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Teaching Law. Two Words. Two Enigmas

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Abstract

What is law and what is teaching – remains disputable. The departure point should be the notion of law, which cannot be said to exist without reference to normativity, binding power and predictability. The obstacle in teaching law is that there are several centrifugal forces resulting in disintegration of law. These are, for example: creating fake sources of law such as binding recommendations, amending laws by lower-ranking acts, which is the specialty of the EU; informally adopting the common law doctrine of *stare decisis* by Continental Judges; using the interpretation of law as a fig leaf for actually amending it; demanding the disregarding of national laws by judges if they come to the conclusion that national laws are in violation of the EU law by the EU Court, even if there is no procedural framework to do so. In teaching law, a teacher should promote theories and practices conducive to the cohesion of the legal system. Teachers have to take sides in the encounter of conflicting ideas and practices in the spirit of fighting for a better law.

Keywords: teaching law, sources of law, cohesion, interpretation of law, stare decisis

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Nauczanie prawa. Dwa słowa. Dwie zagadki

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Streszczenie

Jaka jest istota nauczania i prawa, jest przedmiotem interpretacji. Punktem wyjścia powinno być pojęcie prawa, które nie istnieje bez normatywności, mocy wiążącej i przewidywalności. Na drodze nauczania prawa w wyżej zarysowanym rozumieniu stoją siły odśrodkowe skutkujące dezintegracją prawa. Należą do nich np.: tworzenie fałszywych źródeł prawa, takich jak: wiążące zalecenia oraz zmienianie treści aktów prawnych aktami niższej rangi, w czym celuje UE; nieformalne wprowadzanie przez prawników Europy kontynentalnej anglosaskiej doktryny *stare decisis*; wykorzystywanie interpretacji prawa do zmiany prawa; żądanie przez sądy unijne niestosowania prawa krajowego, jeśli dojdą do wniosku, że jest niezgodne z prawem UE – nawet w braku przepisów proceduralnych, które by na to pozwalały. Nauczając prawa, należy wybierać takie teorie i praktyki, które promują spójność systemu prawa. Niestety, nauczający muszą wybierać między sprzecznymi teoriami, co czyni z nich bojowników, a niekiedy męczenników.

Słowa kluczowe: nauczanie prawa, źródła prawa, spójność prawa, interpretacja, stare decisis

Introduction

"Teaching" and "law" have multiple meanings supplied by intuition, court decisions, and scholarly writing. Teaching can be understood as providing information to students about the nature of law and its contents. The previous affects the latter, and, in a sense, they are functionally inseparable. As for the law as a concept, it seems it is under the pressure of several centrifugal forces that blur its original meaning. The original meaning was that law consists of rules to obey. These centrifugal forces are globalization, Europeanization and ill-conceived intellectualization. Universities are factories of ideas with scholars validating their very existence, or claims to fame, by churning up new publishable ideas. These ideas are frequently mistaken as law and thought as such in law courses by their authors and their colleagues.

This article, while not excluding the universities' role as an intellectual playground, or "a window to the world", opts for a narrower understanding of both teaching and law. Or, to be more precise, for striving by the teacher to preach the gospel of cohesion, clarity and legality. In the face of disintegration of law as a system, a teacher should focus on salvaging the understanding of the plain and traditional meaning of law, with due regard for the assorted variety of theoretical novelties, however extravagant. Regardless of fashionable theories coming and going, the most important criteria remain: does a given rule contain an order of behavior coming from a legitimate source? Is it predictable? Unpredictability, resulting in the plurality of sources, annihilate the very notion of law. Commands without certainty are not law. Psychological phantoms are not the law, however highly we esteem Petrażycki.[2] Somehow lawyers do not do internships in psychiatric wards. What the judge had for breakfast is not the law.[3] Lawyers are not dieteticians. Black letters are the law. Of course, it is suspended in theories and political and social ramifica-

[2] "Law is taken to be a subjective psychological experience", a quotation from R. Pound on Petrażycki, S.R. Pulaski, *Leon Petrażycki*, "Polamerican Law Journal" 1939, 3, p. 5.

[3] What the judge had for breakfast, a phrase symbolizing (extreme) legal realism is attributed to judge Jerome Frank, but the real source is not certain. Judge Frank allegedly said it in jest according to Dan Priel, *Law and Digestion: A Brief History of an Unpalatable Idea*, "Osgoode Legal Studies Research Paper Series" 2017, p. 2. However, Mark DeAngelis traces it to Frank's *Courts on Trial*, http://legalstudiesclassroom.blogspot.com/2013/10/legal-realism-law-depends-on-what-judge.html (access: 2.03.2020). More on Jerome Frank: J.E. Penner, E. Melissaris, *Jurisprudence*, Oxford 2008, pp. 127–130.

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tions of the day that help to understand what the law commands us to do. It is for the teacher to sieve through them and select reliable ones. It is not to imply a pursuit of the Kelsenian legal puritanism shrinking at the sight of reality.[4] The first duty of a teacher is not to confuse theory with the law itself. A teacher should strive to keep it simple, for law is written for ordinary people, not for scholars, just as the commands preserved in the Gospel were intended not for the doctors of the church to have something to write about. Similarly, "Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understanding."[5]

In order to clear the way towards what is law, a teacher has to reject what it is not. It is a teacher's mission to make a decision, to some degree scientific, to some political, frequently against the prevailing currents and fashions sweeping from time to time through the academia. Peaceful existence in the legal world is not an option. It seems impossible at a time of using law for noble and less noble causes in the form of strategic litigation by NGOs.[6] Therefore time seems ripe for activism in teaching law to match judicial activism.[7]

Contesting acts with fake binding power

One of the ways to smuggle non-systemic rules to the legal system is to accord a binding power to non-binding documents such as recommendations or guidelines, which are nor listed neither in national constitutions nor in international treaties. The leader in this practice is the European Union. There exists some criticism of this tendency, but scholars who write about this phenomenon are usually not the same as those who are experts in specific fields be it energy law, telecommunica-

4 B.H. Bix, *Jurisprudence: Theory and Context*, Sweet & Maxwell 2015, pp. 59–63.

5 J. Story, *Commentaries on the Constitution of the United States* [1833] quoted by A. Scalia, B.A. Garner, *Reading Law: The Interpretation of Legal Texts*, Thomson/West 2012, p. 69.

6 Strategic litigation, also known as public interest litigation is a litigation aimed at advocate for social change, e.g. removing discrimination. It was born in human rights clinics at NGOs and universities. For definition see S. Carvalho, E. Baker, *Strategic Litigation Experiences in the Inter-American Human Rights System*, "International Journal on Human Rights" 2014, pp. 450–451.

7 On the choice between the status quo (based chiefly on textualism) and seeking universal foundations of law writes recently J. Jabłońska-Bonca, *O Szkolnictwie wyższym i kształceniu prawników*, Warszawa 2020, pp. 38–39.

tions law or finance. Experts, frequently university professors, remain silent, perhaps because many areas of law are nor commonly perceived as sensitive but rather "technical". Legal issues in areas that don't directly affect human rights seldom inspire interest. One example below shows a portion of the EU energy law, where the EU elevates recommendations to the status of binding norms.

The act illustrating the issue at hand is the Commission Recommendation on minimum principles for the exploration and production of hydrocarbons (such as shale gas) using high volume hydraulic fracturing of 22 January 2014.[8] The act invokes art. 292 of TFUE, which mentions the possibility for the Council to issue recommendation. It does so without further elaboration on their legal status. In the light of the overall structure of the sources of the EU law listed in art. 288 TFUE, these acts have no binding power. It does not mean they can be ignored by the member states. They need to be acknowledged, which amounts to be read and considered, but not necessarily implemented. In consequence their implementation should not be forced by any means, neither administrative nor financial. This invites the question where is the demarcation line between interpreting and creating of the law.

Doubts as to the binding power of recommendations were shared by some legal practitioners but seldom scholars. They noticed the contradiction between the generally non-binding character of recommendations and the expectation of the Commission, expressed in item 11 of the preamble.[9] It undermines the pre-existing structure of the legal system, and, indirectly, the democratic process of its making. Thus it constitutes an infringement on art. 288 TFUE. Furthermore, it constitutes an infringement on the principle of economic freedom enshrined in national constitutions and in fundamental rights.[10] It also discourages investors, which is precisely what the directive, on which it was based, was aimed at avoiding.[11]

For those directly affected, the above criticism may be of little value, for in fear of aggravating the European Commission most parties would follow the path of obedience. Fear plays a role in confusing soft law with hard law. As one scholar observes, "compliance is not enforced by specific personnel or formal institutional bodies [...] but is effected by moral suasion and self-regulation, notably by the fear of being

8 C(2014) 267/3.

9 D. Malinowski, *Rekomendacje KE w sprawie gazu łupkowego okiem prawnika, wywiad z radcą prawnym Miłoszem Tomasikiem*, CMS Polska, www.wnp.pl, 8.01.2014.

10 M. Szydło, *Wolność działalności gospodarczej jako prawo podstawowe*, Bydgoszcz 2011, passim; A *laissez fair* approach to economic freedom represents B.L. Benson, *Economic Freedom and the Evolution of Law*, "Cato Journal" 1998, 18.

11 On the importance of the rule of law for business see T. Bingham, *The Rule of Law*, London 2011, pp. 38–39.

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marginalized, left out or more drastically excluded from the process."[12] Furthermore, "soft mechanisms such as shaming, conformity, persuasion, self-interest, opportunity or fear *are* effective."[13]

However, the approach of a teacher should be different. Teachers prepare not only attorneys but also future legislators, support staff, and political and business leaders. It would contradict their mission if they accepted deviations from the rule of law. If teachers, condone a lenient approach, a sort of extreme realism where anything goes that helps to close the deal, then any rules enforceable upon the society would become law. The decay of the law starts in the classroom. Teachers can't apply the arm's length principle. It means that they should present the whole set of circumstances, including the deviations, but then they have to take the side of the rule of law.

Amending non-essential provisions of law by lower-ranking acts

Another example of documents traditionally viewed as non-binding but increasingly treated as binding are guidelines. Among them are the guidelines mentioned in art. 43 of directive 2009/73 known as gas directive.[14] It explicitly declares guidelines as binding.[15] What is more important, in item 63 of the preamble guidelines were declared to be instruments of harmonization that can modify the non-essential provisions of the directive. Neither the directive nor the general theory of law provides criteria allowing to distinguish the non-essential provisions of law from the essential ones. It is apparently left up to the non-elected officials of the Commission. They have been equipped with legislative powers that violate the rules governing the issuance of directives. Nevertheless, the guidelines' biding power has been reinforced by a sanction mechanism forcing national regulatory authorities to abide.[16] Should there arise "serious doubts" as to compliance, the Commis-

12 F.M. Zerilli, *The rule of soft Law: An introduction*, "Focaal – Journal of Global and Historical Anthropology", 2010, 56, p. 5.

13 Ibidem.

14 Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC.

15 Regulation (EC) No. 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No. 1775/2005, repealing regulation No. 1775/2005.

16 The notion of a national regulatory authority (NRA) refers to authorities in charge of securing market conditions in infrastructural sectors dominated by a natural monopolist (the owner of

sion calls upon the national authority to submit its observations. If the Commission finds the decision taken at the national level to be inconsistent with the guidelines, the national authority is obligated to repeal its decision within two month and to notify the Commission about it. In its preamble the directive justifies providing guidelines with a binding power with the need for greater elasticity of regulation. The directive provides for a procedure of amending provisions deemed non-essential. This procedure illicitly modifies the procedure of issuing directives contained in art. 294 TFUE. One of its effects is depriving the European Parliament of some of its legislative powers. Under no circumstances and in no legal system based on the rule of law is it acceptable to amend a legislative act by a lower-ranking regulation.

Regulations like those mentioned above pose a dilemma for a teacher of how should they be presented to students, as law, or as an usurpation of the executive authority. Should students be encouraged to ignore it, or should they strike conciliatory tones with the Commission? The view advanced in this article is that a teacher should condemn such acts as usurpation of power and refuse according them the status of the law.

Continental judges, common law minds

In teaching law it is unavoidable to resort to a variety of the sources of law. Globalization has forced lawyers to take interest in foreign legal systems. Continental layers have been exposed the most to the common law (so far). Its logic is different, which entails different legal thinking. In Continental Europe the law is generally passed by Parliaments, while in the Anglo-Saxon countries it is also made by judges. Unlike in the English-speaking countries, in the Continental legal systems there is no *stare decisis* doctrine, therefore judicial decisions should be viewed merely as examples of how the law can be interpreted, with the exception of constitutional tribunals and the EU courts. This purposefully simplified picture is being distorted by the practice which to the outside observer might look as an illicit importation of the common law ideas. In Continental Europe, teachers developed the habit of presenting court decisions as if they were the law itself – as if there was a consequential string of decisions tied together by *stare decisis*. The origin of this practice may be traced to the questionable justification of judicial decisions by invoking previous decisions in similar cases. It is also possible that judges are emboldened by academic writing (many judges double as scholars) into believing their powers

the infrastructure). More, see: W. Hoff, *The Guardians of Market Equality*, "Krytyka Prawa" 2010, 3, pp. 89–98.

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are broader than provided by the law. They seem to be encouraged by the example of higher courts and constitutional tribunals asserting quasi legislative powers, while their decisions enjoy the attributes of stare decisis.[17] Whatever their origin, students are fed the false impression that invoking a court decision as a legal basis of another decision is the norm, even in violation of the constitutional list of the sources of law.[18] Unfortunately, the legal doctrine (again, written by scholar-judges) ennobles such practices in academic books and scientific journals.[19] This half-baked imitation of the Anglo-Saxon system particularly dangerous because of its inconsistency. The logical stream of decisions flowing one from another is being replaced by an Ulyssesian stream of thought devoid of consequence, made possible by Google and vast university databases.

Interpretations that takes the place of the law

Non-existent laws are smuggled into the classroom under the pretext that law is aging and someone has to give it a fresh look corresponding to the new circumstances. Those in charge of invigorating it, or even giving it new life are scholars and judges. Continental judges seem to draw inspiration from the American doctrine of a living constitution. Such practice has one advantage that occasionally laws indeed do become obsolete. In the meantime the parties to the dispute cannot wait for amendments of the law which can take years or never materialize. But more often than not, it is a political weapon intended to circumvent democratic parliamentary procedures and overcome the prospect of unfavorable vote. Some believe that that judges represent a more liberal and more progressive view than legislators. They forget that at the time of the French Revolutions judges were viewed as reactionaries. They also forget that judges were in the way of the abolition of racial segregation in

17 E.g. decisions of the German Federal Constitutional Court is claimed to have such position by P. Steiner, D. König, *The Concept of Stare Decisis in the German Legal System – A Systematically Inconsistent Concept with Hight Actual Importance*, "Studia Iuridica Lublinensia" 2018, 27(1), p. 128.

18 In case of Poland it is art. 87 of the Constitution.

19 Such approach can be seen in an article by E. Łętowska, *Czy w Polsce możemy mówić o prawie precedensowym? [Can we talk about case law in Poland?]*, [in:] A. Śledzińska-Simon, M. Wyrzykowski (eds.), *Precedens w prawie polskim*, Warszawa 2010, pp. 9–14. E. Łętowska at first denies the existence of precedence casting it as mere psychological element of decision-making process needed to "break-in" a judge. She concludes however in the affirmative, complaining about the lack of critical analysis to accompany particular cases. A decisive opponent of the precedent system seems to be e.g. J. Zajadło, *Precedens rzeczywisty i pozorny, czyli po co prawnikom filozofia prawa*, [in:] ibidem, p. 27.

the United States.[20] Such practices may be viewed as a European version of the American Restatement movement, where scholars take it upon themselves to say what written rules mean, using this occasion to adjust the content to their personal perspective.[21] The only difference is that the American Restatement movement is institutionally focused in the American Law Institute while the European movement is institutionally dispersed and fragmented. The result is the same: the law is plagiarized by scholars in order to be deformed. As one author noted: "Restatements have, by the nature of Institute process, produced a noticeably different product from law that would have been created by a democratically elected legislature."[22] Decentralization makes it even more difficult to raise criticism, for when thousands of scholars and judges do the writing of law, it has become part of legal culture, hard to contest by a scrupulous teacher.[23]

In the face of the above, teachers, instead of approving the seizure of legislative powers by judges, should promote and advocate the parliamentary way of making laws. By raising awareness in students they would create a long-lasting pressure on legislators to update laws.[24] Allowing the interpreters of the law to become unelected legislators damages both democracy and to legal education. The damages to democracy were well described in legal literature: "...taking power from the people and placing it instead with a judicial aristocracy can produce some creditable results that democracy might not achieve. The same can be said of monarchy and totalitarianism."[25] Damage to teaching materializes itself in presenting students with an idea that a content conjured up by a cartel of scholars and judges agreeing together is the law. The collateral damage to the legal culture will last for generations.

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20 In 1896 the U.S. Supreme Court upheld racial segregation in public facilities in Plessy v. Fergusson 163 U.S. 537 (1896). It was very "noble" of the Supreme Justices to demand that facilities are of equal quality.

21 Ten years after the initiation of the Restatement movement there appeared its first fruit of this project aimed to "clarify, unify and simplify our common law", see Ch.E. Clark, *The Restatement of the Law of Contracts*, "Yale Law Journal" 1933, 42(5), p. 643.

22 K.D. Adams, *Blaming the Mirror: The Restatements and the Common Law*, "Indiana Law Review" 2007, 40, p. 240; In a similar vein: D. Logan, *When the Restatement is not a Restatement: the Curious Case of the "Flagrant Trespasser"*, "William Mitchell Law Review" 2010–2011, 37, pp. 1483–1484.

23 The Restatement movement is criticized for its conservative, formalistic approach, for being too activist, presenting the law as it should be, rather than as it is, and violating democratic process of law-making, K.D. Adams, op. cit., pp. 206, 208–210.

24 One such solution could be the concept of sunset laws making governmental programs and pertinent regulations to expire automatically every 10–15 years. It was advocated by President Jimmy Carter and analyzed by Ph.K. Howard, *The Death of Common Sense. How Law is Suffocating America*, New York 2011, pp. 202–203.

25 A. Scalia, B.A. Garner, op. cit., p. 88.

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From universal rights to multicentricity

Non-existent "legal" sources can be smuggled into law courses via providing students with the universal principles of law allegedly shared all over the globe. In most legal systems such principles are not listed among the sources of law in national constitutions, but there is a broad consensus that they are binding by virtue of their necessity and universality.[26] They are detached from national laws and decisions of supreme courts and constitutional tribunals. They are pure invention of scholars and judges based on the myth of the "international community" or "civilized nations". The hotbed of such attitudes are judicial networks and their attempt to build "cosmopolitan justice". These coexisting notions have created a belief that rules can be simply imported instead of read in a journal of law. Such attitude may lead to an extreme voluntarism, where judges and scholars, frequently two in one, become the institutional source of law. An interesting case in point is the declaration made by a Sri Lankan judge and scholar Maithri Amarasinghe Jaytilake. She regards judicial networking as a tool to sever the ties between judges and states. She considers majoritarian democracy obsolete and she sees no place for the traditional rule of law.[27] Thus international judicial networks may loosen the ties between justice and national laws. It also means that judges disregard the societies that elevated them to prominence and trusted them with real power. Judicial networks want to replace national laws with a global 'constitutional identity'.[28] Constitutional and supreme courts are cast to play a dubious role, for their international networks increasingly influence and affect national laws while trying to be 'independent of national and constitutional controls'.[29] This development steers towards a judicial *coup d'état*, particularly that it is supposed to be governed by the 'invisible college of judges'. It is destructive to representative democracy, having as its aim expanding judicial power beyond the constitutional framework. The same author complains that judges "are at the receiving end of these global horizontal command structures imposed under ROL programs."[30] Apparently, she would rather see judges at the giving end of the lawmaking process. Such statement is particularly ominous for

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26 The Constitution of South Africa bows towards the cosmopolitan approach to law when in art. 39(1) it allows state authorities consideration of foreign laws.

27 M.A. Jayatilake, *The Global Judicial Network: Towards New Hope for Development, Democracy and Equality in the Global Era*, "Sri Lanka Journal of International Law" 2009, 21, p. 167. Similarly, with a focus on taking over legislative functions by judges: I. Vetzke, *Beyond dispute: International Judicial Institutions as Lawmakers*, "German Law Journal" 2011, 12, pp. 982–983.

28 M.A. Jayatilake, op. cit., pp. 142–143.

29 Ibidem.

30 Ibidem, p.164.

a Western teacher of law, for ROL stands for the rule of law. Some scholar-judges view the rule of law with hostility, as an instrument of neo-colonialism. However, it may easily transform itself into its opposite – an instrument to colonize Western legal culture to the standards of the East and Far East. What these standards are going to be remains to be seen, however we have a preview such as the overt discrimination of minorities in many Asian nations. So far the outlook is not optimistic. Nevertheless, the general process of decay of law is predictable – novelties born in judicial networks would seep to academic standards through conferences and legal writing, working as centrifugal forces to the existing notions of the Western legal culture. Networking judges would like to "break free" from their traditional role as "*bouche de la loi*". In this vision judges do away with 'passive reception' to be replaced with 'dialogue', believing in cross pollination between jurisdictions.[31] Such dialogue would lead to the 'interactive authority', and that in turn to *transjudicialism* and 'judicial comity' Creating law by parliaments would be increasingly substituted by the will of judges. Legal writing abounds in legal phantasies such as forming coalitions of networks by joining forces with e.g. sectorial and financial networks.[32]

Viewing judicial process as a choice of a particular meaning of a statute, coupled with a choice of legal sources, directly leads to multicentricity of law, contributing to further disintegration of the core concept of law. Multicentricity, sometimes called polycentricity, implies not only plurality but also relative equality of sources. Some scholars insist that judges should have the right to decide which pool of law to draw from. The concept of multicentricity has several sources. The least problematic results from the fact that states give constitutional priority to the rules created by international organizations such as the EU, which form supranational law. Another source are international treaties and agreements which, if ratified by parliaments, become national law and enjoy priority before national laws. Such expansion of legal sources is relatively free of moral or theoretical concerns. Certain forms of multicentricity were always practiced even outside the domestic law. For

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31 Cross-fertilization of jurisprudence is routinely practiced by the International Court of Justice which takes in to account the decisions issued by other international and regional tribunals. It is also believed to homogenize the human rights law, according to Anita Ušacka, *Constitutionalism and human rights at the International Criminal Court*, [in:] M. Scheinin, H. Krunke and M. Aksenova (eds.), *Judges as Guardians of Constitutionalism and Human Rights*, Cheltenham–Northampton 2016, pp. 294–296.

32 On integration of networks, see M. Castells, *The Rise of the Network Society*, Blackwell 2000, pp. 501–509. Castells, an urban geographer turned economist, perceives globalization as 'another way of referring to the network society', which by its very nature is global. Idem, *The Network Society. From Knowledge to Policy*, [in:] M. Castells, G. Cardozo (eds.), *The Network Society. From Knowledge to Policy*, Washington, DC 2005, pp. 4–5.

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example, national authorities accept a foreign entity as an enterprise. We accept marriages concluded under the Islamic law abroad. Even marriages with minors are recently accepted in some European countries under the rubric of religious freedom, however divorces by triple *talaq* are less fortunate.[33] What should be alarming the most, is purely doctrinal multicentricity springing from the minds of scholars. Even in dualist states such as the United States, where as a matter of principle no foreign laws can bind citizens unless passed by Congress, there is pressure to integrate multicentricity into the systems. The proponents are university professors and judges who are frequent guest speakers in universities.[34] Contesting such destructive ideas by the teacher is difficult for those who preach them are high-ranking judges celebrated by the media. They frequently double as senior scholars sitting in academic boards, they vote on academic degrees and teaching curricula, they review doctoral and postdoctoral dissertations, which in academic circles amounts to sharing executive powers. To ignore, or contradict them, may be risky not only for junior faculty. A teacher who would like to thwart their views would be a true crusader, and possibly a martyr.

The hard case – teaching EU law

Proponents of multicentricity are hardly alone in their effort to undermine the predictability of law, and thereby the law itself. Their views are apparently shared by the EU courts. One decision has had particularly distractive effect. It is the Simmenthal II case of 1978 that made its way to every textbook of European Law.[35] In this decision the European Court of Justice stated that the Community law not only takes precedence before national law, but also obligates national courts to deny validity to national laws if not in conformity with the Community law. Judges, the court declared, can do it regardless of the procedures leading to the repealing of such national law. It follows that an uncritical teacher should instruct students to disregards the national law. This type of negation of the existing legal order is difficult for a teacher to refute, for it comes from a source responsible for the integrity of the legal system. This source not only seems to have superior legal authority,

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33 In case 372/16 Soha Sahyouni v. Raja Mamisch, European Court of Justice Press Release No. 137/17 of 20 December 2017.

34 E.g. Justice R.B. Ginsburg, *Looking Beyond Our Borders: The Value of Comparative Perspective in Constitutional Adjudication*, "The Yale Law and Policy Review" 2004, 22(2), pp. 329–335.

35 Case 106/77 Amministrazione delle Finanze dello Stato a Simmenthal SA, European Court reports 1978 page 00629. In the context of supremacy of the EU law see S. Weatherhill, *EU Law*, Oxford 2003, pp. 99–101.

at least by its own standards, not always shared by national courts, but as in cases above, it has gained support from many within the academic community. It seems that most teachers uncritically accept the position taken by the EU courts, although some scholars may feel torn between two loyalties. Luckily for the latter, national courts grow increasingly rebellious against the usurpations of power by the European court as seen in landmark cases Solange I and Solange II[36] and more recently in the opposition coming from the Spanish court in a highly publicized case concerning an EU MP from Catalonia.[37] They gave teachers an intellectual ammunition, but it does not make his task much easier. Before the Solange doctrine, in the absence of opposition form the EU Court, a teacher might be lead to believe, that the Simmental is an unavoidable development in legal history. After Solange, one is faced with a choice between two doctrines, each claiming superiority. It seems a teacher should opt, upon presenting to students both theories, for one which gives the law more cohesion and predictability.

Conclusions

Understanding and applying, law with or without globalization, requires making choices. Some of them may be more political than legal. Teaching law increasingly resembles floundering through a mine field riddled with perils such the rivalry of normative systems, new technologies, social upheavals and politicization of the legal theory. This in turn leads to the weaponization of science and teaching. Because the content of teaching heavily relies on the output of research, therefore the academia should strive to create conditions for it to be conducted in an unbiased framework. At face value, it may seem that legal education at least in central Europe is designed for both questioning the established truths and provide stability. In Germany, as in Poland, it is a two-step process. The first consists of 5-year studies of law which in Germany, unlike in Poland, is concluded by the state exam. The second phase is a two year practicum in Germany called Referendariat. "While

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36 In Solange I the German Constitutional Tribunal said the EU law enjoys priority before national law only as long as meets the German constitutional standards. In Solange II it confirmed it does. Solange I, decision of the German Constitutional Tribunal of 28 May 1974, 37/271, NJW 1974, 1697; Solange II, decision of the German Constitutional Court of 22 October 1986, 73/339, NJW 1987, 577.

37 For example a recent decision of the Spanish Supreme Court refusing to recognize a jailed Catalan separatist as a member of European Parliament. More, Nicolas Zambrana-Tevar, *The European Court of Justice Establishes the Immunity of Catalan Separatist Leader but the Spanish Supreme Court Keeps Him in Jail*, http://opiniojuris.org/2020/01/16/the-european-court-of-justice-establishes-the-immunity-of-catalan-separatist-leader-but-the-spanish-supreme-court-keeps-him-in-jail/ (access: 20.02.2020).

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students at law school are encouraged (especially in criminal law) to challenge and critically reflect past adjudication and even the settled and common practices by the high court, the exact opposite takes place during the *Referendariat*. In order to succeed in the clerkships and the Second State Exam, the *Referendar* has to produce "practically usable" decisions, i.e., decisions that are aligned with the settled opinion of the high courts [...]."[38] On paper the dichotomy seems clear and effective, but it is not. Questioning the established principles and notions, the way many schools of thought do (like postmodernism and post- anything), is easier than proposing a coherent solution to the problems of making and applying the law. It is also counterproductive. One can doubt that a student who was not "infected" with the sense of a mission, the mission to build cohesion and predictability of law, can produce practically "usable decisions". Unless of course, usability is defined as conformity with any tolerated practices, however corrupt. Regardless of the institutional framework, teacher should strive to provide, in cooperation with students, a comprehensive model of law, rather than condoning its further decomposition. In their effort to promote the unity of law, teachers cannot avoid personal responsibility for the choices they make. For, as Justice Cardozo said a century ago „We must spread the gospel that there is no gospel to spare us the pain of choosing at every step."[39]

[38] P. Steiner, D. König, op. cit., p. 125.

[39] Ph.H. Howard, op. cit., p. 190.