# SYNTHETIC (INTEGRAL) NATURE OF LAW REACTION TO THE CHALLENGE OF LEONID PITAMIC

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***Abstract:*** *The essential elements of an integral conception of law are order and humaneness.*

*Pitamic's challenge opens very broad creative possibilities. For the author of this paper, it is of special importance that Pitamic's theory also fecundates the modern theory of argumentation in law. The methodological pluralism makes it possible to accept the theory of graduated legal order and to treat it contentually. It is of decisive importance to differentiate between the legal text and the understanding thereof. Acting in a responsible manner, one cannot avoid the arguments of understanding. The work of a lawyer is creative, yet it also burdens him with responsibility that has to be borne.*

## 1. Pitamic's Range of Research Layout.

Pitamic's (Leonid Pitamic 1885−1971[1] ) contribution to the understanding of law [2] ranges between a purely normative approach and a synthetic understanding of law,[3] which unites "order" and "humane behaviour" into a uniform concept of law. The fundamental articles along this way are Denkökonomische Voraussetzungen der Rechtswissenschaft (Cognitive Economy as a Precondition of Legal Science, 1917) and Naturrecht und Natur des Rechtes (Natural Law and Nature of Law, 1956). A common denominator is also a responsible pursuit (creation) of law and state order enabling coexistence in the society:

"Boundless freedom necessarily destroys human society and Man himself. *Society and Man can only exist in a state of limited freedom. How the boundaries defining that freedom are set is a problem of logic and morality and also a problem of the state*" [4]

## 2. Methodological Clarity and Purity of the Theory of Law

A special merit of Pitamic's paper Denkökonomische Voraussetzungen der Rechtswissenschaft (Cognitive Economy as a Precondition of Legal Science), is that he proposed methodological clarity in legal theory without altogether reducing the object law as a priori to its normativity, and without completely divesting the

1 See Pavčnik 2008.

2 The author of this paper has addressed Pitamic's thought several times. Thus, one cannot avoid some repetitions. The underlying paper is the plenary lecture given by the author at the World IVR Congress in Frankfurt/Main in 2011. See Marijan Pavčnik: Methodologische Klarheit oder gegenständliche Reinheit des Rechts? Anmerkungen zur Diskussion Kelsen − Pitamic. Archiv für Rechts- und Sozialphilosophie, Beiheft 136 (2013): 105−129.

3 Cf. Pitamic 1927, 2 ff., where he discusses the synthetic view of the concept of the state.

4 Pitamic 1920, 6.

concept of all its non-normative elements.[5] Pitamic sharply distinguishes between the deductive-normative and the inductive-causal methods. The first one only provides a way of thinking which enables us "to identify without contradiction the norms of a given legal material in their relations to one another, as well as to apply them in the face of factual events." [6] The core of this method is normative imputation (Germ. *Zurechnung*), which is nothing but "the conjunction of normative constituent elements with relevant factual elements on the basis of a norm." [7] It is a characteristic feature that a user of the deductive-normative method presupposes the starting point of his research, whereas the starting point itself (i.e. legal material as the object of research) can only be defined by the inductive-causal method. The latter looks for a concrete starting point, i.e. such legal order that can be found "in its concrete *contents* determined by time and place." [8]

This methodological dualism, which legal science is unable to avoid, is illustrated by Pitamic in a metaphorical way:

"When *Kelsen* starts from a standpoint he presupposes as given – a complex of norms, and from this formal condition (which permits any contents) derives consequences in a purely deductive manner, he is, so to speak, on the top of a mountain from which he descends normatively fighting his way down; yet Kelsen does not ask himself how to reach the top. 'Others' who try first to achieve the material conditions, the starting point of the norms, look first for the top of a certain mountain; they fight their way to it, which is only possible by the method of induction and causality because this means […] establishing the psychological effects of ideas about 'ought' (Germ. *Sollen*), which belong to the area of the knowledge of 'is' (Germ. *Sein*)." [9]

Pitamic convincingly explains that in a series of ideas produced according to a certain method one can never escape from an infinite series unless one commands a halt by means of ideas produced according to another method.[10] Pitamic calls this "a *jump* (italics added by M. P.) over an abyss, whose endless depth *logically* separates the world of 'is' (Germ. *Sein*) from the world of 'ought' (Germ. *Sollen*)." [11] In short: It is an unsolved, possibly even an insoluble epistemological problem that can be bridged by man's value jump (the word 'value' added by M. P.) in such a way that "the normatively running deduction is interrupted by the fact of 'is' (Germ. *Seinstatsache*)." [12]

## 3. Law is not just a social technique

Already at the beginning of his theoretical development he saw that law is not and cannot be just a social *technique* [13] because the technique thereof has to be social if it wants to be legal.[14] He was not interested in law as just a refined and finely finished normative technique, he saw in it also a socially effective legal order that was entitled to be called law if it protected the humane behaviour of men in general and especially fundamental (human) rights (humanity as the criterion of lawfulness).

It is a characteristic thought that "fundamental (human) rights and natural law ... have not lost their importance as an important *condition* (italics added by M.P.) for the continued existence of positive law. For law

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5 Cf. Kelsen 1923, V, and Kelsen1934, 1. See also Kelsen 1928, 305: »Denn ein Verhältnis ist nur zwischen Elementen eines und desselben Systems möglich.«

6 Pitamic 1917, 365−366. See also 366−367: "In dem hier dargelegten Sinne ist die Erkenntnis des Rechtes von der richtigen Anwendung beider Methoden, der deduktiv-normativen wie der induktiv-kausalen bedingt. Letztere hat die materiellen Voraussetzungen für die Rechtskonstruktion zu beschaffen, erstere diese Konstruktion ausschließlich mit juristischen Begriffen durchzuführen."

7 Pitamic 1917, 342.

8 Pitamic 1917, 344.

9 Pitamic 1917, 344.

10 Pitamic 1917, 355

11 Pitamic 1917, 356.

12 Pitamic 1917, 356.

13 See Kelsen 1934, 28.

14 Pitamic 1941, 188.

which comes in conflict with the urgent needs of the material and spiritual life of man cannot hope to survive very long." [15]

## 4. Synthetic (Integral) Nature of Law

Step by step, these results prompted Pitamic to combine the positive-law and the natural-law conceptions of the nature of law. For Pitamic, to sum up once again, the essential elements of law are order and humane behaviour. These elements are interdependent. The order is associated with legal norms regulating external human behaviour. It is so essential that law ceases to be law when its norms cease to be at least *grosso modo* effective.[16] However, not any order can function as an element of law; the condition is that it is an order which prescribes "only external humane behaviour and does not prescribe or allow its contrary, 'inhumane behaviour', otherwise it loses its legal quality." [17]

However, the legal norm "ceases to be law when its content seriously threatens the existence and social interaction of the people subject to it." [18] For this it is not sufficient that there is some kind of inhumanity in the content of the legal norm (e.g. high taxes which are unjust); there has to be "a conspicuous, obvious, severe case of inhumanity" (such as mass slaughter of helpless people). [19] There has to be a "crude disturbance" (e.g. the extermination of the members of another race), which interferes so intensely with law that its nature is negated. [20]

Ulfrid Neumann convincingly observes that Pitamic "does not invoke ethical criteria beyond law but appeals to elements of the legal concept itself." [21] This form of justification is to some extent in accordance with Radbruch and his formula. The similarities between Radbruch and Pitamic consist predominantly in the fact that their projects both aim at the justification of the legal concept, and that they both, in a similar way, explore the boundary which may not be transgressed by a conflict between single elements of law in order to remain within lawfulness. The Rubicon is crossed once the order is "blatantly inhumane" (Germ. *krass unmenschlich*). We are here faced with an obvious parallel to Radbruch's "formula of intolerability" (Germ. *Unerträglichkeitsformel*).[22]

It cannot be concluded from Pitamic's oeuvre that he drew on Radbruch's theories. In the work "An den Grenzen der Reinen Rechtslehre" (On the Edges of the Pure Theory of Law), Radbruch's name is only mentioned once in association with heteronomous obligations.[23] In Pitamic's central book, Država (The State, 1927), Radbruch is not quoted at all. The majority of reasons for their affinity lie in the fact that Radbruch and Pitamic underwent a similar development, which ultimately led to similar results. Radbruch as a Neo-Kantian endorsed value-theoretical relativism and held the view that legal values cannot be "identified" (Germ. *erkennen*) but only "acknowledged" (Germ. *bekennen*).[24] Given the fact that the supreme value of law cannot be known, it is necessary, for the sake of legal security, that this content be defined by the state authority. [25]

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15 Pitamic 1927, 203.
16 Pitamic 1956, 192–193.
17 Pitamic 1956, 194.
18 Pitamic 1956, 199.
19 Pitamic 1960, 214.
20 Pitamic 1956, 199. See also Pitamic 1960, 215: "Es kann ja auch nach positivem Recht sogar eine rechtskräftige Entscheidung aus gewissen schwerwiegenden Gründen wegen krasser Verletzungen des positiven Rechtes angefochten und außer Kraft gesetzt werden."
21 Neumann 2011, 281.
22 See Neumann 2011, 281.
23 Pitamic 1918, 750.
24 Radbruch 1914. Quoted from the reprint in Gustav Radbruch Gesamtausgabe II, 1993, 22 and 162. [The English quotation is taken from PAULSON 2006, 31.] See also Radbruch 1973, 96, and Radbruch 1934.
25 Radbruch 1973, 164–165.

His experiences with Nazism motivated Radbruch to make his points of view complete and partly also to complement them in the light of the condition of legal values. This was done after the Second World War. The definitive derivation states that when the conflict between positive statute and justice reaches an "intolerable degree", "the statute as 'flawed law' (Germ. *unrichtiges Recht*) must yield to justice" (the formula of intolerability). Besides this formula, there is also the formula of deniability (Germ. *Verleugnungsformel*); this formula applies when the law deliberately betrays equality. In this case, the law is not "merely 'flawed law', it completely lacks the very nature of law." [26]

Pitamic's development was similar. He first encountered theory and philosophy of law as Kelsen's disciple and was impassioned by normative purism as a form. He was not very deeply affected by the sharp distinction between the *is* (Germ. *Sein*) and the *ought* (Germ. *Sollen*), as he also contemplated law sociologically and axiologically. From the very beginning, he was perturbed by the self-sufficiency of law as a normative system. In the face of the assertion that an ought can only be derived from an ought, he advanced the thesis, inspired by Aristotle, that man is by his very nature implanted into normative relations. [27]

His experiences with the barbarism of the 20th century certainly had an influence on Pitamic, who, just like Radbruch, placed law in relation to values. Radbruch argues that law strives for justice, while Pitamic seeks the solution in a concept of law which also has to be humane. Radbruch's formula is articulated more thoroughly than Pitamic's legal concept. However, Pitamic can also be understood as saying that conscious disavowal of equality is inhumane, and that an inequality which is intolerably inhumane lacks legal character.

## 5. The Importance for the Synthetic (Integral) Understanding of Law

The central importance of Radbruch's, Pitamic's and other synthetic (integral) views of law is that they *bridge* the one-sidedness of the extreme legal positivism on the one hand and of the extreme natural-law conceptions on the other hand. The extreme legal positivism is so completely indifferent to the content of law that law can have any content. The extreme natural-law view of law only acknowledges the positive law that is in accordance with its value ideal. The views bridging these contradictory conceptions are aware that law comprises factual as well as value-normative elements. These conceptions find themselves in the battlefield of life, which is never the best but strives to be just and humane. Radbruch and Pitamic both speak quite convincingly about it; in this matter they do not differ fundamentally from each other. [28]

Those thinking integrally make *dialogue* possible. A dialogue can only take place between those speaking about the same or at least similar elements of law. The graduated legal order, to which the Pure Theory of Law dedicates itself, is emptied of its content (sociological surroundings and values), yet it is an important element of law that other theories must take into consideration. A supporter of the integral view of law will not reject the theory of graduated legal order but will accept it and suitably supplement it sociologically and with values. The same can be said for the opposite direction if the theories in question are not the ones wishing to remain completely pure. But also, in these cases a minimal dialogue can take place. A classic example is the Pure Theory of Law, in which the purity did not completely work out. *Nolens volens*, the Pure Theory of Law had to take position on philosophical, sociological and value issues because it could not define the object of its investigation without it. [29]

The participant's view of the law is even more sensitive. If among the participants only those taking authoritative decisions (an archetype thereof being the judge) are mentioned, it is evident that they are torn between

[26] Radbruch 1946. Quoted from the reprint in 1973, 345−346. [The English quotation is taken from Paulson 2006, 26.] – For more on Radbruch and Radbruchs Formula, see e. g. Kaufmann 1987, 9−88; Alexy 1992, 52 ff.; Saliger 1995; Sprenger 1997, 3−7, and dreier, Paulson 1999. See also Dreier,1997, 193−215.

[27] See Pitamic 1960, 212. See also Pavčnik 2010, 93−94.

[28] See section 4 of this paper.

[29] See and cf. Kelsen 1928, 281 ff. See also Paulson 1998, Paulson 1999 and Jestaedt 2009.

all elements of the legal phenomenon. The judge decides concrete cases that form part of social relationships. He decides them on the basis of legal principles and legal norms disclosed by the constitution, statutes and other general legal acts. The decision-making is only possible when he evaluates the factual starting point in view of the normative starting point and *vice versa* as well as in view of the values that are legally important and legally protected. A participant in the legal game (e.g. the judge) is thus inevitably also a (co-)creator of law. So are the legislators and other lawgivers. They cannot deal just with single elements of the legal phenomenon. Their task is – if I may repeat myself – to separate single elements, to define them as to their meaning and to interconnect them. This represents one of the central challenges of law and at the same time a huge responsibility for the decisions taken.

## 6. Hominum causa omne ius constitutum

Behind the elements of law there is always a person (e.g. a judge), who – if he acts responsibly – may not hide himself behind the article number. The judge does not decide cases just in accordance with the constitution and the statutes, but his decision also depends on how he *understands* the constitution and the statutes. Law is an interpretative phenomenon and it therefore demands that, in this dimension, it is substantiated by arguments (of understanding).[30] The judge or any other decision-maker must be aware that, as Pitamic would say, "*hominum causa omne ius constitutum*". A very indicative viewpoint in this connection can also be found in the paper rounding off Pitamic's opinion on the nature of law:

"Concerning this issue, the graduated structure of law does not have any role, because all legal phenomena, the abstract and the concrete ones, the norms or the application thereof, in all their forms from the highest to the lowest ones and irrespective of their accord with a higher 'stage', have to correspond to the nature of law, if they are to be called law." [31]

This is the direction we must take. If we deviate from this route, we betray law and nature. If we remain on this course, we can contribute – sometimes more and sometimes less – to the rule of law. It would be naive to think that we shall reach the Golden Age the poet Ovid was talking about, but it is realistic to think that we shall be able to live reasonably securely.

## Literature

Alexy Robert. 1992. *Begriff und Geltung des Rechts*. München: Alber.

Alexy, Robert. 2009. Hauptelemente einer Theorie der Doppelnatur des Rechts. *Archiv für Rechts- und Sozialphilosophie 95*: 151–166.

Alexy, Robert. 2010. The Dual Nature of Law. *Ratio Juris* 23: 167–182.

Borowski, Martin. ed. 2019. *Modern German Non-Positivism. From Radbruch to Alexy*. Mohr Siebeck: Tübingen.

Dreier, Ralf. 1997. Gustav Radbruch, Hans Kelsen, Carl Schmitt. In *Staat und Recht. Festschrift für Günther Winkler*. Eds. H. Haller et al. Springer: Wien, New York, 193–215.

Dreier, Ralf, Paulson, Stanley L. 1999. Einführung in die *Rechtsphilosophie Radbruchs*. In G. Radbruch, Rechtsphilosophie. Studienausgabe. C. F. Müller: Heidelberg, 235−250.

Jestaedt, Matthias . 2009. Von den »Hauptproblemen« zur Erstauflage der »Reinen Rechtslehre«. In Robert Walter, Werner Ogris, Thomas Olechowski (eds.), *Hans Kelsen: Leben – Werk – Wirksamkeit*. Wien: Manz, 2009, 113−135.

Kelsen, Hans. 1920. *Das Problem der Souveränität und die Theorie des Völkerrechts*. Tübingen: J. C. B. Mohr (Paul Siebeck).

[30] See Pavčnik 2017.
[31] Pitamic 1956, 206−207.

Kelsen, Hans. 1923. *Vorrede zur zweiten Auflage Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre vom Rechtssatze*. Tübingen: J. C. B. Mohr (Paul Siebeck).

Kelsen, Hans. 1928. Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus. In *Philosophische Vorträge, veröffentlicht von der Kant-Gesellschaft*, 31: 73 pp. Charlottenburg: Pan−Verlag Rolf Heise. − Reprint in Klecatsky, Hans; Marcic, René; Schambeck, Herbert, eds. *Die Wiener rechtstheoretische Schule*. Volume I, 281−350. Wien 1968: Europa Verlag.

Kelsen, Hans. 1934. *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik* (1st ed.). Leipzig, Wien: F. Deuticke.

Koller Peter. 2006. The Concept of Law and its Conceptions. *Ratio Juris* 19: 180–196.

Neumann, Ulfrid. 2011. Buchbesprechung: Leonid Pitamic, An den Grenzen der Reinen Rechtslehre. Herausgeber und Einführungsstudie: Marijan Pavčnik. Ljubljana 2009 (Erstausgabe 2005). *Archiv für Rechts- und Sozialphilosophie* 97: 279−281.

Paulson , Stanley L.; Litschewski Paulson, Bonnie, eds. 1998. *Normativity and Norms. Critical Perspectives on Kelsenian Themes.* Oxford: Clarendon Press.

Paulson Stanley l. 1999. Arriving at a Defensible Periodization of Hans Kelsen's Legal Theory. *Oxford Journal of Legal Studies*, 19: 351−364.

Paulson Stanley L. 2006. On the Background and Significance of Gustav Radbruch's Post-War Papers. *Oxford Journal of Legal Studies*, 26: 17−40.

Pavčnik Marijan. 2008. Leonid Pitamic. In *Der Kreis um Hans Kelsen. Die Anfangsjahre der Reinen Rechtslehre*. Eds. R. Walter, C. Jabloner, K. Zeleny. Wien: Manz, 323−350.

Pavčnik Marijan. 2010. Die Frage der rechtlichen Grundnorm (Pitamic' Brief an Hans Kelsen). *Archiv für Rechts- und Sozialphilosophie* 96: 87−103. − Reprint in: Pitamic. 2009. An den Grenzen der RR.

Pavčnik Marijan. 2015. *Čista teorija prava kot izziv/ Reine Rechtslehre als Anregung*. Ljubljana: GV Založba.

Pavčnik Marijan. 2017. Juristisches Entscheiden als intellektuell verantwortliche Aktivität. In Frank Saliger et alt. (eds.), *Rechtsstaatliches Strafrecht*. Festschrift für Ulfrid Neumann zum 70. Geburtstag. Heidelberg: C. F. Müller, 295−308.

Pitamic, Leonid. 1917. Denkökonomische Voraussetzungen der Rechtswissenschaft. *Österreichische Zeitschrift für öffentliches Recht* 3: 339–367. − Reprint in: Pitamic. 2009. An den Grenzen der RR.

Pitamic Leonid. 1918. Eine »Juristische Grundlehre«. *Österreichische Zeitschrift für öffentliches Recht* 3: 734–757. − Reprint in: Pitamic. 2009. An den Grenzen der RR.

Pitamic, Leonid. 1920. *Pravo in revolucija* (Law and Revolution). Ljubljana: Tiskovna zadruga.

Pitamic, Leonid. 1927. Država (The State). Celje: Družba sv. Mohorja.

Pitamic, Leonid. 1928. Buchbesprechung: Hans Kelsen: 1. Das Problem der Souveränität und die Theorie des Völkerrechts (Tübingen 1928), 2. Der soziologische und der juristische Staatsbegriff (Tübingen 1928). *Zeitschrift für öffentliches Recht* 7: 640−645.

Pitamic, Leonid. 1935. Buchbesprechung: Hans Kelsen: Reine Rechtslehre (Leipzig, Wien 1934). *Zeitschrift für öffentliches Recht* 15: 410−416.

Pitamic, Leonid. 1941. Čista pravna teorija in naravno pravo (Pure Theory of Law and Natural Law). *Razprave pravnega razreda Akademije znanosti in umetnosti v Ljubljani* 1: 175−195.

Pitamic, Leonid. 1956. Naturrecht und Natur des Rechtes. *Österreichische Zeitschrift für öffentliches Recht*, N. F. 7: 190−207. − Reprint in: Pitamic. 2009. An den Grenzen der RR.

Pitamic, Leonid. 1960. Die Frage der rechtlichen Grundnorm. In *Völkerrecht und rechtliches Weltbild. Festschrift für Alfred Verdross*, 205−216. Wien: Springer. − Reprint in: Pitamic. 2009. An den Grenzen der RR.

Pitamic, Leonid. 2005. *Na robovih čiste teorije prava/An den Grenzen der Reinen Rechtslehre*. Ed. and introduction: M. Pavčnik. Ljubljana: Slovenska akademija znanosti in umetnosti, Pravna fakulteta. (Reprint: 2009.). Abbreviation: Pitamic. 2009. An den Grenzen der RR.

Pitamic, Leonid. 2010. Die Frage der rechtlichen Grundnorm (Pitamic' Brief an Hans Kelsen). *Archiv für Rechts- und Sozialphilosophie* 1: 87−103.

Radbruch, Gustav. 1914. *Grundzüge der Rechtsphilosophie*. Leipzig: Verlag von Quelle. − Reprint in: Gustav Radbruch Gesamtausgabe. Ed. A. Kaufmann. Volume II, 9−204. Heidelberg 1993: C. F. Müller.

Radbruch, Gustav. 1934. Le relativisme dans la Philosophie du Droit. *Archives de philosophie du droit et de sociologie juridique* 1/2: 105−110. German: Der Relativismus in der Rechtsphilosophie. In *Gustav Radbruch Gesamtausgabe.* Ed. A. Kaufmann. Volume III, 17−22. Heidelberg 1993: C. F. Müller.

Radbruch, Gustav. 1946. Gesetzliches Unrecht und übergesetzliches Recht. *Süddeutsche Juristenzeitung 1*: 1−8. 1973. Rechtsphilosophie. Eds. E. Wolf, H.–P. Schneider. 8th ed. Stuttgart: K. F. Koehler Verlag.

Radbruch, Gustav. 1999. *Rechtsphilosophie. Studienausgabe*. Eds. R. Dreier, S. L. Paulson. Heidelberg 1999: C. F. Müller.

Saliger, Frank. 1995. *Radbruchsche Formel und Rechtsstaat*. Heidelberg: C. F. Müller.

Sprenger, Gerhard. 1997. 50 Jahre Radbruchsche Formel oder: Von der Sprachnot der Juristen. *Neue Justiz* 1: 3–7.