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# OF RIGHTS AND OF PRIVILEGES: THE MORALITY OF DUTY VS. THE MORALITY OF ASPIRATION

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## *Homage Lon L. Fuller*

In speaking of the relation of the two moralities, I suggested the figure of an ascending scale, starting at the bottom with the conditions obviously essential to social life and ending at the top with the loftiest strivings toward human excellence. The lower rungs on the scale represent the morality of duty; its higher reaches, the morality of aspiration. Separating the two is a fluctuating line of division, yet vitally important. . . . If the morality of duty reaches upward beyond its proper sphere the iron hand of imposed obligation may stifle experiment, inspiration, and spontaneity. If the morality of aspiration invades the province of duty, men may begin to weigh and qualify their obligations by standards of their own and we may end with

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the poet tossing his wife into the river in the belief — perhaps quite justified — that he will be able to write better poetry in her absence.

Lon L. Fuller, *The Morality of Law*<sup>1</sup>

“La raison est régulière comme un comptable;  
la vie, anarchique comme un artiste . . .”

Georges Canguilhem<sup>2</sup>

#### INTRODUCTION

In his groundbreaking work, Professor Lon L. Fuller of Harvard Law School introduces this seminal distinction between the two moralities.<sup>3</sup> On the one hand, we have the morality of duty, and on the other hand, we have the morality of aspiration. Clearly, the morality of duty represents the substance of what we call law, i.e., its commands, its prohibitions, and its authorizations.<sup>4</sup> The morality of duty, in one way or another, refers to the lowest common denominator of human behavior.<sup>5</sup>

As Fuller points out, this is very important to understand for reasons which have mostly been disregarded, as the definitions of human actions — commanded, prohibited, or authorized — are only possible if they refer to behavior which is in every sense prevailing, ordinary, or even statistically prevalent.<sup>6</sup> Such behavior may be subject to legal delineations simply because it is ordinary and can be empirically subject to the definition *per genus proximum et differentiam specificam*: by the proximate general category on the one hand and the specific difference characterizing the particular piece of behavior in that category on the other hand.<sup>7</sup>

Criminal law, for example, in its substantive branch, refers to criminal actions that are easy to describe (in *corpus delicti*) in order that the prosecutor would have a well-defined burden of proof in which he must substantiate every element of the crime.<sup>8</sup> One could even say that the

<sup>1</sup> LON L. FULLER, *THE MORALITY OF LAW* 27–28 (Yale University Press rev. ed. 1969).

<sup>2</sup> “[R]eason is as regular as an accountant; the life is as anarchic as an artist.” Georges Canguilhem, *Note sur la situation faite en France à la philosophie biologique*, in *REVUE DE MÉTAPHYSIQUE ET DE MORALE* 326 (1947).

<sup>3</sup> See FULLER, *supra* note 1, at 27–28.

<sup>4</sup> See *id.* at 15, 42.

<sup>5</sup> See *id.* at 2, 13, 19–22, 27.

<sup>6</sup> See *id.* at 22–23.

<sup>7</sup> See *id.* at 25, 29.

<sup>8</sup> The prosecution bears the burden of proof beyond a reasonable doubt and also carries the risk of non-persuasion (*in dubio pro reo*). This applies to every element of the crime in the special part of the criminal code, but it does not, as in *Patterson v. New York*, necessarily apply to an element deriving from the general part of the criminal code: extreme emotional disturbance as a mitigating factor or the heat of

definitions of the substantive criminal law are truly the lowest common denominator of human comportment, which is why we sometimes refer to the criminal code as the minimal moral code.<sup>9</sup>

But this conclusion concerning the possibility to define human conduct does not refer only to criminal law. To the extent that Fuller observes, it implies all kinds of private law torts, contracts, as well as the different aspects of administrative law.<sup>10</sup> Even in the international context of human rights, we often speak of the positive and negative obligations of the states whose behavior in particular situations is capable, too, of being defined, i.e., the definition making it possible to condemn the particular state for a particular kind of violation of human rights.<sup>11</sup>

By contrast, the morality of aspiration does not lend itself to these kinds of delineations. Aspirations, referred to by Fuller, by definition egress the prevalent, the ordinary, and the statistical.<sup>12</sup> When we speak of particular achievements of human beings surpassing, in the positive sense, the ordinary frontiers of behavior, we speak of something that is *a priori* impossible to reduce the lowest common denominator.<sup>13</sup>

For example, some time ago in 2015, there was a concours of the child prodigies on the French television, in which children of various ages performed a range of musical pieces on the violin and violoncello.<sup>14</sup> As we shall see later, it is important to note that the winner of this competition was a young girl performing, on the violin, a fragment of “The Summer”

passion on sudden provocation, as in *In re Winship*. The three cases together demonstrate that the simple formula to the effect that the prosecution must prove every element of the crime does not work. It does not work because the major premise of the criminal law’s syllogism is a product of combining specific offences on the one hand, and the elements deriving from the general part of the criminal code on the other hand. Needless to say, there are literally billions of possible combinations. So much, too, for the simplistic continental understanding of the principle of legality, *principe de légalité*, *Legalitätsprinzip*. For the so-called *Winship–Mullaney–Patterson* triangle of the U.S. Supreme Court cases, see *Patterson v. New York*, 432 U.S. 197 (1977); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *In re Winship*, 397 U.S. 358 (1970).

<sup>9</sup> See generally Edmund L. Pincoffs, *Legal Responsibility and Moral Character*, 19 WAYNE L. REV. 905, 908 (1973) (discussing criminal law’s relevance to a “minimal moral code”).

<sup>10</sup> See FULLER, *supra* note 1, at 23-25, 32.

<sup>11</sup> See, e.g., Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, amended by Protocol 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms [hereinafter ECHR].

<sup>12</sup> See FULLER, *supra* note 1, at 28 (defining the nature of human aspirations for perfection, seeking maximum economic efficiency, to be pliable and responsive to changing conditions).

<sup>13</sup> See *id.* at 5.

<sup>14</sup> See Anas Tazi, *Prodiges (France 2): Qui est Camille Berthollet, la grande gagnante?*, TÉLÉSTAR (Dec. 29, 2014), <http://www.telestar.fr/2014/articles/prodiges-france-2-qui-est-camille-berthollet-la-grande-gagnante-66427>.

of Vivaldi's "Four Seasons."<sup>15</sup> The moment the girl started to play, it was clear that she was going to win the competition; all other competitors faded into the background. The jury, all adults, composed of a cellist, a singer, and a dancer, praised all the competitors and tried to be reassuring to everybody. But when it came to the terrific girl violinist, they were at a loss to find the commensurate superlatives with which to compliment her. In a very real sense, the girl's performance surpassed the usual criteria of musical quality in a way that is impossible to define, and especially of course, to define in advance. The jury struggled in heaping praise upon the girl but the superlatives on which they had agreed, had not done much to "define" the extraordinary aspiration. Nobody in the public or in the jury was capable of describing why this was discernibly the case. In a sense, as we shall see later, this is the metaphysical aspect of the morality of aspiration.<sup>16</sup>

As we have seen, it is relatively easy to establish this basic difference between the morality of duty and the morality of aspiration. In law, *a priori*, the morality of aspiration simply does not seem to be relevant. The law's commands, prohibitions, and authorizations are there in order to regulate definable human behavior — and not to inspire extraordinary achievements.<sup>17</sup> Also, one cannot be commanded or authorized to be a brilliant violinist, remarkable researcher, or Nobel Prize novelist. Fuller recognizes that much, and he draws from it certain consequences.<sup>18</sup> In other words, the Nobel Prize Committee, by definition, cannot be bound, while awarding its prizes, to any legal and formalistically defined criteria proclaimed beforehand. Fuller seems to believe that such criteria, due to

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<sup>15</sup> See Fabien Randanne, *Camille Berthollet: «Ce que montrent mon album et «Prodiges», c'est que la musique classique, c'est aussi la jeunesse»*, 20 MINUTES (Oct. 10, 2015), <http://www.20minutes.fr/culture/1711091-20151016-camille-berthollet-mon-trent-album-prodiges-musique-classique-aussi-jeunesse>.

<sup>16</sup> But not on the proto-judicial (ethical) plane where the morality of aspiration is completely divorced from the question we are treating here. See generally David Ingram, *Of Sweatshops and Subsistence: Habermas on Human Rights*, 2 ETHICS & GLOBAL POL. 193 (2009). "[The] tension between the legal and moral aspects of human rights can be resolved if and only if human rights are conceived as moral aspirations and not simply as legal claims. In particular . . . there are two reasons why human rights must be understood as moral aspirations that function non-judicially: First, the basic human goods to which human rights provide secure access are determinable only in relation to basic human capabilities that are progressively revealed in the course of an indefinite (fully inclusive and universal) process of collective learning; second, the institutional impediments to enjoying human rights are cultural in nature and cannot be remedied by means of legal coercion." *Id.* at 193. Ingram does not seem to be even aware of Fuller's "The Morality of Law."

<sup>17</sup> See FULLER, *supra* note 1, at 5.

<sup>18</sup> See generally *id.* at 4-6, 11-15, 27-29.

the extraordinariness of certain human achievements, cannot be described.<sup>19</sup>

However, as we shall see, there are very specific repercussions to the above distinction between the morality of duty and the morality of aspiration. One consequence of this differentiation is the distinction between the right and the privilege.<sup>20</sup> Relying upon Fuller's framework, it is thus the purpose of this article to focus on this latter aspect and to explore the impact of the reasons for the fact that in some cases, similar to privileges, the discretion of the decision-maker cannot be made subject to the strict rules of law.<sup>21</sup>

## I. THE RIGHT

### A. *The Right and the Remedy*

The procedural reiteration for the concept of "right" is — "entitlement." It means that the carrier of the right is entitled to a certain outcome in case he or she commences a legal procedure.<sup>22</sup> The Roman Law's *rei vindicatio*, for example, was an action "in defense of a thing" that the aggrieved person "owned," i.e., it was an action in law which resuscitated the right only upon the explicit initiative of the presumed procedural owner of the thing.<sup>23</sup> The right of ownership was defined as "*ius utendi et abutendi re sua*," i.e., the right to use and consume (or abuse) the thing "owned" by the owner.<sup>24</sup> The "entitlement" was this right.

This abstract *and* static definition of the entitlement called "property,"<sup>25</sup> however, overlooks the simple fact that millions of things are

<sup>19</sup> See *id.* at 14, 30.

<sup>20</sup> See *id.* at 29 (stating that essential social rigidities must maintain themselves, not simply by being there, but by pressing actively for recognition — the fundamental meaning of a "right"). See also *id.* at 30 ("Considerations of symmetry would suggest that in the morality of aspiration, which strives toward the superlative, reward and praise should play the role that punishment and disapproval do in the morality of duty.").

<sup>21</sup> See *id.* at 28, 42, 44-45.

<sup>22</sup> See *id.* at 5 (discussing how Greek society developed its social norms through qualifications of the morality of aspiration).

<sup>23</sup> See Joshua C. Tate, *Ownership and Possession in the Early Common Law*, 48 AM. J. LEGAL HIST. 280, 286-87 (2006).

<sup>24</sup> See ULRICH DUCHROW, PROPERTY FOR PEOPLE, NOT FOR PROFIT: ALTERNATIVES TO THE GLOBAL TYRANNY OF CAPITAL 11-13 (2004). *But see* CODE CIVIL [C. CIV] [CIVIL CODE] art. 544 (Fr.): "La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements." [The property is the most absolute right to enjoy and to dispose of things insofar as it does not represent a usage prohibited by law and regulation.]

<sup>25</sup> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest

“being owned” by their proprietors without anybody ever claiming this to be a right, an entitlement.<sup>26</sup> In other words, the right and the entitlement latently lie dormant up until the moment the owner is forced into a dynamic *rei vindicatio*, i.e., into the defence of his chattel or immovable property, presumably because somebody has interfered with the entity in question.

In substantive terms, the right of property is, therefore, nothing else but the right to exclude others from the property in question; that static and latent right is dynamically recovered *qua* entitlement only when it is confronted by those who are excluded. To put it differently but still somewhat ambiguously, the substantive right does not exist outside of its procedural context.<sup>27</sup>

It should then come as no surprise that the right and the remedy<sup>28</sup> are two sides of the same coin. Indeed, as Professor Chayes of Harvard Law School put it in his seminal article, the right and the remedy are interdependent.<sup>29</sup>

## B. *The Procedural Context*

To maintain that the right and the remedy are interdependent is evident, but we would like to make a further step in the procedural direc-

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and subject to the conditions provided for by law and by the general principles of international law.” See Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, 213 U.N.T.S. 262 (emphases added). In the French version: “Toute personne physique ou morale a droit au respect de *ses biens*. Nul ne peut être privé de sa *propriété* que pour cause d’utilité publique et dans les conditions prévues par la loi et les principes généraux du droit international.” The discrepancy between the two texts (possessions versus *propriété*) is surprising. Since Roman law, it has been clear that possession is a fact, whereas property is a right.

<sup>26</sup> See *id.* See also DUCHROW, *supra* note 24, at 12.

<sup>27</sup> In the American context, this procedural context is more or less taken for granted. It is not so in continental law, where jurists tend to consider the static substantive entities (legal definitions, etc.) as reified realities, quite separately from their procedural dependence. I consider this to be a major factor (both the cause and the consequence) of the still-prevalent continental legal formalism. I have addressed this in a text concerned with the similar reification, on the continent, of human rights. The article critical of legal formalism, including that within the ECtHR, was published in Slovenian translation under the title *On the ‘Essence’ of Human Rights* and is being edited for the forthcoming edition in English under the title *On the European Court of Human Rights* [on file with author].

<sup>28</sup> See Thomas R. Phillips, Speech, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1322 (2003) (finding that state provisions guarantee a right to a remedy).

<sup>29</sup> Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282–83 (1976).

tion. Because the remedy is so fatally dependent on the access to court,<sup>30</sup> it is also obvious that the substantive right is interdependent with its *procedure*. As we pointed out above, the substantive rights abound, but they lay dormant until there is a perspicuous procedure for their vindication. It follows logically that the substantive right is not only interdependent with its remedy, but that the remedy itself is matter-of-factly a question of procedure.

To put it more fundamentally, the origins of the law lie in its procedures. We can imagine the access to court and the concomitant procedures without any substantive rights whatsoever. But we cannot imagine the substantive rights without a procedure with which to obtain the remedy.<sup>31</sup> It was Hannah Arendt who maintained that the essence of human rights lies in the procedural access to the forum in which those rights may be articulated and defended.<sup>32</sup> But this goes for law in general, even anthropologically. It is easy to imagine primitive societies in which there are no fixed substantive rights, only ancestral procedures whereby certain unarticulated entitlements might be asserted and defended.

Imagine, likewise, that the settlers in Jules Verne's novel "The Mysterious Island" ("*L'Île Mystérieuse*") were to thrive and to multiply and become an insulated little new society.<sup>33</sup> As in any human community, disagreements would be bound to occur. How would they be resolved? Probably, as in the remote inhabited region of Tristan da Cunha, the mediator would be the "main islander" with his or her authority over the procedure and without reference to any substantive definitions of rights except those of "natural law," as "certain unchanging laws which pertain to a man's nature, which can be discovered by reason, and to which man-made laws should conform."<sup>34</sup> Thus, the origin of all law lies in these

<sup>30</sup> I have dealt with this more extensively in another work. See Boštjan M. Zupančič, *Access to Court as a Human Right According to the European Convention on Human Rights*, 9(2) NOTTINGHAM L.J. 1 (2000).

<sup>31</sup> This is why, before the coming of the constitutional courts, the continental constitutions enumerated superabundant rights, which meant literally nothing since they were not directly litigable. Presumably, they only bound the legislature etc., but even this was not open to judicial review and other remedies. See R. H. Helmholz, *Continental Law and Common Law: Historical Strangers or Companions?*, 1990 DUKE L.J. 1207, 1210-16, 1225 (1990) (describing various chapters of the Magna Carta that were derived from continental law); see also *Haver v. Thorol* (1629) 124 Eng. Rep. 221, 222, 228, 230.

<sup>32</sup> See HANNAH ARENDT, *THE HUMAN CONDITION* 25 (1959).

<sup>33</sup> The remote South Atlantic Island called Tristan da Cunha, with fewer than 300 inhabitants, is just such a society. For an overview of its government and laws, see generally TRISTAN DA CUNHA, <http://www.tristandc.com/>.

<sup>34</sup> *Natural Law*, OXFORD ENGLISH DICTIONARY (2d ed. 1989). But see JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 29-53, 364-65 (H.L.A. Hart ed., 1980) (including a complete restatement of "natural law" mainly according to the neo-Thomist theology).

anthropologically primordial procedures, and substantive rights are the conventional long-term precipitate from these procedures.

### 1. The Example of Roman Law

This is most certainly true of Roman law. The First Table in the *Leges Duodecim Tabularum* (circa 450 B.C.)<sup>35</sup> was, typically, the imperative: *Si in ius vocat ito, ni it antestamino: igitur em capito*. The Second Rule was: *Si calvitur pedemve struit, manum endo iacito*.<sup>36</sup>

Indeed, as I have explained elsewhere,<sup>37</sup> this first procedural imperative is not only at the origin of all law. Its cardinal importance lies at the basis of the necessity to prevent self-help, i.e., the physical fight between the two aggrieved parties. If this were to be tolerable, then society would very quickly retrogress to anarchy, to Hobbes's *bellum omnium contra omnes*, a war of everybody against everybody.<sup>38</sup> Nevertheless, given that the organized enforcement by the state at that point in history was practically nonexistent, the Third Table did permit a circumscribed self-help

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<sup>35</sup> See Samuel Parsons Scott, *The Civil Law*, CONST. SOC'Y, [http://www.constitution.org/sps/sps01\\_1.htm](http://www.constitution.org/sps/sps01_1.htm) (last visited Feb. 12, 2016).

<sup>36</sup> "If plaintiff summons defendant to court, he shall go. If he does not go, plaintiff shall call witness thereto. Then only shall he take defendant by force. . . . If defendant shirks or takes to heels, plaintiff shall lay hands on him." *The Law of the Twelve Tables* (c. 450 B.C.), LATIN LIBR., <http://thelatinlibrary.com/law/12tables.html> (last visited Feb. 12, 2016) (attributing work to E.H. Warmington's "Remains of Old Latin III").

<sup>37</sup> See BOŠTJAN M. ZUPANČIČ, THE OWL OF MINERVA: ESSAYS ON HUMAN RIGHTS 13-42 (Nandini Shah ed., 2008) [hereinafter, ZUPANČIČ, THE OWL OF MINERVA].

<sup>38</sup> THOMAS HOBBS, LEVIATHAN XIV(4) 125 (A.P. Martinich & Brian Battiste eds., 2011) (1651).



kind of enforcement;<sup>39</sup> this was an inspiration for Shakespeare's "Merchant of Venice" and the proverbial "pound of flesh."<sup>40</sup>

## 2. Modern Law

In modern law, the procedural origin of everything legal is very easy to prove. For example, about sixty years ago, the European Court of Human Rights (ECtHR) was inaugurated with the meager text of the European Convention on Human Rights (ECHR) — and absolutely no case law on which to rely.<sup>41</sup> In other words, the *acquis* of the ECtHR commenced purely procedurally on a complete *tabula rasa*, which is, incidentally, also true of most of the newborn constitutional courts in the so-called "new democracies."<sup>42</sup>

The emphasis on the substantive law is more typical of continental law than of the common law. Montesquieu, for example, detested the "procedures" while he was a magistrate in Bordeaux,<sup>43</sup> and even Kelsen considered the procedure an unimportant "adjective" law — adjective, that is,

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<sup>39</sup> For an overview of the Third Table, in both languages, see below:

### Tabula III

aeris confessi rebusque iure iudicatis XXX dies iusti sunt.

post deinde manus iniectio esto. in ius ducito. ni iudicatum facit aut quis endo eo in iure vindicit, secum ducito, vincito aut nervo aut compedibus XV pondo, ne maiore aut si volet minore vincito. si volet suo vivito, ni suo vivit, qui eum vinctum habebit, libras faris endo dies dato. si volet, plus dato.

tertiis nundinis partis secanto. si plus minusve secuerunt, se fraude esto adversus hostem aeterna auctoritas <esto>.

### Table III.

1. One who has confessed a debt, or against whom judgment has been pronounced, shall have thirty days to pay it in. After that forcible seizure of his person is allowed. The creditor shall bring him before the magistrate. Unless he pays the amount of the judgment or some one in the presence of the magistrate interferes in his behalf as protector the creditor so shall take him home and fasten him in stocks or fetters. He shall fasten him with not less than fifteen pounds of weight or, if he choose, with more. If the prisoner choose, he may furnish his own food. If he does not, the creditor must give him a pound of meal daily; if he choose he may give him more.

2. On the third market day let them divide his body among them. If they cut more or less than each one's share it shall be no crime.

3. Against a foreigner the right in property shall be valid forever.

See generally Scott, *supra* note 35.

<sup>40</sup> See Edith Z. Friedler, *Essay: Shakespeare's Contribution to the Tracking of Comparative Law—Some Reflections of The Merchant of Venice*, 60 LA. L. REV. 1091 (2000); Max Radin, *Secare Partis: The Early Roman Law of Execution against a Debtor*, 43 AM. J. PHILOLOGY 36 (1922).

<sup>41</sup> See ECHR, *supra* note 11, art. 19.

<sup>42</sup> I refer to most eastern European countries, e.g. Poland, Ukraine, Czech Republic, Slovakia, etc. Some of these countries, at the time of the transition, already had functioning constitutional courts. They have not, because they had not have any real judicial review power, accumulated any relevant or binding case law (*acquis*).

<sup>43</sup> See Matthew P. Bergman, *Montesquieu's Theory of Government and the Framing of the American Constitution*, 18 PEPP. L. REV. 1, 4 (1990).

to the important substantive law.<sup>44</sup> Elsewhere, I have explained whence this reification of substantive law due to the interference, above all, of the codifications, was prompted by the need of the absolutist monarchs of the 18th and 19th century to control the judicial branch of power. If everything were left as it were to the procedures, then control would be in the hands of the judges. They would be unimpeded in their creation of the law — as they were in England.<sup>45</sup> Chayes's formula above, therefore, that the right and the remedy are interdependent, is the substantive way of perceiving the procedural nature of the rights. The remedy is the substantive *aide-mémoire* to recall that the right without its procedural context — amounts to nothing.

### C. *The Right and the Legality*

Despite the above procedural–contextual proviso, however, the principle of legality belongs squarely to substantive law. The definitions of rights, of offences,<sup>46</sup> etc., may be the substantive precipitate of the accumulation of the age–old legal procedures; yet once defined, they stand on their own. The rights in the substantive law circumscribe the attendant impact of the remedies in the concomitant procedures. This is where formalistic legal conciseness comes into full performance, which is why law is an abstract learning. Again, this is truer in the continental legal system, where the jurists are subject to the collective illusion — the above reification — that the substantive rights exist quite apart from their procedural context. The opposite of this formalist legality is discretionary decision–making. As we shall see, the ECtHR confronted this problem squarely in the case of *Boulois v. Luxembourg*.<sup>47</sup>

### D. *The Principle of Legality in Criminal Law*

In criminal law, the principle of legality (*principe de légalité*, *Legalitätssprinzip*) is especially strict; the general principle being, the more there is

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<sup>44</sup> See generally Petra Gumplová, *Law, Sovereignty and Democracy: Hans Kelsen's Critique of Sovereignty* (Nov. 11, 2004) (unpublished manuscript) (presented at Midwest Pol. Sci. Ass'n 67th Ann. Nat'l Conf., Chiago), [http://citation.allacademic.com/meta/p361108\\_index.html](http://citation.allacademic.com/meta/p361108_index.html).

<sup>45</sup> See ZUPANČIČ, THE OWL OF MINERVA, *supra* note 37, at 108-25.

<sup>46</sup> Offences in substantive criminal law, too, are *stricto sensu*, in fact more so than in other branches of law, the “rights.” The definition of the offence (*corpus delicti*) is simultaneously the *right not to be punished* unless all the elements of this *corpus delicti* have been proven beyond a reasonable doubt. See *supra* text and accompanying note 8.

<sup>47</sup> *Boulois v. Luxembourg*, 2012-II Eur. Ct. H.R. 385, [http://echr.coe.int/Documents/Reports\\_Recueil\\_2012-II.pdf](http://echr.coe.int/Documents/Reports_Recueil_2012-II.pdf).

at stake, the stricter the legal guarantees.<sup>48</sup> Inversely, this means that this pure morality of (minimal) duty permits of no discretion on the part of the decision-maker. It would therefore seem that in criminal law the privileges<sup>49</sup> deriving from the morality of aspiration have no place whatsoever.<sup>50</sup> As far as the principle of legality is concerned, in one sentence of Article 7(1) of the ECHR — “No punishment without law” — covers the whole substantive criminal law.<sup>51</sup> The formula *nullum crimen, nulla poena sine lege praevia* is not originally from Roman law; it was conceived of by Anselm von Feuerbach and put into the 1813 Bavarian Criminal Code.<sup>52</sup> The idea, however, originates from the Enlightenment and the Italian Cesare Beccaria and his treatise “*Dei delitti e delle pene*.”<sup>53</sup> The famous Austrian criminal law theorist Franz von Liszt maintained that

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<sup>48</sup> See, e.g., *Streletz, Kessler, & Krenz v. Germany*, 2001-II Eur. Ct. H.R. 409, 456 (Zupančič, J., concurring), [http://echr.coe.int/Documents/Reports\\_Recueil\\_2001-II.pdf](http://echr.coe.int/Documents/Reports_Recueil_2001-II.pdf).

<sup>49</sup> Needless to say, the “privilege” against self-incrimination is not a privilege; it is a constitutional right derived from the Fifth Amendment of the U.S. Constitution and from the old maxim *nemo contra se prodere tenetur*. See ZUPANČIČ, *THE OWL OF MINERVA*, *supra* note 37, at 87–159.

<sup>50</sup> This is not entirely true. It is well known that the judge during the sentencing phase of criminal procedure, at common law, was empowered with practically unlimited discretion as to what sentence he or she might impose. Once the presumption of innocence had been overcome, the trial phase of the procedure was over, and the guarantees no longer applied.

This has only begun to change in the United States in the 1970s. On the other hand, nobody really knows to what extent the jury sequestered in the jury room feels bound by the judge’s instructions. See generally HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (Phoenix ed., The Univ. of Chi. Press 1971); Joseph L. Gastwirth & Michael D. Sinclair, *A Re-examination of the 1966 Kalven-Zeisel Study of Judge-Jury Agreements and Disagreements and Their Causes*, 3 *LAW, PROBABILITY & RISK* 169 (2004).

In this respect, it is true that the continental legal system offers far more guarantees. For comparison, see *Taxquet v. Belgium*, 2010-VI Eur. Ct. H.R. 145, 160. The continental judgments are reasoned out (motivated) both as to the facts and to the law, whereas a jury’s verdict, even in Belgium, is laconic. If there is no reasoning out (motivation) of the judgment, as in jury’s laconic verdict, there can be no appeal on substantive grounds. This is why at common law most criminal law case law is focused on procedural guarantees.

<sup>51</sup> “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.” ECHR, *supra* note 11, art. 7(1).

<sup>52</sup> See *Streletz*, 2001-II Eur. Ct. H.R. at 456 (Zupančič, J., concurring).

<sup>53</sup> CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS* 13–20 (Aaron Thomas ed., Aaron Thomas & Jeremy Parzen trans., Univ. of Toronto Press 2008) (1764).

the substantive criminal law combined with the principle of legality was the *magna carta libertatum* of the criminal defendant.<sup>54</sup> The above description is limited to criminal law but may be generalized to the effect that the guaranteeing role of any legal provision depends directly on the conciseness of the definition of the right in question. The prevention of arbitrariness of decision-making in law depends on this kind of formal legality.

## II. THE PRIVILEGE

In contradistinction to the right, the privilege, according to Fuller, is not subject to these constraining effects of the principle of legality and the associated legal formalism.<sup>55</sup> For Fuller, the privileges attach to the morality of aspiration, and they are granted in a fully discretionary manner.<sup>56</sup> Of course, the entitlement of the receiver of the privilege may, once granted, become a right, but the *process* of receiving it is completely outside the bounds of legal formalism. As I said, the Nobel Prize Committee or any other private award conferring body is totally free in its considerations that may or may not result in the bestowing of the award.

But what about the conferring of the French *Légion de honneur* (Legion of Honor) by the President of the Republic? Clearly, this choice is no longer a private choice of the private body but is, on the contrary, the bestowing of the honor by a state authority. An even more compelling example is that of bestowing mercy upon a criminal convict the effect of which is that he is released from the punishment that had been legally imposed on him.<sup>57</sup> Here, we are no longer speaking of the morality of aspiration, unless of course we would consider, absurdly, the bestowing of mercy upon a criminal convict as some kind of emanation of the above morality.

### A. *The Two ECtHR Cases*

There have been two cases in the European Court of Human Rights that have dealt indirectly and then directly with the question of privilege.

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<sup>54</sup> *Streletz*, 2001-II Eur. Ct. H.R. at 456 (Zupančič, J., concurring).

<sup>55</sup> See FULLER, *supra* note 1, at 30-31.

<sup>56</sup> See *id.*

<sup>57</sup> The bestowal of mercy by the Chief Executive in any jurisdiction is a *lex in privos data*, i.e., a quasi-legislative act that applies only to one case. In contradistinction, *amnesty* is a general legislative act that applies *in abstracto* to any number of specific cases. In the former case, we speak only of privilege (to be a subject of the bestowal of mercy), whereas in the latter case we speak of the right of the particular convict as per the criteria in the said legislative act of amnesty.

The first case was *E.B. v. France*<sup>58</sup> and the second case was *Boulois v. Luxembourg*.<sup>59</sup>

### 1. *E.B. v. France*: The Introduction of the Idea

In *E.B. v. France*, the issue was whether a member of a lesbian homosexual couple was or was not discriminated against concerning her privilege to adopt a child.<sup>60</sup> The Court until that time did not perceive the distinction between the right and the privilege. The judgment in the case did not mention the privilege at all, but I have filed a dissenting opinion.<sup>61</sup> I started from the premise that we were talking from the point of view of the “best interest of the child.” This, in turn, implied that the possibility for a woman, *any woman*, to adopt a child, *a priori* could not be a right.<sup>62</sup> The considerations, which come into play when the social care organ having jurisdiction decides whether to accord the privilege of adoption to a particular person, among other things, cannot be legally articulated. These imponderables deriving from the “best interest of the child” to be adopted are, for example, of a psychological nature and they do require and presuppose the completely free discretion on the part of the decision-maker bestowing the privilege of adoption.<sup>63</sup>

It seems, that the dissenting opinion had some impact on the Court. In my dissent I have, for the first time, introduced the distinction between a right and a privilege:

The issue is in some respects disguised, but the crucial question in this case is discrimination — on the basis of the applicant’s sexual orientation — concerning the privilege of adopting a child. That this is a privilege is decisive for the examination of the case; it implies — and the majority recognises this — that we are not dealing with the applicant’s right in terms of Article 8.

The difference between a privilege and a right is decisive. Discrimination in terms of unequal treatment is applicable to situations that involve rights; it is not applicable to situations that essentially concern privileges. These are situations in which the granting vel non of the privilege make it legitimate for the decision-making body, in this case an administrative body, to exercise discretion without fear that the right of the aggrieved person will be violated. Put in the simplest terms, the theoretical principle according to which a right is subject to litigation and according to which a violation of that right requires

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<sup>58</sup> *E.B. v. France*, App. No. 43546/02, Eur. Ct. H.R. (2008), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-84571>.

<sup>59</sup> *Boulois v. Luxembourg*, 2012-II Eur. Ct. H.R. 385.

<sup>60</sup> *E.B.*, App. No. 43546/02, Eur. Ct. H.R. at 33 (Zupančič, J., dissenting).

<sup>61</sup> *See id.* at 33-35.

<sup>62</sup> *Id.* at 33.

<sup>63</sup> *See id.* at 33-35.

a remedy does not apply to situations in which a privilege is being granted. An exaggerated example of such a situation would be the privilege of being granted a decoration or a prize, or other situations of special treatment reserved for those who are exceptionally deserving.

In other words, it would be “bizarre” for anybody to claim that he ought to have received a particular award, a particular decoration or a particular privilege.

There are, of course, middle-ground situations such as applications for a particular post for which the aggrieved person is a candidate. One may, for example, conceive of a situation in which an applicant wished to become a judge or a notary public or was a candidate for a similar position but, for whatever reason, was denied that position. Even in that case, it would be unusual for the Court to entertain a refusal to grant a privilege as something that is subject to the discrimination criteria.

In this particular case, the preliminary question of essential importance is to determine whether the privilege of adopting a child is subject to the discrimination criteria under Article 14. As pointed out above, the majority is not inclined to consider the privilege of adopting a child as a right. It is therefore inconsistent to consider that there has been any kind of violation as long as the Court persists in its (justifiable!) position according to which the possibility of adopting a child is clearly not a right and is in any event at best a privilege. The question is then what kind of discretion the administrative body is entitled to exercise when making a decision concerning the privilege of adopting a child.

On the other hand, is it possible to imagine the Nobel Prize Committee being accused of discrimination because it never awards any Nobel Prizes to scientists of a particular race or nationality? Such an assertion would, of course, require statistical proof. Statistical evidence is, indeed, very prevalent in employment discrimination and similar cases. In other words, if in this particular situation, the European Court of Human Rights were to establish that the French administrative authorities systematically discriminate against lesbian women wishing to adopt a child, the issue would be much clearer.

But we are dealing here with an individual case in which discrimination is alleged purely on the basis of a single occurrence. This, as I have pointed out, does not permit the Court to reach the conclusion that there is in France a general discriminatory attitude against homosexuals wishing to adopt a child. The issue of systematic discrimination has not been explored in this specific case, and it would probably not be possible to even admit such statistical proof in support of the allegation. If it were possible, however, the treatment of

the case would be completely different from what we now face. It is therefore incumbent on the Court to extrapolate a consistent line of reasoning from its preliminary position, according to which the privilege of adopting a child is in any event not a right.

A separate issue under the same head is whether the procedures leading to the negative answer to the lesbian woman were such as to evince discrimination. This question seems to be the distinction upon which the majority's reasoning is based.

The question distilled from this kind of reasoning is whether the procedures — even when granting, not a right, but a privilege — ought to be free of discrimination. In terms of administrative law, perhaps, the distinction is between a decision which lies legitimately within the competence of the administrative bodies and their legitimate discretion on the one hand and one which moves into the field of arbitrary decision.

A decision is arbitrary when it is not based on reasonable grounds (substantive aspect) and reasonable decision-making (procedural aspect) but rather derives from prejudice, in this case prejudice against homosexuals. It is well established in the legal theory that the discrimination logic does not apply to privileges, but it may well apply to the procedures in which the granting or not of the privilege is the issue.

It is alleged that the procedures in French administrative law were discriminatory against this particular female homosexual, but the question then arises as to whether this kind of discriminatory procedure is nevertheless compatible with the legitimate discretion exercised by the administrative body. I am afraid that in most cases, precisely this kind of “contamination” of substance by procedure is at the centre of the controversy. I cannot dwell on it here but the question could be posed as follows: If the granting of privileges is not a matter of rights, is it not then true that the bestower of privilege is entitled — *argumento a majori ad minus* — not only to discretion but also to discrimination in terms of substance as well as in terms of procedure? The short answer to this is that in the public sphere — as opposed to the purely private sphere of awards, prizes and so forth — there are some privileges which are apt to become rights, such as adopting a child, being considered for a public function, and so on. Decidedly, insofar as this process of the privilege potentially “becoming a right” is affected by arbitrariness, prejudice and frivolity the discrimination logic should apply.

The rest is a question of fact. Like Judge Loucaides, I do not subscribe to the osmotic contamination theory advanced by the majority.

There is one final consideration. The non-represented party, whose interest should prevail absolutely in such litigation, is the child whose future best interests are to be protected. When set against the absolute right of this child, all other rights and privileges pale. If in custody matters we maintain that it is the best interests of the child that should be paramount — rather than the rights of the biological parents — how much more force will that assertion carry in cases such as this one where the privileges of a potential adoptive parent are at issue?<sup>64</sup>

In other words, as articulated in my dissenting opinion, it is often difficult to distinguish the procedure of bestowing the privilege from the privilege itself. While the privilege, in terms of substantive law, is by definition discretionary, the procedure of bestowing it — while discretionary — must not be arbitrary.

## 2. *Boulois v. Luxembourg*: The Precedential Follow-Up

In *Boulois v. Luxembourg*, the issue was different. It related to the privilege of a particular convict to be eligible for furlough during his serving of the sentence of imprisonment.<sup>65</sup> Again, the criteria of betterment and re-socialization, which are determinative for the granting of the privilege of the temporary absence from the prison, are mostly psychological and are in the same sense imponderable. As such, these criteria cannot be defined in advance; this forces the legal system to bestow the discretion upon the decision-making parole board. The law in Luxembourg, which was very helpful, explicitly referred to the possibility of the convict to obtain a temporary absence from the prison *as a privilege*.<sup>66</sup> This made it easier for the Court squarely to adopt the distinction between a right, say in the context of post-conviction remedies, and a privilege. Nevertheless, the case is a potent precedent and in the future, the Court will have the possibility of treating certain quasi-entitlements as mere privileges. The Court held:

The Court notes first of all that a “dispute” existed in the present case, concerning the actual *existence of the right* to prison leave claimed by the applicant. . . . As regards the issue whether such a “right” could be said, at least on arguable grounds, to be recognised in domestic law, the Court observes that section 6 of the 1986 Law defines prison leave as permission to leave prison either for part of a day or for periods of twenty-four hours. Section 7 states that *this is a “privilege”* which “*may be granted*” to prisoners in certain circumstances . . . . The notion of “privilege” may have different meanings in different contexts; it may refer either to a concession that can be

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<sup>64</sup> *Id.*

<sup>65</sup> *Boulois v. Luxembourg*, 2012-II Eur. Ct. H.R. 385.

<sup>66</sup> *See id.* ¶ 47.



granted or refused as the authorities see fit, or to a measure which the authorities are bound to grant once the person concerned satisfies certain prior conditions. . . . In the instant case the Court is of the view that *the term “privilege” as characterised by the legislature should be analysed in conjunction with the phrase “may be granted”* and in the light of the comments accompanying the relevant bill, according to which the granting of measures relating to the means of executing a sentence “will never be automatic and will *ultimately remain at the discretion of the post-sentencing authority*” . . . . Thus it was clearly the legislature’s intention to create a *privilege* in respect of which *no remedy was provided*. . . . the present case concerns a benefit created as an incentive to prisoners. . . . the Prison Board enjoys *a certain degree of discretion* in deciding whether the prisoner concerned merits the privilege in question. . . . The Board takes into consideration the personality of the prisoner, his or her progress and the risk of a further offence, in order to assess whether he or she may be granted prison leave. The statistics produced by the Government . . . confirm *the discretionary nature* of the competent authorities’ powers. It follows that prisoners in Luxembourg *do not have a right* to obtain prison leave, even if they formally meet the required criteria. . . .

. . . .

It is thus apparent from the terms of the legislation in Luxembourg, and from the information provided on the practice concerning prison leave, that *the applicant could not claim, on arguable grounds, to possess a “right” recognised in the domestic legal system*. . . .

. . . .

In view of all the foregoing considerations, the Court cannot consider that the applicant’s claims related to a “right” recognised in Luxembourg law or in the Convention. Accordingly, it concludes, like the Government, that Article 6 of the Convention is not applicable. . . . It follows that the Government’s preliminary objection should be allowed. There has therefore been no breach of Article 6 of the Convention.<sup>67</sup>

## B. *Academia*

In principle, therefore, the privilege is something in the full discretion of the decision-making body. This implies that the decision on the privilege need not or cannot be reasoned out, or motivated. Consequently, no appeal is possible against such a decision. One could still, together with Fuller, maintain that being worthy of becoming an adoptive parent or of being worthy of receiving a temporary release from prison pertains to the morality of aspiration, although such “aspirations” do not really belong in

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<sup>67</sup> *Id.* ¶¶ 95–99, 101, 104–05 (emphases added).

the circle of extraordinary human achievements.<sup>68</sup> The point, at least in the two documented cases, rather seems to lie in the *imponderable* nature of decisive considerations, which prevent the articulable reasoning out of the decision-maker. An interesting approximation to this is academic freedom of professors to give certain grades to students. The courts in the United States, for example, decline to interfere with the grades assigned by professors:

When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.<sup>69</sup>

As another court explained, “[g]rades must be given by teachers in the classroom, just as cases are decided in the courtroom . . . . Teachers therefore must be given broad discretion to give grades.”<sup>70</sup> The courts never referred to Fuller’s morality of aspiration; they never defined the achievement of certain grades as privileges — but the essential logic is the same. It looks as if the courts refuse to meddle in the academic freedom of the faculty, but the essence of the problem lies in judicial incapacity, due to the imponderables, to review the grading process in a particular case.

### C. *The Middle Ground*

In the area of judicial appointments or elections as well as dismissals from the judicial office, there are two cases at the ECtHR that merit, in this context, some attention. The first case is *Volkov v. Ukraine*,<sup>71</sup> and the second case is the case of the former judge of the Court, *Baka v. Hungary*.<sup>72</sup> In both cases, the issue was the allegedly baseless dismissal of the judges from the Ukrainian and Hungarian judiciary, respectively.<sup>73</sup> These two cases are relevant not because they would raise the question of privilege but because, on the contrary, they raise the question of arbitrary dismissal from the privilege of being a judge.

In the case of *Volkov v. Ukraine*, the judge was dismissed on the fuzzy grounds of having violated the judicial oath.<sup>74</sup> In *Baka v. Hungary* the

<sup>68</sup> See FULLER, *supra* note 1, at 17 (explaining that morality of aspiration “implies some conception of the highest good of man”).

<sup>69</sup> *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985) (citation omitted).

<sup>70</sup> *Settle v. Dickson Cty. Sch. Bd.*, 53 F.3d 152, 155-56 (6th Cir. 1995).

<sup>71</sup> *Oleksandr Volkov v. Ukraine*, 2013-I Eur. Ct. H.R. 73, [http://echr.coe.int/Documents/Reports\\_Recueil\\_2013-I.pdf](http://echr.coe.int/Documents/Reports_Recueil_2013-I.pdf).

<sup>72</sup> *Baka v. Hungary*, App. No. 20261/12, Eur. Ct. H.R. (2014), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-144139>.

<sup>73</sup> See *Volkov*, 2013-I Eur. Ct. H.R. ¶ 76; *Baka*, App. No. 20261/12, Eur. Ct. H.R. ¶ 62.

<sup>74</sup> See *Volkov*, 2013-I Eur. Ct. H.R. ¶¶ 3, 40-55.

applicant was dismissed from the post of the President of the Supreme Court of Hungary by virtue of a constitutional law attaining the two-thirds majority in the Hungarian Parliament.<sup>75</sup> This, in turn, meant that the applicant had no constitutional complaint or recourse against this decision, which was obviously a political decision by the government.

As I said, the two cases seem to be the inverse of the question that we are treating here, i.e., the real issue would be the privilege of selecting and appointing a judge or rather the unmotivated refusal to elect and appoint a judge. Especially in *Baka v. Hungary*, it was obvious that the applicant had enjoyed the “privileged” position of the President of the Supreme Court of Hungary, of which he had been “arbitrarily” deprived.<sup>76</sup> This is, therefore, the mirror image of the issue that would have arisen had he not been appointed. Thus, both cases involve the violation of the *rights* of the applicants — given that their anterior nomination, which was a *privilege*, had in the meanwhile been converted into rights pertaining to their offices.<sup>77</sup> Other than that, the ECtHR does not seem to have treated the issue of such discrimination concerning the privilege at an anterior point in the development. It would seem that the distinction between the *right* and the *privilege* is for the moment, therefore, limited to *E.B. v. France* and *Boulois v. Luxembourg*.<sup>78</sup>

### 1. *Majhen v. Slovenia*

Meanwhile in 1995, inspired by Fuller, I raised for the first time (in my dissenting opinion) the issue of a privilege as distinct from a right, as a judge of the Constitutional Court of Slovenia.<sup>79</sup> The case of *Majhen v. Slovenia*<sup>80</sup> is, so far as I am aware, the first time in legal history that Fuller’s theory had been put to work in the judicial environment. The case raised a rather typical post-socialist issue because the appellant to the Constitutional Court, a lawyer from the town of Maribor, was denied the appointment to the position of a notary public<sup>81</sup> — this is not the American “notary public,” it is a continental institution in which the *notaire* performs in his semi-public function and is therefore *a priori* a person of public confidence.<sup>82</sup> The function of the *notaire* is thus consid-

<sup>75</sup> See *Baka*, App. No. 20261/12, Eur. Ct. H.R. ¶¶ 3, 17-23.

<sup>76</sup> See *id.*

<sup>77</sup> See *Volkov*, 2013-I Eur. Ct. H.R. ¶ 84; *Baka*, App. No. 20261/12, Eur. Ct. H.R. ¶ 26.

<sup>78</sup> For a discussion of the privilege, see *supra* text accompanying notes 62-71.

<sup>79</sup> Ustavno Sodišče Republike Slovenije [US-RS] [Republic of Slovenia Constitutional Court] June 1, 1995, U-I-344/94 (Zupančič, J., dissenting), <http://odlocitve.us-rs.si/sl/odlocitev/US17453>.

<sup>80</sup> *Id.*

<sup>81</sup> See *id.* ¶ 1 (majority opinion).

<sup>82</sup> See *id.* ¶ 6.

erably higher in prestige and in remuneration than that of an ordinary private lawyer.

Mr. Majhen was such a lawyer, but then he applied to be chosen for the position of a *notaire*.<sup>83</sup> The Ministry of Justice refused to appoint the appellant to the function of *notaire*, and he then raised an application for the abstract judicial review of the impugned rule concerning the appointment of *notaires* before the Constitutional Court.<sup>84</sup> Moreover, the Ministry of Justice made a mistake as it motivated its refusal to grant the appellant the privilege of becoming a *notaire*. This made it possible for him to appeal the grounds for the refusal.<sup>85</sup> The Constitutional Court, however, dealt with the case, such as it appears now on the Court's database, exclusively on the abstract ground of the compatibility of the disputed rule on the basis of which the appellant had been denied the appointment.<sup>86</sup>

Nevertheless, during the deliberations, I raised for the first time the distinction between the morality of duty on the one hand and the morality of aspiration on the other. I maintained that the aspiration to become a *notaire* is an aspiration to be worthy of the privilege, i.e., that the nomination to the post of *notaire* is decidedly not a right and that it is in the discretionary power of the Minister of Justice, i.e., that he or she needed not reason out, to motivate the decision.<sup>87</sup>

<sup>83</sup> See *id.*

<sup>84</sup> The appellant compared the impugned rule to the criterion of "moral and political fitness" that had been a *sine qua non* for appointment to all judicial functions in the Federal Socialist Republic of Yugoslavia. At least in the abstract, there had been nothing wrong with this criterion. However, in the post-transitional backlash, the initiator of the abstract review of the impugned rule maintained that it was unconstitutional simply because the criterion reminded him of the socialist "moral and political fitness." See *id.* ¶¶ 1-2.

<sup>85</sup> See *id.* ¶ 4.

<sup>86</sup> See *id.* ¶ 15.

<sup>87</sup> An ECtHR case similar to *Majhen v. Slovenia* is *Thlimmenos v. Greece*. *Thlimmenos v. Greece*, 2000-IV Eur. Ct. H.R. 263, [http://echr.coe.int/Documents/Reports\\_Recueil\\_2000-IV.pdf](http://echr.coe.int/Documents/Reports_Recueil_2000-IV.pdf). In *Thlimmenos*, the applicant, similar to Mr. Majhen, aspired to become a certified public accountant. *Id.* ¶ 8. Mr. Thlimmenos passed all the necessary exams *cum laude* but was thereafter denied the appointment to become a certified public accountant due to a prior conviction for refusing to wear a military uniform because it conflicted with his religious beliefs. *Id.* ¶¶ 2, 7. The Court treated that question as one of discrimination in the inverted sense of the word in that the Greek authorities rather mechanically treated the applicant like any other previously convicted aspirant for the position of a certified public accountant. See *id.* ¶¶ 33, 39-49. In other words, the Greek authorities failed to differentiate between the conviction for crimes involving moral turpitude (*malum in se*) on the one hand and violation of a societal prohibition (*malum prohibitum*) on the other. The absence of this differentiation amounted to a kind of discrimination with which the Court had not been confronted. Not only must similar cases be treated similarly, but the different cases must be treated differently. *Thlimmenos* is similar to *Majhen*, because

## CONCLUSION

The distinction between the morality of duty and the morality of aspiration does not entirely match, except in both extremes, the distinction between the right and the privilege. Obviously, for not receiving the Nobel Prize or the *Légion d'honneur*, there can be no appeal. In the other extreme, that of criminal law, the right *not* to be convicted is subject to the principle of legality and to extremely strict procedural safeguards.

However, is the position of a certified public accountant or *notaire* something one “aspires to” in Fuller’s sense of the word? Here, much depends on the specific legal context. The domestic law may or may not require the reasoned decision of the decision-making, e.g., administrative body. In case this is required, it is only logical that the appeal will lie against such a decision as it indeed did in *Thlimmenos v. Greece*.<sup>88</sup> However, in *Boulois v. Luxemburg*,<sup>89</sup> the domestic law explicitly referred to a privilege against which there was no appeal. There is, as we have pointed out, a general principle in law positively correlating, as on a curve, the stakes in the outcome of a particular procedure and the strictness of substantive and procedural safeguards attaching to what is at stake: the higher the stakes, the stricter the law. It is only one step from this to the asseveration that privileges and awards do not require legality and procedures whereas rights and especially penalties do.

What then of Fuller’s Nietzschean finding, “If the morality of duty reaches upward beyond its proper sphere the iron hand of imposed obligation may stifle experiment, inspiration, and spontaneity?”<sup>90</sup> I think Fuller refers obliquely to “the law as the great equalizer” and to the *sur-réglementation*,<sup>91</sup> which according to Roland Gori, in modern times, has become the widespread regulation of everything possible and impossible. The issue therefore is not equality versus inequality. The moment something is being made subject to strict rules, the kind of legally formalist “equality” is enacted. This formalism is capable, as Nietzsche (and Fuller) would say of stifling life itself (experiment, inspiration, and spon-

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in both situations the privilege of holding a certain position had been denied. The issue in *Thlimmenos* would have been even more interesting if the question had arisen as to the need for the Greek authorities to justify the decision made on these blatantly discriminatory grounds.

<sup>88</sup> *Thlimmenos v. Greece*, 2000-IV Eur. Ct. H.R. 263; *supra* text accompanying note 87.

<sup>89</sup> *Boulois v. Luxembourg*, 2012-II Eur. Ct. H.R. 385; *supra* notes 68-71 and accompanying text.

<sup>90</sup> FULLER, *supra* note 1, at 27-28.

<sup>91</sup> See ROLAND GORI, *LA FABRIQUE DES IMPOSTEURS (Des Liens Qui Libèrent ed. 2013)* (“De cette civilisation du faux-semblant, notre démocratie de caméléons est malade, enfermée dans ses normes et propulsée dans l’enfer d’un monde qui tourne à vide.”) [“In this pretense of a civilization, our chameleon democracy is sick, locked as it is in its norms and propelled towards the hell of an idle running world.”]

taneity). This may be happening to human rights, too. But the question is really whence this need to regulate and to adjudicate, to impose everywhere, the domineering morality of duty?

The short answer to this, as Roberto Mangabeira Unger would put it, is that rules and adjudication would not be even necessary if we utterly shared all the values.<sup>92</sup> Inversely then, we are speaking of the collapse of normative integration,<sup>93</sup> and as I have described, of the underlying process of Oedipalisation. This is not the place to broach this broad and meta-judicial topic.<sup>94</sup> Suffice it to say that Fuller and Canguilhem lived in a different time.

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<sup>92</sup> For his legal theories, see generally Roberto M. Unger, *Legal Theory*, <http://robertounger.com/legal.php>.

<sup>93</sup> See Boštjan M. Zupančič, LL.M. Thesis, *Criminal Law and Its Influence upon Normative Integration*, 7 ACTA CRIMINOLOGICA 53 (1974), <http://id.erudit.org/revue/ac/1974/v7/n1/017031ar.pdf>.

<sup>94</sup> I have dealt with this in four books, printed only in Slovenian: BOŠTJAN M. ZUPANČIČ, *EPIFANIJA: CETRTA OD SUHIH KRAV* (2015); BOŠTJAN M. ZUPANČIČ, *PRVA OD SUHIH KRAV* (2009); BOŠTJAN M. ZUPANČIČ, *TEMBATSU: DRUGA OD SUHIH KRAV* (2011); BOŠTJAN M. ZUPANČIČ ET AL., *TRETJA OD SUHIH KRAV: RAZPRAVE O RAZLOGIH ZA RAZSULO* (2012) [on file with author].