Athens Institute for Education and Research
2022

A Contemporary Anthology of Law

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First Published in Athens, Greece, by the
Athens Institute for Education and Research
ISBN: 978-960-598-463-2

Printed and bound in Athens, Greece by ATINER
9 Chalkokondili Street
1067 Athens, Greece
www.atiner.gr

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Introduction

David A. Frenkel

This book offers a selection of essays which shed light on various issues in the field of Law. The essays are revised versions based on presentations at the 2021 International Conferences on Law organised by the Athens Institute for Education and Research (ATINER) held in Athens, Greece. The essays in this volume have been selected after a process of blind-review on the basis of the reviewers' comments and the essays contribution to the ongoing discussion of the respective issues.

Despite the pandemic, the meetings were successful, though most of the papers were online presentations. Lawyers and other scholars who are interested in law and legal matters from across the world have proved their willingness to get together and discuss and talk about current legal issues.

Traditional boundaries have become permeable. We live in a transparent, influenceable and pervious world. The response of the law and the legal systems to current developments including the issues and questions caused and raised by the Covid-19 pandemic is one of the great and serious challenges of our time. The authors of the essays collected for this anthology seek to analyse some of these challenges.

The book commences with **Michael P. Malloy'**s essay *Encountering the Mysteries of Law and Literature.* The year 2019 marked the 125th anniversary of the birth of Dashiell Hammett, author and early contributor to the "hard-boiled" school of realist detective fiction. What is distinctive about Hammett's novel *Red Harvest* is the extent to which the narrative is devoted to the corrosive effects of the failure of the rule of law. The essay examines the experience of life in a society where the rule of law has been abandoned in favour of greed and brutal self-interest. It looks at this issue from the literary perspective of *Red Harvest*, and from the legal perspective of cases in which the U.S. Supreme Court considered the implications of possible judicial bias – or perhaps even corruption – based upon the timing of a litigant's large campaign donation to a state supreme court judicial candidate. Among other things, the essay concludes that in the absence of legitimate and impartial law, the default rules of society tend to be more fragile and less predictable in their application and enforcement than fundamental due process requires.

The second contribution is **Angélica María Burga Coronel**'s essay *The Principle of Proportionality as Control Criterion of the Permissible Restrictions: The Inter-American Court of Human Rights Standards.* The authoress focuses on permissible restrictions to fundamental rights set forth by the American Convention on Human Rights. Within this framework, states may exceptionally prescribed restrictions on some fundamental rights provided they meet specific requirements that prevent a right from being violated. In determining the compliance with these requirements of legitimacy, the principle of proportionality has been established as the control criterion used by the Inter-American Court of Human Rights. The essay analyse how the Inter-American Court of Human Rights applies the principle of proportionality and present the established standards to verify whether the

restrictive means imposed by the states comply with the legitimacy requirements enshrined in the American Convention on Human Rights.

Vladimir Orlov is the author of the third essay *Russian Legal Discourse.* Due to the nonrecognition of the origin of the business law in the commercial law, grown out of the customs and usages of merchants that existed before the emergence of law itself, characteristic for the continental law, in respect of commercial activities that introduced its public regulation, has reserved its self-regulatory and dispositive nature, the Russian legal discourse is quite different to what is generally represented as the Western legal discourse. Although Russian business law has been developed under the influence of Western law, the idea of the legislatively established legal surveillance of business activities, where written law is regarded as a progressive means of regulation, plays still an important role, and the breach of the law requirements is a *sine qua non* condition for civil liability (for damages) in Russia.

The authoress of the fourth essay *Platform Contracts: Legal Framework and User Protection* is **Maria Luisa Chiarella.** Digital platforms are a very important economic reality, also in consideration of the epidemiological emergency which has increased online daily transactions. We refer to the transformation of the markets, induced by the exploitation and use of new technologies, in which digital contracts are an increasingly widespread phenomenon, when we talk about digital markets. There are different elements to be considered, such as contract requirements, weaker party protection, sharing economy and some issue about the so-called "zero price economy". The essay summarises some profiles of legal relevance of such topical and wide subject.

The fifth essay *Computational Econometrics for Litigation Support in Employment Discrimination: The Odds Ratio* has been written by **Elias C. Grivoyannis** & **Constantine H. Grivoyannis**. The authors of this essay show how computational econometrics are used in the United States for litigation support in employment discrimination. The metric of the odds ratio is first presented and calculated for an age discrimination as a point of reference using statistical data arranged in a 2x2 contingency table. Then a limited categorical dependent variable regression model is introduced, and a maximum likelihood estimation of a Logit econometric model is used to show how the information content of the conventionally computed odds ratio is significantly improved.

Mihaela Elvira Patraus & **Ionita Maria Ofrim** have authored the sixth essay *Contractual Unpredictabiliy in the Context of Covid-19 Pandemic.* The new realities require a revitalisation of the legal system to overcome the effects of the Covid-19 pandemic. The current health crisis is a challenge not only for public authorities, but also for the scientific community and legal practitioners, concerned with finding viable solutions for the adaptation of legal institutions. For the legal system, the contract is an essential factor from a theoretical and practical point of view, an indispensable element for the sphere of private law. The authors have in view an objective analysis of the contractual contingency, starting from the jurisprudential consecration that was conferred under the previous regulation and until the introduction of the new Romanian Civil Code in 2011. In a dynamic social and economic context, it is essential to clarify the relationship between the binding force of contracts and the possibility of invoking unpredictabiliy, in situations where certain changes affecting the contractual balance occur in the

performance of obligations will try to answer the question whether this institution finds its applicability in the most debated issue at legal, national and international level in the current period, namely the effects on contractual relations, generated by the Covid-19 pandemic and the measures taken by public authorities to limit the effects of the virus on human health. In the sphere of performance of contractual relations, in progress at the time of the pandemic, a multitude of controversies have been created, regarding the possibility of invoking, as the case may be, force majeure, fortuitous event or unpredictability and in this essay the authors highlight to what extent the parties have these remedies at hand.

The seventh contribution is **Marta Picchi**'s essay *The Protection of the Status Filiationis in the Event of Surrogate Motherhood.* Surrogate motherhood is a highly debated issue for which there is now considerable case law because it calls into question the role of women and the meaning of motherhood. In legal systems whose lawmakers have been slow to intervene or are entrenched in absolute prohibitions, unable to restrict the phenomenon of procreative tourism, adequate protection for the multiple interests at stake has yet to be offered. The rulings by the European Court of Human Rights as well as domestic courts have gradually exhibited diversity in balancing the best interests of the child with other interests and values worthy of protection. The authoress reconstructs the recent case law of the European Court of Human Rights and offers some reflections on the current state of the protection of children born through surrogacy.

Lost in Translation: Dogmatic, Methodological and Philosophical Issues of Contractual Automation authored by **Claudio Sarra** is the eighth essay. This, in turn, has suggested to many the idea of a paradigm shift in the very core of private law, that is, the concept of "contract", which should put it in line with the requirements of the "Fourth Revolution". Computerised transaction protocol that executes the terms of a contract – are now being introduced in many legal systems along with significant normative modifications to make them work as proper juridical tools. The author discusses in the essay what prevents the "automated game" to absorb the complexities of a full contractual existential relation.

Andrew James Perkins is the author of the ninth essay -*The legal and economic questions posed by the German Constitutional Court's decision in the Public Sector Purchase Programme (PSPP) Case***.** The author explores the PSPP decision of the German Constitutional Court and its effect on the monetary policy decisions taken by central banks. He starts by exploring the decision and its effect in Germany, together with its wider implications for the European Monetary Union, before moving onto consider the standard of review that should be applied by the Courts when they are required to review central banks actions. The author's conclusions show that any standard of review should be limited because of the unique economic and political circumstances in which central bank decision making takes place.

Duties and Responsibilities Beyond the Decades is the title of tenth essay authored by **Şule Şahin Ceylan.** Justice between generations is the name given to the equilibrium to be established between the present generation and the previous or next generations. While some authors deal with the concept in a way that covers both the past and the future, the authoress merely refers to the relationships between present and future generations and consider intergenerational justice as an important concept that emphasises the need to pass on some essential values and

goods to people of the future. These values are mostly defined in economical, legal and political terms.

Lavinia-Olivia Iancu has authored the eleventh essay *Insolvency of the Natural Person and COVID 19 in Romania.* The authoress notes that the entry into force in 2018 of the law on insolvency of the natural person represented not only an indisputable progress but also an entry into normality in the context that all EU member states had already had legislation in this area. However, as pointed out by the authoress, the results anticipated by the legislator are far from the reality. The year 2020 characterised by the devastating effects of COVID 19, affected both individuals and legal entities. If the impossibility of overcoming difficult situations by legal entities leads to their deregistration, as far as natural persons are concerned, their disappearance due to the difficulties cannot be taken into account, they must continue their life with overcoming the situation. Accessing the insolvency procedure of the natural persons is the solution that can be accessed by those in financial difficulty.

The twelfth essay *Crucial Issues with Legal Protection of Consumers Human Rights when Banks unilaterally Close Accounts* has been authored by **Aleksejs Jelisejevs.** The author points out that when a bank unilaterally closes a customer's account due to so-called "de-risking", the customer's interests are not only ignored by the bank but their human rights, including respect for his private life and presumption of innocence, are also severely violated. De- risking stigmatises discarded consumers as being involved in criminal activity without a court conviction. As a result of the unfair account closure, both the consumer's social and psychological integrity can suffer**.** In order to overcome the above collision of interests, the author proposes a doctrinal assessment of consumer's interests that should limit the bank's right to unilaterally terminate the contract by the systemic and teleological interpretation of regulating rules in combination with the general civil principle of good faith. In view of the affirmative obligations of the member states under the European Convention on Human Rights, the author shows that the consumers' conflicting interests should take priority in legal protection until the consumer's involvement in money laundering and terrorist financing is established and proven.

Personality Rights – A Universal Tool for the Recovery of Non-Pecuniary Loss is the title of the next essay authored by **Martyna Kasperska.** As society develops, the concept of personality rights and their legal protection gain significance over the years. Naturally, this concept is evolving as society changes, and it should protect new personal interests against infringement. At the same time, there are reported instances of granting legal protection with doubtful legal justification. Interesting examples of this "search" for new personality rights as tools to compensate the plaintiffs for non-pecuniary damages, along with some controversial cases of granting non-pecuniary damages based on questionable legal justification are brought up at the essay. The authoress clarifies the notion of non-pecuniary loss and examines whether the courts try to expand its meaning to grant legal protection to plaintiffs. Her analysis is based on Polish law, with some comparative remarks. As the problem is complex and varies according to the jurisdiction, this essay provides a general illustration of the issue at hand.

The fourteenth and final essay in this volume, *Encountering Charles Dickens: The Lawyer's Muse,* has been authored, too, by **Michael P. Malloy**. The essay

explores the themes of the practical impact of law in society, the life of the law, and the *character* of the lawyer, as reflected in the works of Charles Dickens. The author argues that, in creating memorable scenes and images of the life of the law, Charles Dickens is indeed the lawyer's muse. Dickens – who had worked as a junior clerk in Gray's Inn in London and a court reporter early in his career – outpaced other well-known writers of "legal thrillers" when it came to assimilating the life of the law into his literary works. The centrepiece in this regard is an extended study and analysis of *Bleak House*. The novel is shaped throughout by a challenged and long-running estate case in Chancery Court, and it is largely about the impact of controversy on the many lawyers involved in the case. It has all the earmarks of a true "law and literature" text - a terrible running joke about chancery practice, serious professional responsibility issues, and a murdered lawyer.

Many of the debates analysed are ongoing and the policy, ideas and interpretation brought up in the essays will undoubtedly contribute to future debates. I hope the reader will find the collection of essays stimulating and insightful reading not only for those who are interested in a particular issue discussed but also to acquaint themselves with other current issues.

The views expressed in the essays in this volume are those of the authors and do not represent nor are they intended to represent the views of any other individual or body.