Judicial Independence under Authoritarian Rule – An Institutional Approach to the Legal Tradition of the West

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Introduction

After the fall of the iron curtain, international organizations and professional actors have made significant efforts in former authoritarian societies to help build legal orders, based on the rule of law. Despite this, there is little measurable improvement in world averages of governance since 1998 (Kaufman, Kraay and Mastruzzi 2009:23). Faced with the lack of success of reshaping societies in the image of Western rule of law, reformers and scholars have turned to institutional theory to explain change and resistance to change (North 2005, Prado and Trebilcock 2009).

The idea that legal reform, and that the functioning of basic elements of a legal order such as the rule of law, depend not only upon formal rules, but also upon informal practices, values, norms and power-structures seems self-evident. However, statements made on the historical development of law in its relation to economy and society made by world-recognized scholars, such as Douglass C. North and Francis Fukuyama, are sweeping and lack precision seen from the view of a legal scholar. Their theoretical contributions lack insights into the dynamic features of law, and into the proper relationship between formal and informal institutions (Faundez 2016). Furthermore, the building of institutions and their effect on social practices such as the rule of law is notoriously difficult to measure (Voigt 2012). Nevertheless, the basic idea of the so-called "New Institutionalism" is too compelling to be dismissed off-hand. A main aim of this article is to demonstrate that these theories deserve closer attention when studying the developments in the relation between the political power and the law, and in the judiciary and its relationship to the rule of law.

A central theme of the institutional approach to history is how the economic and political success of the West can be ascribed to its institutions, to Western law and the rule of law. North points to the framework of law and its enforcement in Europe of the tenth to fourteenth centuries as an essential requirement for the impersonal exchange that is necessary for economic growth (North 2005:133). Fukuyama claims that "the growth of the power and legitimacy of European states came to be inseparable from the emergence of the rule of law (Fukuyama 2011:245). Both North and Fukuyama make claims that there is a legal tradition particular to the states of Western Europe, and that something like the rule of law is part of this tradition. Such claims are not obvious, and involve complex notions such as "Western legal tradition" and "Rule of law". This article aims to place these notions, based on existing research in the field of law, into the theoretical approach of institutional theory. This will provide a refinement of the claims made by North and Fukuyama. For this, I will first elaborate a little further on the basic elements of institutional theory as necessary to analyse the development and function of legal institutions. I will then present the notions of a Western legal tradition, and the way that an understanding of the rule of law can be placed into this tradition. My object here is to go beyond general and sweeping statements of the rule of law as a Western concept of a set of ideas, to reach a more precise picture of the relationship between a Western legal tradition and the rule of law.

The object of study in much research from an institutional approach has been on non-Western societies and their resistance to adopt elements of the Western legal tradition. However, if institutional theory explains resistance to and conditions for change, it must also be able to explain resistance to change in Western societies and in the Western legal tradition itself. Are Western legal orders equally resistant to fundamental change? There have been periods in the recent history of Western countries where the tradition of the rule of law has

been fundamentally challenged, notably under fascist and Nazi rule during the twentieth century. The rule of law has been challenged also in countries that have not experienced non-democratic rules, such as in USA and Western Europe during the world wars and the cold war, UK during the Irish troubles and USA and Europe today with the rise of the threat of international terrorism.

Douglass North sees the main difference between authoritarian and consensual rule in "the extent to which decision makers are influenced by the formal and particularly the informal constraints in the system" (North 2005:105). On the face of it, this is a problematic way of seeing it, because, by definition it excludes the rule of law from authoritarian rule, as something that is possible only in societies with a system of consensual rule. It clearly contradicts North's own argument that the rule of law originated in Europe of the Middle Ages (North 2005:133). Being constrained by the law is something separate from the nature of the rule as authoritarian or consensual, although there is also a clear relationship between them. What this relationship more precisely is, is a main object of study.

An important topic for institutional theory, is therefore how legal orders belonging to the Western legal tradition respond to challenges of authoritarianism. Such studies may provide empirical light on the effects and sources of institutional path dependence, and thus make it possible to be more precise about its implications. Although my aim is more general, I focus on the experience of Germany with some comparative comments on other experiences. There are traits in the relationship between such an authoritarian government as Nazi Germany and its judiciary, that can best be explained by the decision makers being influenced by informal constraints, since the formal constraints could be abolished by a Fuhrer decree. It is of interest to see the extent to which the development in Nazi Germany was an instance of path dependence of the German legal institutional matrix, and in that case to identify its sources.

If the institutional theory is powerful in its explanation of the relationship between law and politics, it has implications also of a practical nature. If there is such a thing as a western legal tradition embedded into our institutional matrix, and path dependence is a factor in determining choice and action, better knowledge of how this works may help in influencing the outcomes of changes in the political landscape. We must consider the non-ergodic nature of the world (North 2005:19). The challenges facing us are unique, and cannot be fully met by employing the methods of the past. This is the reason why a theoretical understanding is important in addition to knowledge about the past and about our present institutions.

Institutions

Thick Institutionalism

Several theoretical perspectives are possible when explaining human action. Action can be norm driven and conventional, strategic and governed by the interests of those acting, or determined by relations of power and dependence. An institutional approach combines all these, as institutions provide both opportunities, constrains and incentives, and form the basis for establishing and maintaining power relations. Institutions shape human actions by providing constraints, opportunities and incentives.

Institutions are much more than formal rules, and include informal practices and values, mindsets and accumulated experienced and knowledge. To understand the legal institutions, we need a "thick" institutionalism that includes all these aspects of institutions. This is easily illustrated by an example. The Venice Commission states that "an appropriate method for guaranteeing judicial independence is the establishment of a judicial council, which should be endowed with constitutional guarantees for its composition, powers and

autonomy."[1] At the same time the commission emphasises the need for formal requirements such as the entrenchment of rules of judicial independence in the constitution. We know from experience, however, that many countries with a high respect for the rule of law, such as the UK and the Nordic countries, do not live up to such requirements, whereas many countries who do, perform poorly as regarding the rule of law. On the other hand, we have seen, as demonstrated by the recent case of the changes in the Polish Constitutional Court, that slight changes in the legal framework can make a significant difference in the functioning of a constitutional tribunal (Mrozek and Śledzińska-Simon 2017). This can only be explained by drawing upon other factors than the mere formal sides of the institutions.

In their institutional theory of law, Neil MacCormick and Ota Weinberger distinguish between what they call institutions in a sociological sense and in a philosophical sense. In the sociological sense, law is in "various ways made, sustained and enforced and elaborated by an interacting set of social institutions" (MacCormick and Weinberger 1986:56). An institutional approach to law in this sense, is according to MacCormick and Weinberger necessary to fully explicate the way in which general principles of law are "superimposed upon rules, making them into a coherent unity, justifying the limitation of their effect in some areas, and justifying extensions or innovations in other areas" (MacCormick and Weinberger 1986:74). This calls for "a full understanding of the mode of operation of the social institutions which are charged with the tasks of making, sustaining, interpreting, applying and enforcing the law". Such a full understanding is lacking within legal theory. We can find it, however, in other disciplines, notably in the institutional economic history developed by Douglass

[1] European Commission for Democracy through Law (Venice Commission) Report on the Independence of the Judicial System Part 1: The Independence of Judges, Adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010) CDL-AD(2010)004 paragraph 31.

C. North, which with few exceptions has been largely ignored by socio-legal scholars.[2]

North defines institutions as "humanly devised constraints that structure political, economic and social interaction" (North 1991:97). An imperative distinction to North is between institutions and organisations. Institutions are normative structures. It is important that institutions are structure, not action. Institutions do not act or react in any way. Agency and action is performed by humans operating within structure. Institutions define roles, relations and powers. People fill these positions and thereby form organisations. In this way North draws a distinction between institution and organization that is to a certain extent unfamiliar to ordinary usage, some would even say confusing (Cole 2013:395, Faundez 2017:401). Many would speak about the "legal institutions" of a given society, meaning the norms and the actual persons filling the positions and performing their functions. Speaking about the "judicial organisation" when meaning the judiciary and their rules seems awkward (Prado and Trebilcock 2009:349).

This is more than semantics, organisations also provide structure for human action and create norms (Faundez 2017:401). Faundez finds that North's failure to address organisations i a major shortcoming in his theory from a socio-legal perspective, because it has no room for conflicting interpretations over meaning of rules or of the behaviour of organisations (Faundez 2017:406). In my view, this criticism is misplaced. North is explicit on that humans through their actions create scaffolds consisting both of tools, techniques and artefacts to control the environment, and these are both of a mental and physical kind (North 2005:49). When analysing institutions, it is also important to acknowledge that institutions form an elaborate structure, an institutional

[2] A critical overview and assessment of North's theory of institutions is provided by Faundez 2016.

matrix, that determine economic and political performance (North 2005:2). There is no need to interpret his institutional theory as entailing a distinction between institutions as rule makers, and individuals and organisations as rule makers (Faundez 2005:406). Individuals create and recreate institutions and form organisations, individually and organised, in harmony or in struggle. The advantage of North's distinction is that it gives us the tools to distinguish sharply between structure and agency, between normative structure, action situation and action. As I see it, this is a major advantage to this theoretical approach compared to many others. Organisations can in this picture be seen from a dual approach, both as structure constraining action, and thus as institutions, and as concerted action of individuals. In this way organisations can be incorporated into the theoretical framework.

It is essential that institutions consist both of norms and knowledge. According to North, beliefs are a key to building a foundation to understand the process of change (North 2005:83). Both norms and knowledge can be formal and expressed, and informal and tacit. Informal and tacit norms and knowledge may be known to and recognised by the actors, but there is also a lot of tacit norms and knowledge that the actors follow and use unconsciously, and that form part of what they take for granted, such as beliefs and unrecognised presuppositions for thoughts and actions. The emphasis on what is tacit and taken for granted is an important characteristic of the thick concept of institution.

Humans construct beliefs about the nature of the reality that surrounds them, and based on these beliefs seek to create and modify institutions in order to improve their positions. Institutions are thus the result of intentional action by those powerful enough to drive their views through. Institutions form part of the structure that shapes human action and consist of "formal rules, informal rules and their enforcement characteristics". So, institutions consist both of informal constraints such as sanctions, taboos, customs, traditions, and codes of

conduct, and formal constraint of the legal kind. By this they shape the choices humans make by providing incentives (North 2005:48). The constraints are a mix of the formal constraints and informal constraints, embedded in language, physical artefacts and beliefs (North 2005:1). There is an intimate relationship between beliefs humans hold and institutions. Rules and informal norms, and thus institutions, are derived from the beliefs humans have (North 2005:48). The institutional structure reflects therefore the beliefs of those in position to make the rules of the game (North 2005:49). At the same time, the institutions and norms shape human values and beliefs. The thoughts of the dominant become the dominant thoughts. We can hear the echo of Marxist thinkers such as Gramsci and Althusser in the approach of North.

Incentives, constraints and opportunities

To North, norms and rules shape human action by providing incentives. Others, particularly in social and legal theory, have provided a more nuanced version of how norms operate on human behaviour. Norms are not only incentives for action, but also define positions of authority and power, and ascribe value to different items, positions and actions. In the words of Neil MacCormick and Ota Weinberger, institutions «exist in the context of and for the purposes of norms and rules which (in complex sets) variously give sense to, justify, regulate or even authorise human conduct in social settings» (MacCormick and Weinberger 1986:14).

The emphasis on institutions as providing constraints and incentives is in line with another influential institutional theorist within political science, Elinor Ostrom, who defines institutions as "the prescriptions that humans use to organize all forms of repetitive and structured interactions including those within families, neighbourhoods, markets, firms, sports leagues, churches,

private associations, and governments at all scales" (Ostrom 2005:3). With the emphasis on prescriptions, Ostrom's approach highlights yet another aspect of institutions, namely that they enable actors and thus function as opportunities. We should therefore see institutions as providing both constraints, incentives and opportunities.[3]

Ostrom points to how institutions provide both opportunities and constraints that go beyond their normative constraints and prescriptions in that they influence individual behaviour and this in turn has consequences for others. Institutions thus govern the information people obtain, the resources, exclusion and inclusion and the need a person has in different situations to reason and justify his actions (Ostrom 2005:3). She also gives a refined classification of rules, and thus provides a list of seven different functions or regulated components of a particular action situation. These are positions, participants, actions, control, information, costs/benefits and outcomes (Ostrom 2005:191). Incentives, therefore, need to be taken in a wide sense and include all functions of norms whether incentives to act or powers to be obeyed. From one perspective, the authority of one provides incentives to act for those under his or her authority, particularly if the power is backed up with sanctions and enforcement. We know, however, from social psychology that authority as such can entail strong incentives for acting in accordance with the demands of a person in authority.

The dynamics of institutional development must be understood on the background of the world being non-ergodic. In an ergodic world, the future can be fully understood by reference to the past, at least in principle. In a non-ergodic world, we encounter situations that are unique in comparison to anything in the past. The world that humans encounter is obviously non-

[3] Institutions as part of the factors shaping opportunities for judicial action is highlighted by Gloppen et. al. 2010:3.

ergodic. This entails that there however sophisticated and developed our knowledge and theories are, there is still a residual uncertainty that cannot be explained. Institutions develop when humans try to reduce uncertainty and solve upcoming problems by normative means. Sometimes this entails altering the institutional structure. North explains the development of new legal institutions such as maritime insurance, merchant law and intellectual property law in this light (North 2005:20).

Path Dependence

A main feature of institutional theory is the idea of path dependence. Path dependence is, according to North, "the way by which institutions and beliefs derived in the past influence present choices" (North 2005:21). "We inherit the artifactual structure – the institutions, beliefs, tools, techniques, external symbol storage systems – from the past" (North 2005:156). From a legal perspective it is illustrating to point to the way the existing conceptual structure and set of practices influence the approach to novel issues that are often tackled by way of analogy (Bell 2013:792). The combination of such beliefs, institutions and artifactual structure inherited from the past limits the choices actors have and imposes severe constraints on the ability to effectuate change. An important part of part dependence is an "intimate relationship between belief systems and the institutional framework" (North 2005:49). This relationship constrains and empowers social actors, who in turn act to uphold their positions. Addressing the structure of a market, North accentuates that the structure reflects the beliefs of those in a position to make the rules of the game and those who enact the rules that will produce the outcomes. The relationship is evident in the formal rules, but "is most clearly articulated in the informal institutions – norm, conventions, and internally held codes of conduct" (North 2005:49). Path dependence is the heritage of institutions accumulated from the past, but it is also a result of organisations built on the institutions, that will devote resources

to prevent any alteration that threatens their survival. Path dependence is thus a function of norms, ideas and power.

Path dependence is more than just the "history matters". This is, of course, part of it. Choices that have been made in building institutions influence the future scope of action. A choice that has been embedded in a norm becomes the regular course of action. There is, however, another side of path dependence, path dependence in a "narrower" sense, the fact that it is difficult to exit from a path once laid (Pierson 2000:252). There may be sunk costs in the current pattern of action, or the establishment of a new path may be costly. The difficulty of reversing a course may be even more difficult in politics than in economics (Pierson 2000:257). Finally, we have the constraint of ideas and beliefs; other ways of doing things are simply unthinkable, or the time and effort thinking out new ways of doing things is discouraging.

Path dependence is not an "inner dynamic" of institutions, it is about people making choices and acting. People make choices to protect and pursue their interests. People and organizations are brought into an institutional matrix and to resist changes that affect their position and interests. The belief system underlying an institutional matrix also deters radical change. Institutions give shape beliefs, values and the development of knowledge. According to North, "the whole structure that makes up the foundation of human interaction is a construct of the human mind and has evolved over time in an incremental process; the culture of a society is the cumulative aggregate of the surviving beliefs and institutions" (North 2005:83). Since paths are formed by people's choices, people can also change the path of development thorough choices they make.

If legal institutions have their own path dependence, there must be discernible legal traditions where legal orders of different traditions can be traced back to

differences in origins and legal orders of the same tradition to a common origin. This is an evolutionary approach to legal development, which also suggests that the legal institutions have their own path of development distinct from developments in political and social institutions of a given society. A consequence of this is that the legal institutions have a measure of resistance to pressure from social and political forces. Institutional theory therefore suggests that law has an extent of autonomy in its development, and that this development is not simply an effect of social and economic forces operating from the outside (Bell 2013:787). This is, of course, a claim that has been made from many other theoretical perspectives. Applying institutional theory may, however, contribute to our knowledge of *how* the legal order resists outside pressures, and under what conditions this resistance breaks down. Gaining more insight into this is important under current circumstances when the legal institutions are under pressure and attack in many countries, even in the Western world.

The Western Legal Tradition

In their institutional history of the West, North and Fukuyama claim that the law holds a special place, with a development of legal institutions that are particular to the history of Western Europe. Claims of a specific Western legal tradition are made in many different contexts, also outside of institutional theory. In comparative law, "Western law" is often treated as a "family" of its own. Both David and Brierley and Zweigert and Kötz find common features in the legal tradition comprising the Romano-Germanic family and the Common law family. (David and Brierley 1985:25, Zweigert and Kötz 1998:70). Harold Berman, a prominent legal historian, devoted a comprehensive study of Europe in the middle ages to finding the roots of a Western legal tradition. Brian

Tamanaha speaks of the medieval rule of law tradition in the West building on three separate strands: the investiture conflict between the pope and the emperor, Germanic customary law and the conflict between the King and the Barons leading to compromises such as the Magna Carta (Tamanaha 2004:15).

In what way does it make sense to speak of a distinct, yet common legal tradition of the West? Some, such as Tamanaha (Tamanaha 2004) and Canevaro (Canevaro 2017) trace the rule of law back to ancient Greece and Rome. It is not difficult to establish that the notion of the rule of law in the meaning that rule by law was preferable to the rule by men, and that those who governed should abide by the laws was important to the thinking of among others Plato and Aristotle. But the ancient Greeks had no thought of law as an institution or about independent courts and professional judges. Their concept of the rule of law therefore does not differ from concepts that are found outside of the Western tradition. Fukuyama points out that the rule of law in the sense that the ruler is not above the law is not a specifically Western notion or tradition, but is part also of Islamic and Indian heritage. The Christian, Islamic and Indian traditions were similar in law being rooted in religion, based on scripture with a codification of the basic social rules, and a notion of law coming not from political power but from God (Fukuyama 2011:278). But in the West the power was split between the secular and the religious rulers, and the church developed into a single, separate institution with its own hierarchy, and the struggle between the church and the secular rulers was fought to a substantial degree by legal argument and litigation (Møller 2017:280).

In speaking of a Western legal tradition, the West is understood as the geographical area encompassed by the Western catholic church of the high Middle Ages. Berman refers to the break between the eastern and western parts of the Christian church, and takes the term “Western” to include the peoples of Western Europe “from England to Hungary and from Denmark to Sicily”,

excluding Russia and Greece, and the parts of Spain that remained muslim (Berman 1983:2). Berman underlines, however, that "Western" in his use is not a geographical, but a cultural term with a strong diachronic dimension. In this sense, we can include countries outside of the continent of Europe in the tradition, particularly countries in the Americas and Oceania. The Nordic countries were at the periphery of Europe, and did not adopt the feudal structures of central Europe. On the other hand, also they went through a period of radical reform in the eleventh to the thirteenth centuries. The old Nordic codes have been seen as a reflection of the legal order that established itself in Europe in the twelfth and thirteenth centuries "as a result of the 'scientific laboratory' on the legal order (Tamm 2005:19).

An important feature of putting the sovereign under the law was the development of law as a specialised and partly autonomous institution. Berman emphasises ten principal characteristics of the Western legal tradition that developed in the middle ages. These are: 1) a relatively sharp distinction between legal institutions and other types of institutions, 2) the administration of the legal institutions by a special corps of people, 3) this corps being professionalised through a discrete body of learning, 4) a dialectical relationship between this body of learning and the legal institutions, 5) law is conceived of as a coherent whole, 6) with a capacity for growth and change, 7) the growth and development of law has an internal logic, 8) the history of law is linked with the concept of its supremacy over the political authorities, 9) the coexistence of diverse jurisdictions and legal systems, and finally 10) a tension between ideals and realities and between dynamic qualities and stability (Berman 1983:9-10). We see that Berman emphasises the traits that together form law as an autonomous institution, and that he does not include subordination of the ruler under the law in these. Fukuyama points to that from the eleventh to the thirteenth century in the West, law was subject to

codification separate from the authoritative Scriptures, that a high degree of legal specialisation was developed, and that the religious authorities and the law developed a high degree of institutional autonomy (Fukuyama 2011:288). In the terms of institutional theory, we can say that at this time organisations were formed, based on institutional conceptions of law as an autonomous body of learning, and managed by a professionalised corps of learned people.

The ideas of the rule of law of the middle ages was not sufficient for a rule of law as we know it today to develop. The development of a professional legal corps did not in itself put the governance of the state in the hand of professionals or put credible constraints on government. The feudal structures of governance were patrimonial and in the hands of the Kings and his nobles. A proper realisation of binding the power of the state was not possible before the development of a professional bureaucracy functioning on the basis of the neutral application of objective rules. The patrimonial system was subject to the personal preferences and gains of those administrating it at all levels. The next step in the development of the rule of law as we know it today was therefore the professionalization of government by the development of modern bureaucracy. Thomas Ertman has emphasised the construction of professional bureaucracies in the place of the patrimonial system of governance that was the feudal legacy (Ertman 1997). In Britain, a strong parliament forced the ruler to do away with patrimonialism after the Glorious revolution. In Germany, state-building came so late that the absolutist rulers could build their system of governance on more modern conceptions, and thus could avoid constructing inefficient patrimonial structures. Even though absolutist rulers such as Frederik the Great of Prussia could control the state and dismiss bureaucrats, the rule was much less dependent on the personal whim of the ruler than was the patrimonial system. The same was the case in the Scandinavian countries. In Poland and Hungary, however, where state-building also came late, the rulers were so weak and the

nobility so strong that the structures that were constructed were patrimonial. In the old states of the Latin part of Europe, patrimonialism prevailed because there were no strong parliaments or assemblies to challenge the absolutist rulers. Until the French revolution and the beginning of the end of absolutist rule we thus saw a Europe that could be characterised according to its rule being either absolutist or constitutional, and its governance structure being either patrimonial or bureaucratic.

The countries of Europe have followed distinctly different historical paths after the establishment of the Western legal tradition in twelfth and thirteenth century catholic Europe. Fukuyama operates with four different sets of outcomes of the state-building period of Europe between the fifteenth and seventeenth centuries (Fukuyama 2011:334). These four are states with weak absolutism, strong absolutism, failed oligarchy and accountability of government. In the first group with weak absolutism, he places France and Spain. The kings here were never able to dominate the powerful elites, but they developed centralised patrimonial administrations. In the second group, he places Russia. Hungary and Poland form the group labelled failed oligarchy. Here the monarchy was too weak to prevent the aristocracy from developing into an oppressive oligarchy. In the final group with accountability of government, he places England and Denmark. The Dutch and the Swiss represented alternative republican ways to accountability of government, and Prussia developed a strong modern state and the rule of law in absence of accountability. Prussia was thus already from the beginning an example showing that authoritarian rule and the rule of law can be combined.

The essence of being bound by law is that the ruler must accept not to be the final sovereign, but to exercise his powers according to the rules set by the law. The sovereign may still be sovereign and have a special legal status as emperor or king. The King is not a normal legal subject, and has the power to make, and

to derogate from the law. According to Fukuyama, the reason that most European monarchs did not engage in launching campaigns of outright terror and intimidation of the elites such as in Russia, and conscriptions of the peasantry into armies, was the existence of a rule of law. To understand the meaning of this we must therefore next turn to this concept, to unfold the institutional matrix of the Western legal tradition.

The Rule of Law

The rule of law has no established consensual meaning, and is therefore not in an unqualified sense sufficient as a denominator of what establishes the core of a Western legal tradition. It can encompass such diverse concepts as rule by laws, law and order, respect for property, equality before the law, the ruler being bound by law, legal certainty and fundamental rights.[4]

One must go beyond such grand concepts to find the more basic elements of what we can say constitute this legal tradition. "*The rule of law*" as an expression is part of the English common-law tradition. As a concept, it corresponds closely to what in the German tradition is referred to as "*Rechtsstat*" or in the Scandinavian tradition as "*rettssikkerhet"*. As terms these originate in the nineteenth century, but the notions that they entail are much older and form part of a common tradition. Although the emphasis traditionally differs, the English putting more emphasis on the prohibition against punishment except as prescribed by law, and equality before the law, the Germans on the prohibition against the arbitrary exercise of power, and the Scandinavians on due process, the traditions have the same origin and similar social implications (Aubert 1989:65-67). The literature on the rule of law is

[4] Tamanaha 2004 gives an overview over the many different meanings of "The Rule of Law". See also Magen 2016 for an analysis of its importance to EU activity and identity.

vast, and the use of the expression varies to such a degree that some say it is without any meaningful content. Nevertheless, there is agreement among influential scholars both within the fields of history of the European political orders and legal theory that the concept of the rule of law captures something essential in Western law and its tradition.

The expression "rule of law" is as such not part of the historical legacy of the Western legal tradition. In the English tradition, the term was introduced by A.V Dicey in his Introduction to the Study of The Law of The Constitution in 1885. Ideologically, the coining of the term "rule of law" and emphasising its importance as an overriding political value, is closely related to the rise of liberalist political thought.[5]

To Dicey, the rule of law was linked to the rights of individuals (Dicey 1915,1982:107). Dicey included the principles of law as a restriction on arbitrary power by the state, that no man, including officials, are above the law, and that the constitution is a result of judge-made law protecting individual rights (Dicey 1915,1982:110-122). This notion of the rule of law prevailed until it was challenged by the legal positivism of beginning of the last half of the twentieth century. Joseph Raz made the distinction between the rule og law and the rule of *good* laws, and included only the former in the concept of the rule of law (Raz 2009:211). Rule of law according to Raz entails that people should be ruled by law and obey it, and the law should be such that people can be guided by it. It does not include virtues such as democracy, justice, equality or fundamental rights. From the idea of the rule of law, Raz derives certain principles that require the law to conform to certain standards designed to enable it to effectively guide action, and to ensure effective legal institutions to supervise conformity to the rule of law (Raz 2009:218). It is also central to

[5] See Tamanaha (2004) chapter 3 in the relation between liberalism and the rule of law.

Raz's concept that the Rule of law is a matter of degree. A legal order may conform to it to a larger or lesser extent. It is nevertheless a virtue to which a legal order should conform.

Contemporary writers on legal and political theory understand the rule of law today in either a formal or a more substantive sense (Craig 1997, Tamanaha 2004, Waldron 2012:45). In the formal sense, law must be defined independent of an evaluation of the content of the laws. The substantive, or broader, understanding includes various conceptions of individual rights subject to judicial protection. In its broadest sense, the rule of law is often referred to inseparable from democracy and human rights.

It is in the narrower approach that the rule of law transcends the different terms used in the common law and the continental legal systems and is entailed in the deep historical tradition of the Western legal orders. What most observers in the field point to, as a vital characteristic of the tradition, is the notion that law binds the ruler, that there exists a worldly authority higher than the authority of the sovereign. Douglass North accentuates the importance of that the state is bound by its commitments as a factor in explaining the development of western institutions of commerce in the middle ages. This became possible by the shackling of arbitrary powers of rulers and the development of impersonal rules (North 1991:107). In other words, also the rulers were bound by law.

This is also the approach taken by Fukuyama who states that "the rule of law is a separate component of political order that puts limitations on a state's power" (Fukuyama 2011:246). Fukuyama emphasises that such limitations are something more than that the ruler respects property and enforces contracts, and thus provides for the possibility of foreseeable economic transactions in the market. Such restraint can be exercised by a ruler in self-interest without any implication that the ruler accepts being subject to any higher authority than his

own. The rule of law in this sense is therefore something more than a mere practice of legal predictability.

That law in historical societies bound the ruler does not mean that all subjects were protected from arbitrary actions of the rulers, far from it. We are dealing with the realm of ideals, not of social practise. As emphasised above when discussing the concept of "institution", ideas, beliefs and tacit knowledge are important to the understanding of institutions. But even in the world of the ideals of law, not everyone had equal status as subjects. As pointed out by Fukuyama, a rule of law that protects citizens from arbitrary actions of the state itself is often initially applied only to a minority of privileged subjects (Fukuyama 2011:250). Europe in the middle ages was a society divided into people of different status, and the powers of the feudal lords over their subjects were virtually unlimited. The historical notion of the rule of law does not include a notion that all are equal under the law. However, it does include the notion that the law be applied equally to those whom it applies – this is inherent in the application of law as opposed to a rule by fiat or by privilege. The early English notion must also be understood in this way, despite Dicey's assurance that the supremacy of law giving equal rights to individuals is a feature that has characterised the political institutions of England since the Norman Conquest (Dicey 1885 1992:107). This is obviously historically false, except perhaps as a vague ideal.

If we take these different approaches to the Western legal tradition into account, we see that they point to similar features: institutional autonomy, professionalization, specialisation, and the supremacy of law. We can take these elements as essential for the institutional matrix of Western law, and as constituent for what is referred to by the rule of law. The elements form the basis of the way actors organise into a legal complex, shape the body of knowledge of these professionals, and their ideals. When studying specific legal

orders, we can on this basis study them from the perspective of knowledge and ideas, from the organisational structures power relations created by the institutional norms and from the interrelationship between the norms that form the legal order.

Putting Institutional Theory to Test

The Breaking Point of a Tradition

The claims of institutional theory of the development of the Western legal tradition sweep through the scales of time and location. Despite their generality, they also have a quite specific side. This is the claim that Western law has developed as a specialised and partly autonomous institution that protects rights from interventions by the ruler. This is portrayed as an inherent characteristic of Western law that explains the development of merchant and commercial law giving the possibilities for the economic success of the West, and of citizens' rights and professional governance, laying the foundations of Western democracy.

Much has been told about the unfolding of this tradition from the Middle-Ages until the present, notable in works such as those of Berman, North and Fukuyama. There is, however, another side to be investigated, and that is the resilience of this tradition to a breakdown and destruction, and the degree to which a development may take a direction totally different from an ever-lasting un-folding of increased democracy and rule of law. If it is true as claimed by recent research on law and development, that the institutional context must be taken into account when strengthening the rule of law in developing countries (Prado and Trebilcock 2009:364), the same should hold in situations where rulers seek to dismantle and break down the rule of law. A regime can avoid being subordinated under the law either by breaking down the autonomy of the

law, or by escaping from the jurisdiction of legal rule. Based on the history of Western Europe, the latter is a more likely path under the Western legal tradition than the second.

Under certain conditions it should be possible for the state to break the path dependence and to destroy the legal institution and remove from it its characteristics of the Western legal tradition. What we are looking at is the continuation and discontinuation of institutional autonomy, professionalization, specialisation, and the supremacy of law. Institutions are created and recreated though human action and are not under the laws of physics. Institutional theory does not exclude a withering away of a tradition or a revolutionary break with it.

Many of the revolutions that the West has experienced have not had this character; not the reformation, not the Glorious revolution, nor the revolution in France. The enforced revolution by the Soviet Union in Central and Eastern Europe, however, may be an example of the opposite. Here a legal order developed outside of the Western legal tradition, the Soviet Russian, was imposed on countries with Western legal traditions. The form of law and legal institutions were to an extent maintained, but with a total transformation of substance, depriving law of its autonomy all together. Illustrating is what the inquiry commissioned by the Dubček government into the Czechoslovak political trials 1950-1954 writes on the trial against Rudolf Slánský and the other leaders of the Czechoslovak political party. The trial was meticulously prepared by with the aid of Soviet party officials over a year. After prosecutors and the members of the tribunal had been appointed, “the prosecutors, judges and defence council underwent special briefing before the trial, each being assigned his precise role. They had to promise to adhere faithfully to the documents provided by the interrogators and to follow the scenario of the

proceedings" (Pelikán 1971: 110). Even the accused were instructed by the "advisors" to memorise statements to be made in court.

The communist regime of Soviet Russia initially understood itself as a clear break with the bourgeois legal heritage, and placed the judges under direct control of the communist party (Conquest 1968:13, 111-112, Kühn 2011:92-94). In this light, it is illustrating that in the GDR, where the communist legal order was imposed, the regime used law only in a marginal way to legitimize itself compared to its Nazi predecessors (Rottleuthner 1992:241). Empirical research is needed to see whether elements of the Western legal tradition persisted under Soviet rule, and if there were differences among the countries of the Soviet bloc that can be explained according to their different historical trajectories. Institutional theory would predict that there were such differences.

Europe in the twentieth century experienced yet another revolution with a clear front against the rule of law, the Nazi regime of Germany. The Nazis perceived themselves as revolutionary, and have been observed by later commentators as having destroyed the rule of law and substituted it with a regime of lawlessness. In the words of US prosecutor Telford Taylor at Nuremberg, '… leaders of the German judicial system, consciously and deliberately suppressed the law, engaged in an unholy masquerade of brutish tyranny disguised as justice, and converted the German judicial system to an engine of despotism, conquest, pillage, and slaughter.'[6] So they did, but a closer examination reveals that basic characteristics of the law were maintained, also the main elements of the rule of law as defined above; institutional autonomy, professionalization, specialisation, and to a lesser extent, the supremacy of law.

[6] *Trials of War Criminals before the Nuremberg Military Tribunals, vol. III,* The Justice Case, Washington 1951 p. 31.

Law under the Nazi Regime

The question of whether Nazi "law" was law is contested, but needs not be resolved here (Fraser 2005:13, Rundle 2009). It is unquestionable that despite the revolutionary character of the Nazi regime, there was also a continuance of institutions (Graver 2015:24). Legislation and decrees were used to rule, they were upheld by and administration based on bureaucratic means and by a judiciary, law was still taught in law faculties at the universities with law as an academic discipline and the practice of law was in the hands of the legal profession. Professionalization and specialisation in law was maintained, with legal education following in mainly the same track as before the Nazi regime, and with emphasis on legal academic merit when appointing judges and prosecutors (Angermund 1990:93). To what extent, however, can it be said that the legal institutions were autonomous and protected by interventions from the ruling party, and to what extent was the state itself submitted to the power of the law? It is in the answer to these questions that the answer to the persistence of the Western legal tradition lays.

The Nazis did not employ the courts as mere show-trials in the way of the Stalinist regime. Illustrative is the preparation of the trial against Herschel Grynspan, the Jewish man who shot the secretary of the German embassy Ernst von Rath in Paris on 7 November 1938, giving the excuse for the "Kristallnacht" in Germany. The preparation of his trial involved people at the highest level, even Adolf Hitler himself. Grynspan claimed that he had provided homosexual services to von Rath, and there was concern about how this information would be treated during the court proceedings. Just before the trial was scheduled, it was discovered that von Rath's brother had been convicted of homosexuality. This tipped the scales. The risk of moral embarrassment from putting Grynspan on trial was too great and the trial was postponed indefinitely.

Grynspan remained in custody and survived the war.[7] This and other examples show that the autonomy of the courts was respected, even in cases with a high political profile.

At one level, one must conclude there was no autonomy for the law. Adolf Hitler proclaimed himself as the supreme legislator and the supreme judge, with a right to give laws in disregard of any procedural rules and with the right to intervene in any case (Fraenkel 1941:7). At the practical level in the day-to-day operations of the courts things were different. The independence of the judges to decide individual cases was maintained. For example, Hitler stated in a speech to Nazi Party leaders on 23 Mai 1942 that he wanted no interference from the party in the functioning of the judiciary (Angermund 1990:255). He also later repeated this, and prohibited putting pressure or any interference what so ever, on any actor in legal proceedings. It is also remarkable that the Nazi regime did not use show trials. On the other hand, the organs of oppression under the control of the SS did not submit to the authority of the law. People who the courts acquitted or treated to leniently were taken by the Gestapo and placed in the camps. The regime operated according to what Fraenkel famously characterised as the dual state, divided into the prerogative state and the normative state (Fraenkel 1941).

Independence of the courts is a core part of the autonomy of the law. Traditionally, judicial independence entails that the judge is fully in control of the outcome of the judicial proceedings, within the limit of the law, in that he or she unhindered have the final word on the ruling. This is basic to the individual independence of the judge and of the law as an autonomous institution in the hand of a professionalised body of experts. In Germany, this was basically maintained, although it was modified in certain senses. Herman Jahrreiss, professor in public law and public international law

[7] The account here builds on Koch 1989 pp. 107-110.

and defender at trial at Nuremberg against the major war criminals, expressed it this way during this trial: "… The only thing that was not quite clear was Hitler's relationship to the judiciary. For, even in Hitler Germany, it was not possible to exterminate the idea that it was essential to allow justice to be exercised by independent courts, at least in matters which concern the bulk of the people in their everyday life."[8] The belief in judicial independence prevailed even with judges deeply embedded in Nazi ideology. The independence of judges was seen as one of the central features distinguishing Nazi Germany from 'Bolshevism'. Hans Frank, at that time the head of the Nazi Lawyers' Association, believed the very existence of their 'bourgeois culture' depended upon the independence of the judges (Linder 1987:15). The Nazi Judge Oeschey held the view at Nuremberg that "the office of judge is naturally abolished and the proceedings in a trial become a farce" if he is under instruction on how to judge.[9] Even as late as 1944 the German High Command issued a regulation stating that "The military judges are not under any orders when it comes to deciding the facts of the matter and their exercise of judicial functions. They are to decide according to their conviction based on all that has been presented during the case, according to soldierly values and an interpretation of the law based on the national socialist view of the world" (Garbe 2000:100).

These opinions expressed by leading Nazi judges and officials show the embedded beliefs as a clear source of path dependence of the legal institutions of Germany. To a German jurist, interference with the judicial process in an individual case was simply unthinkable, and certainly in stark contradiction to their basic notion of law. Such interference was certainly not unthinkable to Hitler and others outside of the corps of legal professionals, but nevertheless the opinion of the lawyers prevailed, even against the Nazi officials and the SS. This is clear evidence of the resistance of institutions to change and outside pressure.

[8] Trial of the Major War Criminals before the International Military Tribunal, Nuremberg 14 November 1945–1 October 1946 vol. 17 p. 487.
[9] The Justice Case p. 1020.

While there was no direct instruction of judges, the ministry of Justice from 1942 sought to influence the judges on a more general basis through communications to the judiciary in circulars to the judges, in German *Richterbriefe* (Angermund 1990:231). Here the ministry informed the judges through examples how different situations should be decided. The letters were, however, not binding on the judges, and did therefore not limit the control the individual judge had over his own judgement. In the courts operating according to martial law, the rulings had to be confirmed by a commanding office (*Gerichtsherr*) for it to come into force. If the *Gerichtsherr* did not wish to confirm a ruling, he would order a retrial. But even in this retrial, the new judge was not bound by the opinion of the *Gerichtsherr*.

Using the categories created by Ellinor Ostrom, we can analyse the changes in the institution of judicial independence that were created by the Nazi legal order. The categories are rules that affect positions, participants, actions, control, information, costs/benefits and outcomes (Ostrom 2005:191).

Nazi law created new judicial positions by establishing special courts (Angermund 1990:137, Rass and Quadflieg 2011:186). These courts were endowed with a particular jurisdiction such as the military courts and SS courts, or with cases of particular political impotence such as the People's Court and the Special Courts. The rules defining the boundaries of the judicial institutions, the conditions for entrance to, and exit from the judiciary were also changed. As early as in April 1933 the law on the "Reestablishment of the public service" was enacted, enabling the ministry to dismiss judges of Jewish origin and judges who were deemed as undependable due to their previous political engagement (Reitter 1976:151). This immediately led to the dismissal of judges of Jewish origin, except for those with a war record from the First World War Later also these were dismissed. Judges with open Social Democrat sympathies were also dismissed. The security of tenure was formally abolished by a new act

on public servants of 1937. According to Article 37, public servants, including judges, could forcibly be put in retirement if they did not engage themselves in the furtherance of the national socialist state (Reitter 1979:192-193). On the other hand, only five cases to remove judges were initiated in the ten years of 1932-1941 (Maas 2017:176). These cases were all based on the behaviour of judges outside their judicial role, such as political expressions against the Nazis and refusal to adapt to Nazi conventions.

Also, the entrance to the judicial career continued to be based on criteria of merit (Angermund 1990:138). There were special boundary rules pertaining to the People's Court and Special Courts in that political criteria were used in addition to the usual criteria. There were initial skirmishes on the role of the party in recruiting judges, but a formal role for the party was fended off. This is further evidence of a continuity of professionalisation and legal autonomy. The regime did nevertheless influence the cost/benefit structure for judges in that the judges' career possibility depended upon their reputation of accommodating the interests of the regime. Judges who were not accommodating could be denied promotion or the most popular post, and promotion to positions as court president was based on political criteria. In some cases, judges were told to resign.

On the other hand, judges who opposed the regime were treated leniently and the ministry of justice was actively involved in protecting the judiciary from intervention by the Party and the SS. Institutional structures even within the Military and the SS itself served to protect the judges (Graver 2018).

Informally, the control the judge had over the outcome of the case was influenced in different ways. Approaches and intimidation by party officials of those taking part in court proceedings, prosecutors, witnesses and judges, was commonplace, at least in cases affecting the interests of the party. Judgments

were also frequently disregarded by the Gestapo and the SS, in that acquitted and released persons were apprehended and put in the concentration camps. This shows that the supremacy of law was curtailed.

The flow of information to the judge was basically unchanged with the exception that judges were obliged to follow express directives from the Fuhrer, and these could often be secret. The flow of information to the public was also affected in other ways in that access to proceedings was restricted. The publicity of legal proceedings was therefore no longer the general norm.

The scope of judicial action was limited, in that judicial review of legislation was abolished. Equally important was that the actions of the SS were exempt from the jurisdiction of the courts. This entailed that the courts had no jurisdiction over the Gestapo or the Concentration camps. The SS courts did have jurisdiction over the camps, but the inmates of the camps had no access to court. Court proceedings could thus not have as an outcome that rules enacted by the regime were disapplied, and could not touch the actions of the SS.

The Nazis changed the formal structure of the German legal system, and introduced laws that created new organisational structures and incentives for the judiciary. They also introduced a new set of values based in the German "Volk", which turned the law into a racist structure that could be employed in a virtual warfare against "enemies of the German people" (Graver 2015:59-69). But there were more hidden structures in the mind-sets of the legal corps that they could not reach, and power relations in the structures of the way the legal system was organised that served to protect basic elements of the legal tradition.

We see how knowledge and ideas of the legal profession resisted change enforced upon them by the Nazi rulers. Even ideologically minded jurists like Hans Frank and Rudolf Oeschey were constrained by their ideas on judicial independence. The organisation of the German legal system gave opportunities

to resist the more radical influences of the Nazi Party. We see how the organisational structures and the power relations created by the institutional norms worked to counter demands from the Nazi state and to protect members of the judiciary. The substance of judicial independence, institutional autonomy, professionalization, specialisation, and the supremacy of law as a core of the Western legal tradition, can thus be explained from the interrelationship between the norms that formed the German legal order as an exponent of this tradition. Elements of the rule of law were in this sense preserved in the Nazi state. This fact strengthens the hypothesis mentioned in the introduction to this paper that this institutional theory is necessary to understand the way law responds to demands of change, and that the legal order has a degree of autonomy from social and political forces.

Some might argue an alternative functional explanation, that judicial independence survived because it was necessary to maintain a legal order to serve an advanced industrialised economy as the one in Germany. This does not explain the functioning of the dual state towards its political enemies. Preserving the economy did not protect the Jews from being deprived all legal protection, even though many of them were deeply integrated into to central parts of the German economy. Neither did it prevent the SS from operating totally outside of the law in its persecution of political opposition and enemies of the state. It is therefore hard to see how functional arguments can explain why the independence of the judiciary was preserved in politicised trials. We can also see from modern examples, such as China, that judicial independence does not seem to be a precondition for the functioning of a modern market-based economy.

Conclusion

A judge who occupies an official role and who must decide according to the law is never truly independent in the sense of being a disinterested third party to the conflict. When the courts exercise social control, as they in most cases do, they represent the interests of the society, or even the state (Shapiro 1981:18). To the extent that judges are employed by the state and apply laws enacted by it, the state is always "an invisible partner" to all legal proceedings, because in the law is an element of social control. For this reason, Western law does not necessarily resist legislation that is repressive and disproportionate. Of the core elements of the rule of law, institutional autonomy, professionalization, specialisation, and the supremacy of law, the supremacy of the law is the element most in peril. The German experience corroborates this. The German judiciary accepted limitations in their jurisdiction and the development of the dual state, but they successfully resisted attempts to dismantle the autonomy of law.

The nature of the control of the judiciary in the Nazi and fascist regimes was to find ways to circumvent the fact that judges are left in control over the outcome of the legal proceedings. The autonomy of law was not abolished, but the state refused to be subject to the law. The fact that the regime had to employ such tactics may be seen as an indication of the strength of the judicial independence within the German legal institution. The regime sought control done by influencing the types of judicial positions that operate in the legal order, the choice of judges, their ideology and career incentives, and last but not least, the scope of their jurisdiction. The one thing that the regime backed away from encroaching upon was the ability of the judge to decide the case as he or she sees correct based on the law and the evidence presented during the proceedings. This was seen as allowing the arbitrary exercise of judicial power, and contrary to defining characteristics of law. In this way the Western legal tradition both checked the extent to which the Nazis transformed the legal

institution, and defined the ways that were taken to come around this obstacle to absolute power.

If we look at this in more abstract terms, we see that many of the elements of the relation between the executive and the judiciary that were manipulated by the Nazis, can be legitimately manipulated also with liberal rule of law states. Martin Shapiro lists four responses from the political authority against courts asserting political power (Shapiro 1981:32). They can yield and accept, they can withdraw from the courts competence in matters of political interest to themselves, they can intervene and pull cases out of the courts and they can create systems of recruitment, training, organisation and promotion to incite the judges to political faithfulness. To this we may add a fifth type of response, that which consists of simply ignoring rulings that go against the interests of the government. The political authority may also simply ignore a court in general, to undermine its legitimacy. This has been the case in present day Poland, where the government prevented the rulings of the constitutional court from being published. A more extreme case was the "dual state" of Nazi Germany where court rulings were systematically ignored by the SS.

Many legal orders withdraw matters of political or administrative discretion from the ambits of the judiciary. The use special tribunals or courts to deal with specific types of cases, is also a widespread practise in countries with well-functioning democratic institutions. And there are hardly any legal orders that lack systematic criteria for recruitment and training of judges to ensure a "well-functioning" judiciary. The functioning and effects of such measures, however, vary greatly between states. Where under some conditions, such measures towards the courts is part of the normal fine-tuning of the relationship between judicial and political authority, they can develop into disempowerment of the courts and the taming of the judiciary under different conditions (Sanchez

Urribarri 2011:860-61). Why is it that some polities go beyond this "tipping point" more easily than others?

One answer may lie in differences in the methods that are employed, and the restraint that is exercised by the regime against ordering judges what to decide in individual cases, or removing and punishing them for their decisions. But this only gives rise to the question of why regimes vary in this kind of restraint. The examples of Nazi Germany and the Soviet Union show very different approaches towards the judiciary by a regime in a country within the Western legal tradition and by one outside of this tradition. A wider sampling strengthens this pattern. At least from the experiences of the twentieth century there seems to be a trend in that authoritarian rulers in countries that belong to the Western legal tradition exercise restraint in attacking the independence of judges to decide individual cases. The Nazi state of Germany abolished the institutional independence, but the independence of the judge to decide the individual case was respected. The same was the case in Italy and France under fascist rule, South Africa under apartheid and some of the Latin American military dictators (Graver 2015:39-44). The institutional embeddedness of the rule of law and path dependence explains the approach of those in power. How then with the reactions of the judiciary?

More research is needed to answer how ready legal institutions are to adapt to new circumstances and challenges, and how robust they are against attempts to break them down. What is clear is that formal rules in constitutions and legislation are neither necessary nor sufficient to change or to preserve the functioning of institutions. As expressed by Tamanaha, "the answer to the ancient puzzle of how the law can limit itself is that it does not – attitudes *about* the law provide the limits (Tamanaha 2004:58). But attitudes themselves are not enough. Attitudes must be set in institutions in order to endure. The way that legal institutions in European states have reacted to the turbulences of the

twentieth and the twenty-first centuries show many variances. While there are no set and clear trajectories, history does matter. Applying institutional theory in its "thicker" sense is a way to grasp more clearly how history matters and how it restricts and encourages different choices and paths of action for those who are involved. There are few studies that cut across several different historical experiences from a common and strong theoretical perspective. Once this is undertaken, both by re-interpreting data from previous studies and by collecting new data that has not yet been analysed, it may be possible to come closer to the answers to the questions of change and continuity.

The American legal realist Karl Llewellyn has likened law to a medieval cathedral.[10] If the Western legal tradition is like a medieval cathedral, it does not mean that it cannot be demolished. St. Michael's Cathedral of Kiev, from the twelfth century, was destroyed in 1934 through 1936 by the Soviet regime to make place for a Soviet government centre. There is also no guarantee that a cathedral is not desecrated or left in decay. But if we keep restoring it and extending it with new parts and functions when needed, there is a pretty good chance that it will withstand attacks and decay. It all depends on choices people make.

[10] "Indeed, in regard to the rule-structure of a developed legal system, it is fascinating to follow the semi-analogue of one of those medieval cathedrals whose building reached across the centuries. In the law – at least in our own – there has never been an original entire plan by any master-architect; but that I think highly probable also in regard to many of those cathedrals which rested content over generations with a choir. In any event, for structured rules and structured stone alike, one finds unit after unit, set up aforetime, in a "style" whose reason has lost meaning to the later user, but whose form will bind him still. (…) And as with a medieval cathedral, work done in an older period-style persists beyond its own day. One finds shift of plan, sudden, irreverent, even rebellious-old wall, old stone, old ornament, being pressed into "modern" service, in a new design. Too, change small enough in scope can sometimes alter an entire aspect, as when the fourteenth century chapel-rows were built between the buttresses, and window and wall pushed outward to make great, smooth space-the buttresses, as the phrasing goes, "drawn in"; or when Gothic vaulting was made to upheave a nave designed for the balanced measure of the Romanesque; or ornate plaster masked upon ancient stone or brick or varicolor, and the horizontal whirl of baroque, in every image, thrown in to force upon eye-lifting Gothic an almost jazz-like rhythm." K. N. Llewellyn, On the Good, the True, the Beautiful, in Law, 9 University of Chicago Law Review 1942 pp 224-265.

References

Ralph Angermund, Deutsche Richtershaft 1919–1945. Fischer, Frankfurt am Main 1990

Vilhelm Aubert, *Continuity and Development in Law and Society*, Norwegian University Press Oslo 1989

Harold J. Berman, *Law and revolution The Formation of the Western Legal Tradition*, Harvard University Press Cambridge Massachusetts 1983

Daniel S. Cole, The Varieties of Comparative Institutional analysis, *Wisconsin Law Review* 2013 pp. 383-409

Robert Conquest, *Justice and the Legal System in the USSR*, The Bodley Head London 1968

Paul P. Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' Public Law 1997 pp. 467-487

René David and John E.C. Brierley, *Major Legal Systems in the World Today*, 3. Edition, Stevens London 1985

A.V. Dicey, *Introduction to the Study of The Law of the constitution*, 8th. edition 1915, Published by Liberty Fund Indianapolis 1982

Thomas Ertman, *Birth of the Leviathan: Building States and Regimes in Medieval and Early Modern Europe*, Cambridge University Press, 1997

Ernst Fraenkel, *The Dual State A Contribution to the Theory of Dictatorship*, Oxford University Press, New York 1941 (republished by The Lawbook Exchange, Ltd New Jersey 2006)

David Fraser, *Law after Auschwitz Towards a Jurisprudence of the Holocaust*, Carolina Academic Press, Durham North Carolina 2005

Francis Fukuyama, *The Origins of Political Order From Prehuman Times to the French Revolution*, Farrar, Straus and Giroux New York 2011

Detlev Garbe, Im Namen des Volkes?! Die Rechtlichen Grundlagen der Militärjustiz im NS-Staat und ihre „Bewältigung“ nach 1945 in Nolz, Bernhard und Popp, Wolfgang (Hrsg.) *Erinnerungsarbeit Grundlage einer Kultur des Friedens*, Lit Verlag, Münster 2000

Hans Petter Graver, *Judges Against Justice On Judges When the Rule of Law is Under Attack*, Springer, Berlin-Heidelberg 2015

Hans Petter Graver, Why Adolf Hitler Spared the Judges: Judicial Opposition against the Nazi State, *German Law Journal* 2018 (forthcoming)

Daniel Kaufmann Aart Kraay Massimo Mastruzzi, Governance Matters VIII Aggregate and Individual Governance Indicators 1996–2008, Policy Research Working Paper 4978, The World Bank Development Research Group Macroeconomics and Growth Team June 2009, available at https://openknowledge.worldbank.org/bitstream/handle/10986/4170/WPS4978.pdf

H.W.Koch, *In the Name of the Volk Political Justice in Hitler's Germany*, I.B.Tauris London 1989

2011 Marc Linder, *The Supreme Labor Court in Nazi Germany: A Jurisprudential Analysis*, Vittorio Klostermann, Frankfurt am Main 1987

Neil MacCormick and Ota Weinberger, *An Institutional Theory of Law New Approaches to Legal Positivism*, Kluwer 1986

Amichai Magen, Cracks in the Foundations: Understanding the Great Rule of Law Debate in the EU, *JCMS* 2016 Volume 54. Number 5. pp. 1050–1061

Heiko Maas, *Furchtlose Juristen Richter und Staatsanwälte gegen das NS-Unrecht*, C.H. Beck München 2017

Anna Mrozek and Anna Śledzińska-Simon, *Constitutional Review as an Indispensable Element of the Rule of Law? Poland as the Divided State between Political and Legal Constitutionalism, VerfBlog,* 2017/1/12, https://verfassungsblog.de/constitutional-review-as-an-indispensable-element-of-the-rule-of-law-poland-as-the-divided-state-between-political-and-legal-constitutionalism/

Douglass C. North, Institutions, *The Journal of Economic Perspectives*, Vol. 5, No. 1. (Winter, 1991), pp. 97-112

Douglass C. North, The Paradox of the West in R.W. Davis, *The Origins of Modern Freedom in the West*, Stanford University Press 1995

Douglass C. North, *Understanding the Process of Economic Change*, Princeton University Press 2005

Jiří Pelikán (ed), *The Czechoslovak Political Trials, 1950-1954*, Stanford University Press, Stanford 1971

Mariana Prado and Michael Trebilcock, Path Dependence, Development, and the Dynamics of Institutional Reform, 59 *University of Toronto Law Journal* 2009 pp. 341-379

Hubert Rottleuthner, Steuerung der Justiz in der DDR, 75 *Kritische Vierteljahrersschrift für Gesetzgebung und Rechtswissenschaft* 1992 pp. 237-264

Christoph Rass and Peter M. Quadflieg, Nachkriegskarrieren von Wehrmachtjuristen Ganz normale Richter? Kriegserfarung und Nachkriegskarrieren von Divisionsrichtern der Wehrmacht in Joachim Perels and Wolfram Wette (eds.) *Mit reinem Gewissen Wehrmachtrichter in der Bundesrepublik und ihre Opfer*, Aufbau Hamburg 2011

Joseph Raz, *The Authority of Law*, Second edition, Oxford University Press Oxford 2009

Ekkehard Reitter, *Franz Gürtner, Politische Biographie eines deutschen Juristen 1881-1941*, Dunker & Humblot, Berlin 1976

Kristen Rundle, The Impossibility of an Exterminatory Legality: Law and the Holocaust, *University of Toronto Law Journal*, 2009, pp. 65-125

Martin Shapiro, *Courts A Comparative and Political Analysis,* University of Chicago Press 1982

Ditlev Tamm, How Nordic are the Old Nordic Laws? In Ditlev Tamm and Helle Vogt, *How Nordic are the Nordic Medieval Laws?* Medieval Legal History I, University of Copenhagen Press 2005

Stefan Voigt, How to measure the Rule of Law, 65 *Kyklos* 2012 pp. 262-284.

Jeremy Waldron, *The Rule of Law and the Measure of Property*, Cambridge University Press Cambridge 2012

Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law*, 3rd. Edition, Clarendon Press Oxford 1998