am Main: Suhrkamp.

Luhmann, Niklas. 1995. *Gesellschaftsstruktur und Semantik 4.* Frankfurt am Main: Suhrkamp.

Mannheim, Karl. [1929] 1952. *Ideologie und Utopie*. Frankfurt-am-Main: Verlag G. Schulte-Bulmke.

Marshall, T. H. [1950] 1992. Citizenship and Social Class. In *Citizenship and Social Class*, Marshall, T.H., Bottomore, Tom, London: Pluto Press, 1992 (orig. publ.: 1950), 3-51.

Meja, Volker, Sehr, Nico (eds.). 1982. *Der Streit um die Wissenssoziologie*. Frankfurt-am-Main: Suhrkamp.

Meßerschmidt, Klaus. In the present volume. Special-interest legislation and legislative capture.

Oliver-Lalana, A. Daniel. 2011. *Legitimidad a través de la comunicación - Un estudio sobre la opacidad y la publicidad del derecho*. Granada: Editorial Comares (Colección Filosofía, derecho y sociedad).

Parsons, Talcott. 1954. A Sociologist Looks at the Legal Professions. In: *Essays in Sociological Theory*, Talcott Parsons, 370-385. London et al., MacMillan / Free Press.

Ost, François. 2016. *À quoi sert le droit ? Usages, fonctions, finalités*. Bruxelles: Bruylant.

Sen, Amartya. [2004] 2008. Éléments d'une théorie des droits humains. In : La liberté au prisme des capacités. Amartya Sen au-delà du libéralisme, Jean de Munck and Benedicte Zimmermann, 139-183. Paris : Éditions de l'École des Hautes Études en Sciences politiques (orig. publ. *Philosophy and Public Affairs* 32, 2004, 315-356).

Sen, Amartya. 2009. *The Idea of Justice*. London : Penguin.

Supiot, Alain. 2015. *La Gouvernance par les nombres. Cours au Collège de France (2012-2014).* Paris: Fayard.

Szende, Paul. 1922. Verhüllung und Enthüllung. Der Kampf der Ideologien in der Geschichte. *Archiv für die Geschichte des Sozialismus und der Arbeiterbewegung*, 183-270.

Teubner, Gunther. 1996. Globale Bukowina: Zur Emergenz eines transnationalen Rechtspluralismus. *Rechtshistorisches Journal* 15: 255-290.

Teubner, Gunther. 2012. *Constitutional Fragments: Societal Constitutionalism and Globalization*. Oxford: Oxford University Press.

Teubner, Gunther. 2014. Recht und Sozialtheorie: Drei Probleme. *Ancilla Iuris* 9: 182-221 (available on http://www.anci.ch/beitrag/recht_und_sozialtheorie_drei_probleme_-_law_and_social_theory_three_problems)

Thornhill, Christopher. In press. *The Sociology of Law and the Global Transformation of Democracy*.

Touraine, Alain. 1984. *Le retour de l'acteur*. Paris: Fayard.

Van Klink, Bart. In the present volume. Legislation, Communication, and Authority. How to Account for the Bindingness of Law?

Van Klink, Bart, Van Beers, Britta, Lonneke Poort (ed.). 2016. *Symbolic Legislation Theory and Developments in Biolaw*. Springer.

Waldron, Jeremy. 1999. *The Dignity of Legislation*. Cambridge et al.: Cambridge University Press.

Webber, Grégoire, Yowell, Paul, Ekins, Richard, Köpcke, Maris, Miller, Bradley W., Urbina, Francisco J., 2018. *Legislated Rights – Securing Human Rights through Legislation*. Cambridge: Cambridge University Press.

Xanthaki, Helen. In the present volume. Misconceptions in legislative quality: an enlightened approach to legislative drafting.

Documents:

International :

2010 Singapore Statement on Research Integrity. http://www.singaporestatement.org/. Accessed February 2018.

2015 Resolution adopted by General Assembly of the United Nations on 25 September 2015: Transforming our world: the 20130 Agenda for Sustainable Development https://www.un.org/sustainabledevelopment/sustainable-development-goals/

European:

2005 EU Charter for Researchers.
https://euraxess.ec.europa.eu/jobs/charter/european-charter. Accessed February 2018.

National :

Portugal: *Estatuto da Carreira Docente Universitária*, Decree-Law Nr. 205/2009 of 31 August 2009. https://dre.pt/web/guest/pesquisa/-/search/488485/details/maximized . Accessed February 2018.

Switzerland, Conseil fédéral, 1996. *Message relatif à une nouvelle constitution fédérale, du 20 novembre*. Bern.